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In the Supreme Court of Florida

LAMAR Z. BROOKS,

Appellant,

v. CASE NO. SC12-629

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

This is a postconviction appeal in a capital case. This case was remanded by the Florida Supreme Court for retrial and a new penalty phase. *Brooks v. State*, 787 So.2d 765 (Fla. 2001)(*Brooks I*). The facts of this case, as recited in the Florida Supreme Court's direct appeal opinion, following retrial, are:

> In the late night hours of April 24, 1996, Rachel Carlson and her three-month-old daughter, Alexis Stuart, were found stabbed to death in Carlson's running vehicle in Crestview, Florida. Carlson's paramour, Walker Davis, and Brooks were charged with the murders. Davis was married and had two children, and his wife was pregnant with their third child. However, the victim believed Davis was also the father of her child and demanded support from him. [n.1] Davis became concerned about this pressure. He was convicted of the murders and sentenced to life imprisonment. However, he did not testify at Brooks' trial.
>
> [n.1.] DNA tests performed after the murders revealed that Davis was not the father.
>
> Brooks lived in Pennsylvania but had traveled to Florida from Atlanta with his cousin Davis and several friends on Sunday, April 21, 1996. Brooks stayed with Davis at Eglin Air Force Base for a few days before returning to Pennsylvania. In interviews with the police, he informed them that on the following Wednesday evening, the night of the murders, he helped Davis set up a waterbed, watched some movies, and walked Davis's dog.
>
> Contrary to Brooks' statements, several witnesses placed him and Davis in Crestview on the night of the murders, although no physical or direct evidence linked him to the crimes.

Brooks v. State, 918 So.2d 181, 186-187 (Fla. 2005)(citing *Brooks I*, 787 So.2d at 768-769).

The jury recommended the death sentence by a nine-to-three vote (9-to-3) for the murder of Carlson, and an eleven-to-one vote for the murder of Stuart. The trial court followed the recommendations, finding the following aggravating circumstances for the murders of

both Carlson and Stuart:[1] 1) the previous conviction of another capital felony; 2) the commission of a capital felony in a cold, calculated, and premeditated manner (CCP); 3) the commission of a capital felony for pecuniary gain; and 4) that the murder occurred during the commission of the felony of aggravated child abuse. The trial court also found that Carlson's murder was especially heinous, atrocious, or cruel (HAC). Despite Brooks' waiver of the right to present mitigating evidence, defense counsel described to the trial court the mitigating evidence he would have presented, and the trial court found several factors in mitigation.[2] *Brooks*, 918 So.2d at 187 (footnotes included).

On appeal to the Florida Supreme Court, Brooks raised fourteen issues: 1) Whether the trial court abused its discretion by admitting the life insurance policy; 2) whether the trial court

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[1] The trial court refused to consider that Stuart was less than twelve years of age in aggravation, finding that consideration of that factor would constitute improper doubling with the aggravating factor of murder in the course of a felony predicated on aggravated child abuse. If an aggravated child abuse felony aggravating factor were not available, the factor of victim less than twelve years of age would be appropriate.

[2] These factors included: Brooks' lack of significant criminal history (little weight); age of twenty-three at the time of the offense (little weight); strong family ties and participation in community affairs (very little weight); status as his family's only living son (some weight); military service (little weight); good character and ability to establish loving relationships (little weight); status as the father of a six-year-old child (some weight); courtroom behavior and demeanor (some weight); regular church attendance and Christian training (little weight); and employment history (little weight). The trial court also considered Davis's sentence of life in prison (little weight); the sufficiency of life in prison without parole as punishment (little weight); and the sufficiency of life in prison without parole as protection for society (some weight).

abused its discretion in admitting testimony relating the victim's statement to a child support worker; 3) whether the trial court abused its discretion by admitting evidence of notes found in Davis' cast; 4) whether the trial court abuse its discretion by allowing the prosecutor to impeach his own witness; 5) whether the trial court abused its discretion by admitting the testimony of the co-conspirator that the defendant said he was going to have to shoot the officer; 6) whether the trial court abused its discretion by overruling the objections to the prosecutor's closing argument; 7) whether the trial court erred by refusing to give an independent conspiracy jury instruction; 8) whether the trial court abused its discretion in denying the motion for mistrial where the prosecutor mentioned trial preparation and prior testimony; 9) whether the trial court abuse its discretion by denying the motion for change of venue; 10) whether the death sentence is proportionate; 11) whether a felony murder conviction based on aggravated child abuse is prohibited by the merger doctrine; 12) whether Florida's death penalty statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002); 13) whether the trial court erred in finding the murder of Alexis Stuart to be for pecuniary gain and in finding the CCP aggravator; and 14) whether the trial court erred in giving great weight to the jury's recommendation of death. The Florida Supreme Court affirmed the convictions and sentence. *Brooks v. State*, 918 So.2d 181 (Fla. 2005), *cert. denied*, - U.S. -, 126 S.Ct. 2294, 164 L.Ed.2d 820 (2006).

Brooks filed a motion for rehearing arguing that because the felony murder theory based on aggravated child abuse was legally

invalid, his murder conviction violated due process under *Yates v. United States*, 354 U.S. 298 (1957). The Florida Supreme Court denied rehearing and issued the mandate on January 9, 2006.

Brooks then sought certiorari review in the United States Supreme Court raising the *Yates* issue. The United States Supreme Court denied certiorari review on May 22, 2006. *Brooks v. Florida*, 547 U.S. 1151, 126 S.Ct. 2294, 164 L.Ed.2d 820 (2006). Brooks' convictions and death sentences became final on May 23, 2006.

Brooks filed his initial 3.851 motion on May 18, 2007, raising seven claims. The State filed a response to the initial motion on July 17, 2007. On October 8, 2007, Brooks filed an amended motion to vacate judgments of convictions and sentences raising seven claims with special request for leave to amend. On November 16, 2007, the State filed a response to the amended motion.

The trial court held a *Huff* hearing on December 7, 2007. The trial court granted petitioner an evidentiary hearing on several claims. The trial court, with Judge Tolton presiding, conducted an evidentiary hearing on January 14-15, 2008 and May 14, 2008. Following the filing of the post-evidentiary hearing memos, Judge Tolton suddenly died.

A second evidentiary hearing with Judge Wells presiding was conducted on May 10-12, 2010. Following the three-day evidentiary hearing, both parties filed written closing arguments. The trial court denied the 3.851 motion and this appeal follows.

Testimony at the second evidentiary hearing

At the start of the evidentiary hearing, the prosecutor noted that the fourth claim in the motion was a claim that counsel was ineffective for failing to retain, and present the testimony of, a mental health expert. (Evid H at 7-8). The prosecutor noted that Brooks refused to be examined by the State's expert, Dr. McClaren, for the evidentiary hearing. (Evid H at 8). Post-conviction counsel, T. Doss, stipulated to Brooks' refusal. (Evid H at 8-9). On this basis, the State objected to testimony of the defense mental health expert, Dr. Eisenstein. (Evid H at 9). The trial court took the objection under advisement. (Evid H at 9).

There was also a discussion of defense exhibit #17 which was the results of a polygraph examination of Melissa Thomas by polygraph examiner, FDLE Special Agent Tim Robinson. (Evid H at 12). The polygraph results stated that Melissa Thomas was being truthful when she stated that Brooks did not change clothes. (Evid H at 13). At the first evidentiary hearing, one of the two defense counsel, Mr. Szachaz testified that he did not recall receiving the polygraph report in discovery. (Evid H at 12). The prosecutor stated that he had, in fact, provided this polygraph report during discovery. (Evid H at 13).

Post-conviction counsel called Wilden Horace Davis, Brooks' cousin, to testify. (Evid H at 15). Wilden Davis has a bachelor's degree in criminal justice from Morris College in South Carolina. (Evid H at 19). He worked as a detention officer in a juvenile detention center and then was a Pennsylvania probation and parole officer. (Evid H at 19). Wilden Davis then became a North Carolina

probation and parole officer. (Evid H at 19). He moved back to Chester, Pennsylvania and is currently working with children with behavior issues. (Evid H at 19-20).

Mr. Davis is the co-perpetrator's, Walker Davis, brother. (Evid H at 16). Both Mr. Davis and Brooks grew up in Chester, Pennsylvania. (Evid H at 15). He saw Brooks four to six times a year while growing up. (Evid H at 15-16). He would often stay with a uncle during the summer and see Brooks during those summers. (Evid H at 16). Mr. Davis is six years younger than his brother Walker Davis and four years younger than Brooks. (Evid H at 16). Brooks was Mr. Davis' favorite cousin. (Evid H at 17). Mr. Davis viewed Brooks as "funny" as "practical joker" who was "smart." (Evid H at 17). Brooks was "really, really smart" and did well in school. (Evid H at 17). Brooks received academic awards while in school. (Evid H at 18).

Wilden Davis did not have as much contact with Brooks after Brooks went into the military. (Evid H at 18). After Brooks left the military, while Wilden Davis was in college, he noticed that Brooks was drinking alcohol when Brooks did not drink previously. (Evid H at 20). Every time he saw Brooks now, Brooks had been drinking "a lot." (Evid H at 20-21). Brooks often had half a gallon of liquor in his bookbag. (Evid H at 21). Brooks became "non-tolerant" after leaving the military. (Evid H at 21). Wilden Davis did not remember anytime when Brooks was not drinking. (Evid H at 23).

On cross-examination, Wilden Davis admitted that Brooks' drinking had not reached the level where he was laying around in

the street drunk. (Evid H at 26). But Brooks always had the bookbag and it always had liquor in it. (Evid H at 27). Wilden Davis testified that Brooks had a drinking problem. (Evid H at 28,33). Brooks would drink starting in the morning. (Evid H at 33). Wilden Davis never suggested to Brooks that he needed help with his drinking. (Evid H at 28-29,33). According to Wilden Davis, Brooks was a happy drunk. (Evid H at 35). Brooks would still be "laughing and playing music." (Evid H at 35). After drinking, Brooks could function like he was not drunk - "drive and everything." (Evid H at 35).

Brooks never talked to Wilden Davis about the war. (Evid H at 29). Nor did Brooks ever speak with him about these murders. (Evid H at 29). Wilden Davis had no explanation for why he did not testify at either of the two previous trials. (Evid H at 29). Wilden Davis was in contact with Brooks following Brooks' arrest. (Evid H at 29). Wilden Davis first became involved in this case two years ago. (Evid H at 29).

He had no personal knowledge of Brooks' drinking the night of the murders. (Evid H at 30). He had no contact with Brooks while Brooks was in Atlanta just prior to the murders by telephone or any other means. (Evid H at 31). Wilden Davis also had no contact with Brooks while Brooks was in Okaloosa County the week or so prior to the murders. (Evid H at 31).

According to Wilden Davis, Brooks' personality was different in two ways after to his entering the military - (1) his drinking and (2) things got on his nerves more easily. (Evid H at 32). Wilden Davis did not think Brooks was mentally impaired. (Evid H at 33).

Post-conviction counsel then called Dr. Eisenstein to testify regarding Brooks' mental health. (Evid H at 37). The prosecutor noted that Brooks' lawyers expressly waived mitigation at the expressed direction of their client Brooks. (Evid H at 37). The prosecutor inquired whether the presentation of mitigation at the evidentiary hearing by post-conviction counsel was also against the expressed wishes of Brooks. (Evid H at 38). Post-conviction counsel acknowledged that Brooks never changed his mind and that Brooks "never wanted to pursue mitigation." (Evid H at 38). The trial court took the issue under advisement and treated the testimony as a proffer. (Evid H at 39). The prosecutor wanted Brooks to be heard on whether the testimony should be presented at the evidentiary hearing. (Evid H at 40). Post-conviction counsel seems to argue that, regardless of Brooks' wishes, trial counsel had a duty to present mitigation to the judge (Evid H at 40).[3] The Assistant Attorney General listed the mitigation offered as part of the *Koon* inquiry[4] in the trial transcripts at 2614-2615 and 5193-5196. (Evid H at 41). The trial court inquired as to the law

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[3] This seems to be an argument that waivers of mitigation necessarily apply only to the jury at the penalty phase, not the judge at the *Spencer* hearing. They do not. A defendant may waive both presentation of mitigation to the jury and presentation to the judge.

[4] *Koon v. Dugger*, 619 So.2d 246, 250 (Fla.1993)(establishing a prospective rule that "when a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision" and "Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.")

when a defendant directs his attorney not to do certain things. (Evid H at 43). Post-conviction counsel asserted that regardless of client wishes the attorneys have a duty. (Evid H at 43). Post-conviction counsel also asserted that mental health mitigation was not part of the *Koon* inquiry and was being presented for the first time at this evidentiary hearing. (Evid H at 43). Post-conviction counsel asserted that, under *Koon*, counsel was required to include this information as part of the proffer of available mitigation. (Evid H at 43-44). The State disagreed, citing the United States Supreme Court case of *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). (Evid H at 44). The *Landrigan* Court reasoned that when a defendant waives presentation of mitigation, there necessarily is no prejudice. (Evid H at 45).

The prosecutor requested that the trial court conduct a waiver inquiry into whether Brooks wanted this additional mitigation evidence presented at the evidentiary hearing. (Evid H at 45). The trial court conducted an on-the-record inquiry of Brooks personally. (Evid H at 46). The trial court swore Brooks and inquired if he wanted mitigation presented at the evidentiary hearing. (Evid H at 46-47). Brooks responded: “I’m not opposed to it, Your Honor.” (Evid H at 47). Brooks stated that he “had no objection to it being presented” and allowed post-conviction counsel to present the additional mitigation at the evidentiary hearing. (Evid H at 48). The prosecutor then stated that the evidentiary hearing should proceed. (Evid H at 48).

Dr. Hyman Eisenstein, a clinical psychologist with a speciality in neuropsychology, testified. (Evid H at 49). He received a Ph.D

in clinical psychology from the University of Chicago in 1982. (Evid H at 49). He is board certified in neuropsychology and conducts neuropsychological examinations on forensic patients. (Evid H at 51). He has been qualified as an expert in over a hundred cases, the "vast majority" of which were capital cases. (Evid H at 51). The State had no objections to Dr. Eisenstein's qualifications as an expert. (Evid H at 52).

Dr. Eisenstein testified that he examined Lamar Brooks at Union Correctional Institution on September 25, 2007. (Evid H at 52). Dr. Eisenstein administered several tests to Brooks including the Weschsler Adult Intelligence test (WAIS III); the Trail Making test; the test of memory malingering (TOM); some projective drawings; Peabody Picture Vocabulary test; paragraph writing; he started the Halstead Category test and conducted a clinical interview. (Evid H at 53).

The Halstead Category test is a test that looks at the ability to make judgments. (Evid H at 53). It has seven subparts. (Evid H at 53). Brooks completed the first subtest then refused to complete the test. (Evid H at 53). Dr. Eisenstein asked Brooks to write a paragraph about how he feels for the paragraph writing test. (Evid H at 54). Brooks wrote "Silly, I feel silly." (Evid H at 54). It was not really a paragraph, "just a few words." (Evid H at 54). Brooks scored 99 on the Peabody Picture Vocabulary test which was average. (Evid H at 54). Brooks' scores of 49 out of 50 and 48 out of 50 on the test of memory malingering ruled out malingering or faking according to Dr. Eisenstein. (Evid H at 55-56).

Dr. Eisenstein administered an I.Q. test, the WAIS III, to Brooks. (Evid H at 57). Brooks' full scale I.Q. score was 89. (Evid H at 58). Brooks' processing speed, however, equaled 71, which was in the third percentile. (Evid H at 58). This placed Brooks in the borderline range of intellectual functioning in this category. (Evid H at 58). This score was significantly different from Brooks' other scores. (Evid H at 58-59,61). This was indicative of "brain disregulation." (Evid H at 60,61).

Dr. Eisenstein reviewed Brooks' school records and his military records. (Evid H at 65). Brooks grades were average but he did receive some awards. (Evid. H at 66). He conducted a clinical interview with Brooks himself. (Evid H at 65). Dr. Eisenstein spoke with Brooks' mother, Ms. Dorothy Brooks; JoAnn Washington; Malcolm Lockley; and Wilden Davis. (Evid H at 65). Brooks came from a good, loving home. (Evid H at 66). It was a close-knit family. (Evid H at 66).

Brooks enlisted in the Army when he was 17 years old. (Evid H at 66). Brooks served six months in Desert Storm clearing mines. (Evid H at 66). When Brooks came back, there was a significant change in his behavior and he began drinking "significant amounts of alcohol." (Evid H at 66). Brooks had infractions for being intoxicated while in the Army and not obeying officers. (Evid H at 67). Brooks was discharged under honorable conditions in March 1994. (Evid H at 67). Brooks did not adhere to Army rules and regulations. (Evid H at 67).

After his discharge from the Army, Brooks worked driving a fork lift in a chemical plant but was fired after five months. (Evid H

at 67). He was continuously drinking. (Evid H at 67). There was a change in Brooks' personality from a happy, go lucky person to a quiet, seclusive person. (Evid H at 67-68). Dr. Eisenstein opined that something occurred while Brooks was in Desert Storm. (Evid H at 68). Dr. Eisenstein diagnosed Brooks as suffering from Post-Traumatic Stress Disorder (PTSD). (Evid H at 68). Brooks, however, did not tell Dr. Eisenstein about any traumatic event. (Evid H at 69). Dr. Eisenstein stated that the PTSD diagnosis depended on Brooks' "perception of reality" and did not depend on whether or not it actually occurred. (Evid H at 69). Brooks' behavior was "consistent" with the "classical syptomatologies" of PTSD such as "anger, feelings of paranoia, feeling of being threatened, impaired relationships, being reclusive, being seclusive, not being able to talk about it" (Evid H at 69). Military combat can create a change in an individual especially when not treated which could explain Brooks' excessive use of alcohol. (Evid H at 69-70). Dr. Eisenstein also diagnosed Brooks with alcohol abuse. (Evid H at 70). Dr. Eisenstein did not diagnose Brooks as suffering from any personality disorder on AXIS II. (Evid H at 70).

Dr. Eisenstein wanted to complete the testing but Brooks refused. (Evid H at 71). He did not have enough information to say definitively whether or not this really occurred. (Evid H at 71). He ruled out head injury; dementia due to alcohol abuse and metabolic disorder due to alcohol abuse but did not have enough information to determine whether Brooks suffered from cognitive brain impairment. (Evid H at 71). Dr. Eisenstein opined that both the statutory mental mitigators applied. (Evid H at 72-73). The

"extreme emotional disturbance" mental mitigator applied due to Brooks' "cognitive disregulation" and "signs of brain impairment." (Evid H at 72). And the "inability to substantially conform his conduct" mental mitigator applied due to Brooks' alcohol abuse. (Evid H at 73).

Dr. Eisenstein opined that Brooks adaptive functioning "had really gone astray." (Evid H at 74). He testified that due to his drinking, Brooks' adaptive functioning was in the same category as a mental retarded person's. (Evid H at 75).

On cross-examination, Dr. Eisenstein admitted that he did not ask Brooks about the night of the murders. (Evid H at 78-79,94). Dr. Eisenstein admitted that Brooks did not tell him the changes in his personality were due to an explosion while clearing mines or any event related to his military service. (Evid H at 80). Brooks described himself to the probation officer who prepared the PSI as only an occasional drinker. (Evid H at 80). Dr. Eisenstein did not question Brooks about his statement to the probation officer. (Evid H at 80).

Dr. Eisenstein's report was exhibit #1 in the prior evidentiary hearing. (Evid H at 81). There was a one page addendum to his report which reflected Dr. Eisenstein's diagnosis. (Evid H at 81).

While Dr. Eisenstein stated that he believed Brooks was putting forth his best efforts, Dr. Eisenstein admitted that Brooks wrote only one sentence of four words, not a paragraph. Dr. Eisenstein stated: "[i]t is what it is." (Evid H at 83). Dr. Eisenstein also admitted that Brooks did not follow the directions regarding the projective drawing test; rather, Brooks just drew some stick

figures which Dr. Eisenstein admitted was "probably not" Brooks' best effort. (Evid H at 83-84). And Dr. Eisenstein admitted that Brooks was not giving his best effort when he refused to complete the category test. (Evid H at 84).

Dr. Eisenstein discussed the global adaptive functioning test. (Evid H at 84). The GAF measures an individuals functioning on a scale from 0 to 100. (Evid H at 84). It is not a test; it is an assessment by the clinician. (Evid H at 85). Dr. Eisenstein scaled Brooks at 35 which indicated "a degree of impairment." (Evid H at 85).[5]

Dr. Eisenstein admitted that Brooks' mother reported no change in his behavior after his military service. (Evid H at 87). Dr. Eisenstein admitted that he did not know whether Brooks' clearing mines in the military involved blowing them up or clearing them in some other manner. (Evid H at 88). Brooks never claimed that he was injured or even near any explosion. (Evid H at 88).

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[5] The State disagrees with a GAF score of 35 reflecting only some degree of impairment. A GAF of 31-40 is "extremely low." *Salazar v. Barnhart* 468 F.3d 615, 624, n.4 (10th Cir. 2006). A GAF score of 61-70 reflects "some mild symptoms (e.g., depressed mood and mild insomnia) or some difficulty in social, occupational, or school functioning," but is generally functioning pretty well but a GAF score of 21-30 reflects delusions or hallucinations, has serious impairment in communication or judgment, or has an inability to function in almost all areas and a GAF score of 31-40 demonstrates some impairment in reality testing or communication or major impairment in several areas. *Webber v. Astrue*, 2010 WL 2773246, n.3, n.5, 6 (W.D.Ark. 2010)(citing the Diagnostic and Statistical Manual of Mental Disorders, 34 (4th ed., 2000) and affirming the denial of SSI benefits and finding the medical evidence did not support Dr. Smith's GAF score of only 30-35, when Plaintiff has fully average IQ scores and organic brain dysfunction of "moderate" severity.)

Dr. Eisenstein acknowledged that he had no knowledge whether Brooks was drinking the night of these murders. (Evid H at 89). Brooks never told Dr. Eisenstein that he was drinking that night. (Evid H at 89,91). Dr. Eisenstein had not spoken with either Melissa Thomas, who saw Brooks at 9:22 the night of the murders, or the Air Force Special Agent, who interviewed Brooks in the early morning hours the next day after the murders, or Rochelle Jones, who drive Brooks and Walker Davis back to Crestview that night, regarding Brooks' drinking that night. (Evid H at 89-90). Dr. Eisenstein acknowledged that it would have been helpful to speak with these people. (Evid H at 101). But he did not. (Evid H at 101).

Dr. Eisenstein acknowledged his diagnosis of PTSD was a tentative diagnosis because Brooks would not fully cooperate in the testing and examination. (Evid H at 92). Dr. Eisenstein attempted to complete the exam at a later date, December 27, 2007, but Brooks refused to come out of his cell. (Evid H at 92).

Dr. Eisenstein would not admit that normally PTSD does not involve a loss of contact with reality. (Evid H at 93-94). Dr. Eisenstein acknowledged that Brooks' military records contain no record of any injury to Brooks during his military service. (Evid H at 95).

Dr. Eisenstein also acknowledged that Brooks was not mentally retarded. (Evid H at 96). But he believed Brooks' adaptive functioning was significantly impaired in two or more areas like a mentally retarded person's. (Evid H at 96). Dr. Eisenstein directly testified that Brooks did not meet the first prong of the

test for the mental retardation because his intellectual function is not 70 or below. (Evid H at 97). Dr. Eisenstein also directly testified that Brooks did not meet the second prong of the test for the mental retardation because there was no onset before age eighteen. (Evid H at 97). It is only one prong, the third prong of the test for the mental retardation, the adaptive functioning prong, that Dr. Eisenstein thought Brooks meet. (Evid H at 97). Dr. Eisenstein testified that the two areas of Brooks' adaptive functioning that were impaired were self-care and communication. (Evid H at 98).

Post-conviction counsel called one of the two trial attorneys to testify, Mr. Kepler Funk. (Evid H at 109).[6] The parties stipulated as to Mr. Funk's testimony at the first evidentiary hearing regarding the documents that Mr. Funk remembered receiving in discovery prior to the second trial. (Evid H at 105-107).[7] The trial court also took judicial notice of the *Brooks I* trial and the trial of the co-defendant cousin, Walker Davis. (Evid H at 108).

Mr. Funk and his partner, Mr. Szachacz, represented Brooks at the second trial. (Evid H at 109). They also represented Brooks in the first appeal which resulted in the reversal for a new trial. (Evid H at 109). Mr. Funk had reviewed the transcript of the co-

[6] Brooks was tried twice. Mr. Beroset represented Brooks at the first trial. Mr. Funk and Mr. Szachacz represented Brooks at the second trial.

[7] Post-conviction counsel agreed to submit the exact pages to the trial court as a notice of filing after consulting with the prosecutor Robert Elmore. Undersigned counsel did not receive a notice of filing.

defendant Walker Davis' trial while preparing the appellate brief in Brooks' first appeal that resulted in the remand for a retrial. (Evid H at 112). Mr. Funk and Mr. Szachacz personally drove over to Mr. Beroset's office in Pensacola to pick up the documents. (Evid H at 118).

Mr. Funk and Mr. Szachacz do not employ a lead counsel and second chair practice; rather, they share equally in all the duties. (Evid H at 110). Each reviews every document and every witness. (Evid H at 110). They both participate in both guilt and penalty phase. (Evid H at 110). Each knows what the other is going to say in opening and closing argument. (Evid H at 110- 111). And each knows what questions the other is going to ask of all the witnesses. (Evid H at 111).

Nothing Mr. Szachacz did at Brooks' trial was a surprise to Mr. Funk. (Evid H at 111). While counsel could not remember the particulars of this particular trial,[8] their typical practice is to go over opening statements with each other "many, many, many, many, many times." (Evid H at 111-112). They practice opening statements in front of each other. (Evid H at 112,139).

He did not remember subpoenaing any witnesses but he also did not recall that it was a problem. Judge Tolton's standard practice was that if a person was listed on the other party's witness list, opposing counsel was asked if he also wanted the person released.

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[8] The retrial was in January of 2002 and this evidentiary hearing was in May of 2010, so there was over eight years between the trial and trial counsel's testimony. However, counsel Funk testified that at the time of the second trial, he knew everything about this case and so did Mr. Szachacz. (Evid H at 165).

Moreover, Mr. Funk and the prosecutor communicated “quite a bit.” (Evid H at 113). It would not have been a problem to call witnesses in the defense case-in-chief if they decided to do so. (Evid H at 113). Witness availability was simply not a factor in the decision regarding whether or not to present a defense case-in-chief. (Evid H at 114). They are always ready to put in a defense case-in-chief if necessary. (Evid H at 115). After the State rests, “then and only then” is the decision regarding whether to present a defense case-in-chief made. (Evid H at 115). The intention is to win, not whether to put on a defense case-in-chief. (Evid H at 116). They have presented defense case-in-chiefs in other cases “lots and lots of times.” (Evid H at 117). Deciding whether to present a defense case-in-chief is a “very complex decision.” (Evid H at 121).

But they were “happy” to keep “the sandwich” in this case. (Evid H at 116). They could get their theory of the case out through leading questions and cross-examination. (Evid H at 116). They believed, given the prosecutor’s style and skill, that retaining the final word was “critical and vital.” (Evid H at 117). Retaining the sandwich was “great” and Mr. Funk thinks to this day, it was the right decision. (Evid H at 125). While Mr. Funk believes that too often, other criminal defense lawyers give themselves too much credit and think retaining the sandwich is going to win the day, in this case, he did think it was “the best chance to carry the day.” (Evid H at 117). But the decision not to present an defense case was not based solely on retaining the sandwich. (Evid H at 125). If there had been a witness that could have really put

a whole in the State's case, they would have called that witness. (Evid H at 125).

They perceived the State's weakness in this case was that these were "[h]orrifically bloody" murders yet there was no forensic evidence tying Brooks to the actual murder scene. (Evid H at 119). There were no eyewitnesses to the murder and no confession. (Evid H at 142). The State's case depended on the testimony of a co-conspirator Mark Gilliam whose credibility had been undermined. (Evid H at 143). Mark Gilliam had recanted his trial testimony at the first trial prior to the retrial. (Evid H at 144). The central theme of the defense was the lack of evidence. (Evid H at 126). Mr. Funk testified that their theory of lack of forensic evidence was established through cross-examination. (Evid H at 123). They portrayed the FDLE witnesses as "wonderful FDLE forensic scientists" and as "the greatest thing since sliced bread, who could find a needle in a haystack" yet who could not tie Brooks to the murder scene. (Evid, H at 124). They tested all these things in Brooks' possession but never came up with anything with any blood on it. (Evid H at 127)

Both he and co-counsel Mr. Szachacz, in consultation with Mr. Brooks, made the decision not to present a defense case-in-chief. (Evid H at 118). Brooks never said to his attorneys I want you to call this witness and they refused to call that witness - "it wasn't like that." (Evid H at 211). Mr. Funk sought Brooks' input on everything including the decision regarding presenting a defense case-in-chief and valued his opinion. (Evid H at 118,119). They both had a great relationship with Brooks, who was "a pleasure to

deal with" and never gave Mr. Funk any trouble. (Evid H at 118). Brooks was easy to talk with unlike some clients. (Evid H at 173). They would go to the county jail at night and speak with Brooks regarding how the trial was going. (Evid H at 120, 174). While Brooks' father contacted them, they went to Florida State Prison to meet with Brooks himself before being hired to represent him. (Evid H at 172).

While they thought that the case would be reversed again on appeal by the Florida Supreme Court based on the evidentiary ruling that the trial court made and that there would be a third trial, they did not decide whether to put on a defense case-in-chief from an appellate perspective; rather, they sought to win it now at trial. (Evid H at 121-122).[9] The target audience at that point in

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[9] This was not an unreasonable view of the likely appellate outcome of the case. *Brooks II* was a 2-2-3 opinion. *Brooks v. State*, 918 So.2d 181 (Fla. 2005). *Brooks II* spit the Florida Supreme Court into several groups. Indeed, it even split one of the Justices from the main opinion to rehearing opinion. Justice Lewis, in the original opinion, dissented regarding the felony murder theory which he would have allowed yet he voted to reverse the conviction based on that theory on rehearing. Justice Lewis said the majority had "affirmed an unconstitutional imposition of the death penalty contrary to both applicable Florida and United States Supreme Court authority. The majority's denial of Brooks's motion for rehearing has rendered him without the means or a forum in which he can obtain relief except federal intervention to prevent the unconstitutional imposition of the death penalty." *Brooks*, 918 So.2d at 224 (Lewis, J., dissenting on rehearing). Opinions on rehearing are unusual in the Florida Supreme Court's capital jurisprudence.

The affirmance was contrary to both the United States Supreme Court case of *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), and the Florida Supreme Court case of *Fitzpatrick v. State*, 859 So.2d 486 (Fla.2003), as Justice Pariente noted in her separate dissenting opinion. *Yates*, however, was later overruled by the United States Supreme Court in *Hedgpeth v. Pulido*, 555 U.S. -, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008). *See*

the decision-making was the jury, not the justices of the Florida Supreme Court. (Evid H at 123).

Mr. Funk did not specifically remember that a Caucasian hair had been found in the victim's hand. (Evid H at 126). He did not recall testing of the hair but he remembered that the hair matched the victim's hair in color and length. (Evid H at 126).

Regarding the DNA profile on the Newport cigarette found outside the victim's car on the ground at the murder scene that excluded Brooks, Mr. Funk explained that he and Mr. Szachacz visited the murder scene on more than one occasion and that the area had lots of cigarettes, beer cans and other trash. (Evid H at 128). Regarding the neighbor of Walker Davis, Mrs. Orr, who said that Walker Davis and a skinny, short black male came to her house the

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Skilling v. United States, 130 S.Ct. 2896, 2934 (2010)(explaining that, while the conviction was flawed like the conviction in *Yates* but that determination does not necessarily require reversal because as "we recently confirmed, in *Hedgpeth v. Pulido*, 555 U.S. -, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008)," *Yates* errors are subject to harmless-error analysis).

Additionally, the *Brooks II* opinion regarding the felony murder theory has produced a two certified question from two different district courts of appeal which basically involve these district courts saying to the Florida Supreme Court that they do not understand the *Brooks II* decision. *Rosa v. State*, - So.3d -, 2010 WL 2430985, 35 Fla. L. Weekly D1361 (Fla. 2d DCA June 18, 2010)(certifying a question of great public importance because *Brooks II* "appears to conflict with the plain language of section 782.04" and following *Lewis v. State*, 34 So.3d 183 (Fla. 1st DCA 2010) but disagreeing with some of its logic)); *Lewis v. State*, 34 So.3d 183 (Fla. 1st DCA 2010) (certifying question).

Moreover, one of the main issues on appeal which generated several dissents was the admissibilty of the life insurance policy just as Mr. Funk predicted it would be. *Brooks II* was truly a close case.

night of the murders at 8:45-9:00 p.m., Mr. Funk did not remember this aspect of the case. (Evid H at 128).

Regarding the banker, Tim Clark, who was working late the night of the murders, Mr. Funk explained that Mr. Szachacz spoke personally with Mr. Clark. (Evid H at 128-129). However, what Mr. Clark said to Mr. Szachacz regarding the time and what he saw the night of the murders was "very, very different" than Mr. Clark's prior statements to law enforcement. (Evid H at 129). The prosecutor refreshed Mr. Funk's memory on cross with exhibits, explaining that Mr. Clark was working late at the First National Bank of Crestview on Wilson which was less than a mile from the murder scene. (Evid H at 152). Mr. Clark claimed to have seen a car at the post office across the street with two black males and Rachel Carlson in it. (Evid H at 152-153). Mr. Funk's memory was that after Mr. Szachacz spoke with Mr. Clark, it was clear that Mr. Clark could not help them. (Evid H at 153). Mr. Clark would have to have been called as a defense witness for the sole purpose of impeaching him. (Evid H at 153).[10] Moreover, anything linking Brooks to the victim, Rachel Carson, would hurt them. It was Walker Davis, who had a relationship with, and a motive to kill the victim, not Brooks. (Evid H at 154). If Mr. Clark was going to say that one of the black males was Brooks, they would not have called

[10] Florida law does not permit the calling of a witness by a party for the sole purpose of impeaching that witness. *Carrada v. State*, 919 So.2d 592, 594 (Fla. 3d DCA 2006) (finding reversible error where the prosecutor was erroneously permitted below to place a witness on the stand for the sole purpose of "impeaching" him with a devastating prior statement citing *Morton v. State*, 689 So.2d 259, 264 (Fla.1997)).

them to testify for the defense. (Evid H at 155). They had already decided not to call him before the trial. (Evid H at 158). Mr. Beroset put on a defense case-in chief but did not call Mr. Clark to testify at the first trial. (Evid H at 165).

Regarding the stolen green Nissan truck with blood spatters on it that was at one time a suspect vehicle in these murders, Mr. Funk had a vague memory, maybe from the Walker Davis trial, of the prosecutor being able to dispel any evidence notion that the truck was involved in these murders "pretty throughly". (Evid H at 129-130). The prosecutor on cross established that Mr. Funk's opinion was that there was never any link between the green pick up and this case. (Evid H at 156). This claim was based on a BOLO based on a anonymous tip which may have had blood on it. (Evid H at 156-157).

Regarding Terrance Goodman testifying at the *Spencer* hearing, Mr. Funk testified that he did not cross-examine Goodman despite wanting to with "every fiber" of his being, because Brooks directly instructed counsel not to cross-examine Goodman. (Evid H at 130). Cross-examining somebody like that would only have helped Brooks.

Mr. Funk explained the mitigation investigation that they did. (Evid H at 131). From preparing the appellate brief from the first trial, which Mr. Funk "believed with all his heart" that the case was going to be reversed and remanded for second trial, he got a jump start on being prepared. He knew from the jury recommendation of death at the first penalty phase, that mitigation was going to be a real issue. (Evid H at 132).

They reviewed the mitigation that Mr. Beroset had. (Evid H at 132). He was in contact with Brooks' parents. (Evid H at 131). He started by interviewing Brooks' parents. (Evid H at 132). He interviewed Brooks' mother and father "extensively" about Brooks' childhood. (Evid H at 132). Mr. Funk was sure he reviewed Brooks' records but could not remember exactly what records he reviewed. (Evid H at 132). He was aware that Brooks was in the military and had been honorably discharged. (Evid H at 132).

He did not have a mental health expert examine Brooks because of all the time he had spent with Brooks and his family, he did not think there was any need to do so. (Evid H at 132). He is "real familiar" with mental health experts and with what such experts can do, not only in death penalty case, but to establish downward departures in non-capital cases, but there was no need for such an expert in this case. (Evid H at 132-133).

On cross-examination, Mr. Funk explained his criminal law experience. (Evid H at 134). He went to the University of Dayton law school. (Evid H at 135). He was admitted to the Florida Bar in 1992. He, along with Mr. Szachacz, was an Assistant Public Defenders in Brevard County for three years in the felony division. They then opened their own practice. (Evid H at 134). He became board certified in criminal trial practice in 1998 (approximately four years prior to the retrial). (Evid H at 134). He is on the Board certification committee of the Florida Bar, which means he drafts and helps grade the exam for board certification in criminal trials in Florida. (Evid H at 135). His practice is almost exclusively criminal trials. (Evid H at 136). He and Mr. Szachacz

joined a civil firm for two years but went back to criminal cases. While he had prior first degree homicide trials, this was his first capital trial. (Evid H at 136-137). He recalled the Sodre case where the defendant was acquitted and a case where Bollos and his wife were charged with first degree murder in 2001 in Pennsylvania. (Evid H at 137-138).

The prosecutor asked about opening statements where Mr. Szachacz said that the jury would hear evidence which Mr. Funk explained that they would elicit testimony via leading questions of the State's witnesses on cross. (Evid H at 138-139). Mr. Szachacz said that the jury would hear about a police dog tracking to the home of Orabell Stanley, who was Gerrold Gundy's grandmother. (Evid H at 139). They were planning on getting this evidence out on cross-examination of the lead investigator Worley presented by the State. (Evid H at 139-140). They were prevented from presenting this on cross-examination by the prosecutor's objection beyond the scope of the direct examination. (Evid H at 140). The prosecutor was careful not to ask Worley the type of questions that would open this area. (Evid H at 140). However, this did not hurt their ability to argue the case. (Evid H at 176). While they would have liked to have gotten this information in front of the jury, it was not critical. (Evid H at 176).

One of the problems in the case was that Brooks denied being in Crestview on the night of the murders. (Evid H at 144). But, as Mr. Funk acknowledged a reasonable juror would have concluded from the State's evidence that Brooks was in fact, in Crestview that night. (Evid H at 144-145). Both Melissa Thomas and her friend

Nikki Henry said that Brooks was at Thomas' house in Crestview, which was a short distance away from the crime scene, around the time of the murders. (Evid H at 145). Moreover, Brooks DNA was on a cigarette in Thomas' house. (Evid H at 145). That testimony and scientific evidence put Brooks within a half mile of the murder scene around the time of the murders. (Evid H at 145). Brooks' denial of being in Crestview and claim that he was at Eglin Air Froce base at the time was a big problem. (Evid H at 162-163). Basically, the jury knew that Brooks was lying about his whereabouts on the night of the murders. (Evid H at 162-163). The prosecutor emphasized to the jury that there was no reason for Brooks to lie about his whereabouts other than he was doing something that he did not want people to know he was doing. (Evid H at 163). No matter what defense counsel presented in the defense case, Brooks' lie was always going to be a constant in the case which the prosecutor would highlight regardless. (Evid H at 163).

Mr. Funk did not directly ask Brooks where he was the night of the murders because that is not his practice. (Evid H at 177). He does not think those types of question are helpful and can be harmful. (Evid H at 177). He does not want to hear blow by blow. (Evid H at 177). He told Brooks that a reasonable juror would believe he lied to the police. (Evid H at 181)

There was a Marlboro cigarette found at the gate of Orabell Stanley's home "in an area where that's a zillion cigarettes butts" because its outside a bar. (Evid H at 146). Mr. Funk noted that Marlboro cigarettes were a pretty common brand. (Evid H at 146). There was also a Newport cigarette found outside the victim's car

near that bar and Gerrold Gundy smoked Newports. (Evid H at 147). That Newport cigarette, however, was tested and the DNA results excluded everyone in the case including Gundy. (Evid H at 147). Part of their trial strategy was to put the prosecutor on the defensive and make the prosecutor start defending Gundy which succeeded to some degree because the prosecutor did start defending Gundy. (Evid H at 148).

Regarding their decision not to present evidence attempting to directly link Gundy to the murders, Mr. Funk testified that they made the decision not to go there. (Evid H at 166). Gundy was a black male with a white female girlfriend who also drive a small red car like the victim. (Evid H at 166). He thought reasonable doubt based on no evidence tying Brooks to the murders was the better defense. (Evid H at 167). Mr. Funk knew that the prosecutor had the ability to rebut if they attempted to seriously claim that Gundy committed these murders. (Evid H at 168). They knew that they could not prosecute Gundy. (Evid H at 168).

Mr. Funk and Mr. Szachacz came to Crestview before the opinion in *Brooks I* was released by the Florida Supreme Court because they were certain that the Florida Supreme Court would order a retrial, to investigate the judge and the prosecutor. (Evid H at 149). The prosecutor was from the community; whereas, the county was very different from the county they had practiced in previously. (Evid H at 149).

The prosecutor asked Mr. Funk about LaConya Orr, who was Walker Davis' neighbor at Eglin Air Force Base. (Evid H at 150). Mrs. Orr had told investigators that Davis along with another smaller man

and Davis' Rottweiler named Heavy came over the night of the murders to see her husband. (Evid H at 150). But her husband, Antonio Orr, said that he had left for his regular Wednesday night basketball game at 8:00. (Evid H at 150). That would leave Davis and Brooks time to get to Crestview, commit the murders and be at Thomas' house by 9:22 p.m. when Brooks made the phone call. (Evid H at 150).

There was no exact time of death for the murders. (Evid H at 151). The time of death was unknown but that was a double-edge sword to point out the lack of timing to the jury because they were attempting to make the "FDLE forensic folks look like the people on CSI." (Evid H at 151). So, they did not make hay out of the fact the FDLE could not determine the exact time of the murders. (Evid H at 151). The prosecutor also noted the time of the ATM transaction by Glenese Rushing at the Eglin Federal credit union where she saw Brooks and Davis waiting for their ride back to Eglin. (Evid H at 151-152). Time was "not going to win the day for the defense." (Evid H at 152). So, it was best not to go there by calling Ms. Orr or Mr. Clark. (Evid H at 152). They had already decided not to call her before the trial. (Evid H at 158).

Mr. Funk was prepared to put on a defense case-in-chief but made a tactical decision not to present a defense case. (Evid H at 157,208,209). Most of the witnesses that they would have called to testify, if they decided to put on a defense case, were readily available because they were under State subpoena and had already testified for the State. (Evid H at 158).

Regarding the four young people, Shannon Chambers; Dreco Gray; Nichole Jensan; and another young man who claimed to have seen the victim in a car near the intersection at a time later than Brooks and Davis were at Thomas' house, Mr. Funk explained their memories were significantly impaired.(Evid H at 159). In his opinion, that evidence did not exist, so he could not present it. (Evid H at 210). Counsel for the co-defendant counsel Walker Davis, Mr. Edmund, had presented them in defense at Walker Davis' trial and the prosecutor had impeached them. (Evid H at 159).

Regarding Brooks' letter to both counsel, which was exhibit #111, in which Brooks told counsel that he wanted a large timeline used for closing argument in the next trial if there was one, Mr. Funk explained that he decided to write in closing rather than have a premade drawing for the purpose of emphasis. (Evid H at 160-161). He listed all of Gilliam's recantations and inconsistencies on the board. (Evid H at 161). The problem with a timeline is that you need something fixed and the only real fixed point, unfortunately for the defense, was the trooper's speeding ticket and Brooks phone call from Melissa Thomas' house at 9:22. So, a timelime was not the "right way to go." (Evid H at 164). A timeline leads nowhere in terms of helping Brooks. (Evid H at 164).

They discussed the possibility of calling Walker Davis as a defense witness. (Evid H at 181). But it was a hornet nest that could not only sting the prosecutor but could also sting the defense. (Evid H at 182). So, he made the tactical decision not to call Walker Davis to testify. (Evid H at 182).

They also discussed Brooks himself testifying. (Evid H at 182). He was sure there were “vigorous” and “loud” conversations about whether Brooks should testify but they developed a consensus that he should not. (Evid H at 183). The prosecutor noted that there was a personal on-the -record waive of the right to testify during the trial. (Evid H at 185 citing trial transcript at 2257).

Mr. Funk “absolutely” would have put on a mitigation case if the decision was up to him and Brooks had not instructed counsel not to present any mitigation. (Evid H at 185). When Mr. Funk first met Brooks he had already been sentenced to death, so the discussion of the death penalty was easier. (Evid H at 186). He talked with Brooks about the sanctity and value of life. (Evid H at 186). Mr. Funk told Brooks that he should fight for his life. (Evid H at 186,214). But in Mr. Funk’s view the decision must be Brooks because Brooks is the one in handcuffs facing the death penalty, not him. (Evid H at 186). Mr. Funk told Brooks that he was making a “horrific mistake” to waive mitigation. (Evid H at 186). But he did not try to coerce Brooks or twist his arm or berate Brooks into changing his mind. (Evid H at 215).

Brooks did not want to spend his life in prison. (Evid H at 187). Brooks directly instructed his attorney not to contest the death penalty. (Evid H at 206). Brooks directly instructed his attorney not to cross-examine any of the State’s witnesses called as victim impact witnesses or in aggravation. (Evid H at 207). Brooks also directly instructed his attorney not to argue against imposition of the death penalty. (Evid H at 207). Brooks directly

instructed his attorney not to write a sentencing memorandum advocating a life sentence. (Evid H at 207).

Mr. Funk explained to Brooks that it was fine if he changed his mind and decided that he wanted mitigation presented after all. (Evid H at 187). He made it very clear to Brooks that he could change his mind at any time. (Evid H at 188).

Mr. Funk also explained to Brooks that it was his duty to investigate mitigation regardless of Brooks' waiver. (Evid H at 187). Mr. Funk stated, while he respected Brooks' decision to waive mitigation, it did not stop him from continuing to look for mitigation. (Evid H at 206).

Mr. Funk explained that these discussions about waiving mitigation were not a "one time visit to the prison;" rather, there were "many, many, many, many" visits regarding Brooks' decision to waive mitigation. (Evid H at 187). While Brooks had told Mr. Funk months before the retrial that he wanted to waive mitigation, the real decision was not until the Court's inquiry. (Evid H at 188). However, Brooks instructed them not to fight the death penalty through mitigation, cross-examination or argument. (Evid H at 188).

Mr. Funk looked into Brooks' military service as well but there "wasn't anything at all." (Evid H at 190). The prosecutor was able to negate Brooks' Army service during the first penalty phase by pointing out that Brooks had been disciplined for participating in a theft and for appearing in formation intoxicated. (Evid H at 203). So, there were negative aspects to Brooks' military service. (Evid H at 203).

He spoke with Brooks' mother about any injury Brooks had as a child. (Evid H at 189). There was no indiction of any head trauma. (Evid H at 190). They investigated Brooks performance in school. (Evid H at 190). There was no indiction from his personal observation of Brooks or any records that he reviewed, that Brooks suffered from any mental illness or brain impairments. (Evid H at 191). They came up empty regarding mitigation. (Evid H at 190). Mr. Beroset's mitigation case at the first trial did not include mental mitigation either. (Evid H at 190). However, Mr. Berosey mitigation case was presented through letters, which in Mr. Funk's opinion is not a good strategy because the jurors need to see the people who love Brooks in person for it to be compelling. (Evid H at 191). Mr. Funk would have presented a live mitigation case if Brooks had allowed him to do so. (Evid H at 198). If he had said to Brooks' parents that he need them for mitigation, his opinion is that they would have "been on the first plane." (Evid H at 198).

He considered retaining a mental health expert. (Evid H at 189). While Mr. Funk's memory was vague, he testified that Brooks said he would not cooperate with any expert. (Evid H at 196). Mr. Funk's previous testimony in the first evidentiary hearing was that Brooks was not "amendable" to being evaluated by a mental health expert. (Evid H at 197). Mr. Funk's previous testimony in the first evidentiary hearing was that Brooks did not want some guy poking around and doing a psychological evaluation. (Evid H at 197). The combination of Brooks' refusal and his personal observations of Brooks whom showed no signs of mental illness is why Funk did not retain a mental health expert. (Evid H at 198). Mr. Funk did not

see or learn nor was told of any hint of brain organicity in any way, shape, or form. (Evid H at 205).

Mr. Funk, Mr. Szachacz and Brooks all also discussed the prosecutor's plea offer of life in exchange for a guilty plea. (Evid H at 200). Brooks personally rejected that plea offer. (Evid H at 200).

Mr. Funk thought that a humanizing, good guy mitigation case would have been a more effective mitigation case than the mitigation case currently being offer as an alternative in the post-conviction proceedings - that of portraying Brooks as a brain damaged, alcoholic because such mitigation would adversely impact residual doubt. (Evid H at 204).

Mr Funk did not believe that he could ethically ignore his client's wishes to waive mitigation. (Evid H at 213). His opinion is that while the court can appoint court counsel to present mitigation, he could not as Brooks' lawyer present mitigation in the face of Brooks' waiver. (Evid H at 213).

Mr. Funk did not think he made any glaring errors in this trial. (Evid H at 216). All of the tactical decision were based on sound reasoning. (Evid H at 216). Sound reasoning is based on two lawyers being involved because then decisions are reached only after long nights of discussions regarding the matter. (Evid H at 216). He could not point to anything that he would have done differently. (Evid H at 216). He was comfortable with everything he did as a lawyer in this case. (Evid H at 217).

Post-conviction counsel then called Joanne Washington, who was a friend of Lamar Brooks, to testify. (Evid H at 217-218). Ms.

Washington is a special education teacher. (Evid H at 225). She has know Brooks for 23 years. (Evid H at 218). They grew up together. (Evid H at 218). They went to high school together at Chester High School in Chester, Pennsylvania. (Evid H at 217). Brooks was “happy go lucky.”(Evid H at 219). She thought Brooks was smarter than her. (Evid H at 219). Brooks received As and Bs in school. (Evid H at 220). Brooks won an award from the NAACP for data processing. (Evid H at 220). He was clean cut and “put together.” (Evid H at 220). After Brooks’s military service, he was more aggressive. (Evid H at 222,231). He was paranoid and did not like people. (Evid H at 222). He went from the happy kid to the mean kid. (Evid H at 223). He did not drink before entering the military but did afterwards. (Evid H at 223,229,230). Brooks drank all the time. (Evid H at 223). Brooks was an alcoholic. (Evid H at 225). There were many times when Brooks was drinking and got into an argument or slapped somebody. (Evid H at 227). Brooks did not discuss the night of the murders with her. (Evid H at 233). Brooks never told her of any combat experience that effected him. (Evid H at 237).

Post-conviction counsel then called the other trial attorney, Mr. Szachacz, to testify. (Evid H at 243). Mr. Szachacz did not recall seeing exhibit #17 prior to the trial. (Evid H at 244). Nor did Mr. Szachacz recall the fact of a polygraph exam being given to Melissa Thomas. (Evid H at 245). She testified at trial that she did not remember Brooks changing clothes at her house. (Evid H at 246).

Nor did Mr. Szachacz recall seeing exhibit #106, which were the filed notes dated April 25, 1996, prior to the trial. (Evid H at 246-247). Mr. Szachacz did not recall seeing exhibit #108, which were the field notes of Investigator Worley regarding Terrance Goodman, prior to the trial. (Evid H at 248). Mr. Szachacz did recall exhibit #54, which was a lead sheet concerning LaConya Orr, prior to the trial. (Evid H at 249).

Mr. Szachacz testified that when he said in opening to the jury that they would hear evidence it meant either through direct or cross-examination. (Evid H at 249). At the time he gave his opening the final decision about whether to present a defense case had not been made. (Evid H at 250). Their initial thoughts were maybe they should not present a defense case but that decision was not set in stone. (Evid H at 251). Mr. Szachacz noted that the attorney in the first trial, Mr. Beroset had presented a defense case yet there was still a guilty verdict. (Evid H at 251).

Regarding Mr. Clark, Mr. Szachacz was assigned him as a witness in their division of duties. (Evid H at 252). Originally, Mr. Clark could not identify Brooks as one of the two black males with the victim but when Mr. Szachacz spoke with Mr. Clark, he stated that he could identify Brooks as one of the men he saw with the victim that night. (Evid H at 253,254,276). Mr. Clark had told Mr. Beroset previously that he would not be any help to Brooks. (Evid H at 252). Even Mr. Clark's timing did not help. (Evid H at 275-276,278). Mr. Szachacz made the determination not to call Mr. Clark after speaking with him. There was no way they would call Mr. Clark because he would hurt their case. (Evid H at 253).

The prosecutor noted that exhibit #17 was an investigative report by FDLE Special Agent Tim Robinson. (Evid H at 256). Special Agent Robinson conducted the polygraph exams in this case including the one of Walker Davis. (Evid H at 256). That polygraph examine resulted in Walker Davis admitting to being present during the murders. (Evid H at 257). Mr. Szachacz clarified that he was not saying he definitively did not receive the polygraph report in discovery, only that he did not recall receiving it. (Evid H at 258). But the report was not in either his Melissa Thomas folder or his Tim Robinson folder. (Evid H at 259). The report concerns whether or not Brooks changed his clothes at her house. (Evid H at 259). The prosecutor however, never contended that Brooks entered the house with bloody clothes because neither Thomas nor Henry saw any blood on Brooks' clothes. (Evid H at 259,264). The polygraph report stated that Thomas was being truthful when she stated that she did not recall Brooks changing clothes at her house the night of the murders. (Evid H at 260). The prosecutor impeached Thomas at trial regarding her original statement that Brooks changed clothes. (Evid H at 260-261). So, the defense could have rehabilitated Thomas with the polygraph results if they were admissible. (Evid H at 262). Mr. Szachacz agreed that it was unlikely that the polygraph results would have been admissible. (Evid H at 262).

Regarding the other exhibits, that were officers' field notes, Mr. Szachacz agreed that they normally are not part of discovery. (Evid H at 268-269). Mr. Szachacz also agreed that there was

nothing in the notes that would have changed his defense strategy at trial. (Evid H at 269).

Regarding exhibit #54, concerning Mrs. Orr, Mr. Szachacz recalled this exhibit. (Evid H at 271). They knew about Mrs. Orr's statements that Walker Davis and Brooks were at her house that night, prior trial. (Evid H at 271). Her husband put the time frame of them being at the house closer to 8:00. (Evid H at 272). In Mr. Szachacz's opinion, the husband's statement were more reliable. (Evid H at 273). Mr. Szachacz and Mr. Funk were aware that it was a 20 minute drive from Eglin to Crestview because they drove it in preparation for trial. (Evid H at 272). Mr. Szachacz agreed that Davis and Brooks had time to be at the Orr's house in Eglin around 8:00p.m., then drive to Crestview, murder both the victims and walk the short distance to Thomas' house by 9:22p.m. (Evid H at 272).

Mr. Szachacz noted that by not presenting a defense case, they retained the sandwich closing argument. (Evid H at 278). Witnesses were presented by Mr. Beroset yet the first trial ended in a guilty verdict. (Evid H at 278). There was no useful way to connect the green pickup to this case. (Evid H at 281). It was "worthless." (Evid H at 294).

Regarding the hair in the victim's hand, the adult victim was stabbed but struggled with her attacker. (Evid H at 285). A hair analyst was called at the first trial and stated that the hair was similar in appearance to the adult victim's hair. (Evid H at 285).

Regarding the investigation of mitigation, Mr. Szachacz testified that he agreed with everything that Mr. Funk had testified to about their investigation (Evid H at 296). They spoke with Brooks' parents and reviewed all of Mr. Beroset's mitigation. (Evid H at 297). They knew Brooks' school records; military records; and his employment history. (Evid H at 297). Their mitigation case, if Brooks would have allowed them to present one would have "been very similar" to Mr. Beroset's mitgation case. (Evid H at 298). It would have been a humanizing mitigation case with lingering doubt. (Evid H at 299). But they did not present any mitigation because Brooks told them not to. (Evid H at 299). Brooks told them not to contest aggravation; cross-examine or argue in favor of life. (Evid H at 299).

Nothing about Brooks suggested any mental illness, brain damage or impairment to Mr. Szachacz. (Evid H at 300). They did not have Brooks examined by a mental health expert because Brooks told them he would not cooperate with any such experts. (Evid H at 301). Brooks said do not bother sending anyone to see me because he would not talk to them. (Evid H at 301). Mr. Szachacz also believes that the final decision on mitigation must be the client's. (Evid H at 301). They attempted to change Brooks' mind regarding his waiver. (Evid H at 302). The were prepared to present a mitigation case if Brooks changed his mind. (Evid H at 303). There were several aunts that were present. (Evid H at 303). They informed Brooks that he could change his mind at any time including at the *Spencer* hearing. (Evid H at 303). It was very difficult for them to "sit silent"during Goodman's testimony at the *Spencer* hearing

but they did so at Brooks' insistence. (Evid H at 304). Brooks told them not to do anything. (Evid H at 305).

The prosecutor presented the testimony of the attorney at the first trial, Mr. Beroset. (Evid H at 300). Mr. Beroset became board certified in criminal trials in 1987 (a decade prior to his representation of Brooks). (Evid H at 308-309). Mr. Beroset was the second attorney on the case. John Albritton of Pensacola represented Brooks from his arrest until Mr. Beroset was retained. (Evid H at 309). Mr. Beroset became counsel of record in the Brooks case in October of 1997. (Evid H at 309). The first trial was in the fall of 1998 (Evid H at 321). Mr. Funk and Mr. Szachacz became counsel of record on April 27, 2001, during the first appeal. (Evid H at 314).

Mr. Beroset testified that he turned over all discovery to Mr. Funk and Mr. Szachacz. (Evid H at 314). None of the exhibits stood out as information that he did not have. (Evid H at 342). Mr. Beroset testified that he did not have any trouble getting discovery from the prosecutor's office. (Evid H at 342).

He attempted to present a positive picture of Brooks in mitigation based on Brooks' lack of prior criminal history. (Evid H at 320). Brooks' father was a minister and he came from a very good family. (Evid H at 320). The prosecutor sought to rebut this mitigation by presenting the testimony of a Texas Highway Patrol Trooper who stopped Brooks for DUI and found him in possession of a sword cane. (Evid H at 320-321).

Mr. Beroset had never had a capital client who waived the presentation of mitigation. (Evid H at 319). Mr. Beroset did not

remember any mental mitigation being presented at the first penalty phase. (Evid H at 320). He did not recall having a mental health expert examine Brooks. (Evid H at 321,337). If he had seen anything that raised mental illness concerns, he would have had Brooks examined. (Evid H at 323). None of the family members that he spoke with indicted that Brooks suffered from any mental illness. (Evid H at 324). While it is a trend today to automatically have a capital defendant examined by a mental health expert, it was not common practice in 1997. (Evid H at 325-326). Mr. Beroset's view is that you make the decision regarding hiring an expert based on contact with the client. (Evid H at 326). He did not believe that Brooks was brain damaged based on his observations. (Evid H at 326,329). Mr. Beroset did not see, or learn of, anything that suggested Brooks had mental health issues. (Evid H at 334).

The prosecutor called Debbie Carter, a legal assistant with the State Attorney's Office, to testify regarding the discovery practices of the office. (Evid H at 344). Ms. Carr has been employed with the Okaloosa County State Attorney's Office since 1979. (Evid H at 344). She was prosecutor Elmore's legal assistant in 1996. (Evid H at 345). The State Attorney's discovery file in this case was in her handwriting. (Evid H at 347). The practice of the office was to place a red check on a paper to note that it was provided in discovery to opposing counsel. (Evid H at 349). Amended discovery provided on August 19,1996 which included the polygraph reports. (Evid H at 350-354; state exhibit #C).

The State called the prosecutor in this case, Robert Elmore, to testify regarding discovery. (Evid H at 356). He was the sole prosecutor in the Brooks case and the sole prosecutor in the co-defendant's case as well. (Evid H at 357). The office practice was to check a document with a red check to verify that it was sent to opposing counsel as required by the discovery rules. (Evid H at 361). The prosecutor testified as to the amended discovery provided to John Albritton, then counsel for Brooks, on August 19, 1996 which included the polygraph report. (Evid H at 363). The Special Agent who performed the polygraph examinations in the case, Tim Robinson's name was also disclosed on the initial discovery dated June 26, 1996. (Evid H at 367). The prosecutor also noted that an office's personal handwritten notes are not discoverable. (Evid H at 368-369). Usually, he does not even accept the handwritten notes of officers; rather, he relies on their typed reports. (Evid H at 369).

SUMMARY OF ARGUMENT

ISSUE I

Brooks asserts that his trial attorneys, Mr. Funk and Mr. Szachacz, were ineffective for relying on reasonable doubt rather than presenting an affirmative defense case. Not presenting a defense case was a reasonable strategic decision. As counsel testified at the evidentiary hearing, their main focus was on reasonable doubt due to the lack of scientific evidence directly linking Brooks to the murders. Such a defense does not require that they present an affirmative defense case. Moreover, they wished to retain final closing argument. As the trial court found, these are reasonable strategic decisions. Nor was there any prejudice.

ISSUE II

Brooks contends that trial counsels, Mr. Funk and Mr. Szachacz, were ineffective for "promising" to present evidence during opening statement and then failing to present that evidence as part of a defense case. Defense counsel did not promise to present any evidence during opening. Rather, defense counsel told the jury: "you're going to learn." But that common phrase is not a promise to present witnesses or evidence. As the trial court found, the decision to present a reasonable-doubt defense based on the lack of scientific evidence was a reasonable strategic decision. Furthermore, there was no prejudice. Brooks would have been convicted of these two murders regardless of defense counsel's

opening statement. The trial court properly denied this claim of ineffectiveness.

ISSUE III

Brooks contends that trial counsels, Mr. Funk and Mr. Szachacz, were ineffective for not presenting additional mental health mitigation. Defense counsel could not investigate or present mental mitigation because Brooks refused to be examined by a mental health expert. A defendant may not thwart the investigation and then raise a ineffective assistance of counsel claim for not investigating. Furthermore, there was no prejudice. Brooks waived the presentation of mitigation. Additionally, a different defense counsel presented mitigation in the first trial yet the first jury also recommended a death sentence. The trial court properly denied this claim of ineffectiveness.

ISSUE IV

Brooks contends that he is innocent of these murders based on Ferguson's testimony that he saw the victim alive after the defendant had left town the night of the murder. IB at 96. The trial court rejected Ferguson's testimony on credibility grounds. This Court gives great deference to a trial court's factual findings, including credibility determinations, and should do so in this case. Ferguson had no explanation as to why he did not come forward at the time or why he waited over a decade to report this information. There is competent, substantial evidence to support

the trial court’s credibility determination. The trial court properly denied this claim of newly discovery evidence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING THE DECISION NOT TO PRESENT AN AFFIRMATIVE DEFENSE RATHER WAS A REASONABLE STRATEGIC DECISION? (Restated)

Brooks asserts that his trial attorneys, Mr. Funk and Mr. Szachacz, were ineffective for relying on reasonable doubt rather than presenting an affirmative defense case. Not presenting a defense was a reasonable strategic decision. As counsel testified at the evidentiary hearing, their main focus was on reasonable doubt due to the lack of scientific evidence directly linking Brooks to the murders. Such a defense does not require that they present an affirmative defense case. Moreover, they wished to retain final closing argument. As the trial court found, these are reasonable strategic decisions. Nor was there any prejudice.

Trial

At trial, after the State rested its case, defense counsel proffered the testimony of Investigator Worley regarding his investigative report and other possible leads regarding Gundy and a stolen pick-up truck. (T. Vol. 39 2237). The trial court conducted a colloquy with the defendant regarding the decision not to present any witnesses during which the defendant agreed with the decision not to present an affirmative defense case. (T. 2257).

The trial court's ruling

The trial court denied this claim of ineffectiveness following an evidentiary hearing. (PC Vol. 7 1255-1267). The trial court

found that the decision not to present an affirmative defense case was a tactical decision based on defense counsel Funk's testimony. (PC Vol. 7 1255). The trial court noted the defense's "primary focus was to contend that there was reasonable doubt." (PC Vol. 7 1257). The trial court additionally noted that the decision permitted the defense to retain "final closing argument" commonly referred to as the sandwich. (PC Vol. 7 1257). The trial court found this strategy to be reasonable. (PC Vol. 7 1257).

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. *Rodgers v. State*, - So.3d -, -, 2013 WL 1908640, *3 (Fla. 2013)(explaining that this "Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions *de novo*" citing *Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004)).

Merits

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial." *Rodgers v. State*, - So.3d -, -, 2013 WL 1908640, *3 (Fla. 2013)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "As to the first prong, the defendant must establish that counsel made errors so serious that counsel was not functioning as

the counsel guaranteed the defendant by the Sixth Amendment." *Id.* "For the second prong, *Strickland* places the burden on the defendant, not the State, to show a reasonable probability that the result would have been different." *Rodgers*, - So.3d at -, 2013 WL 1908640 at *3 (citing *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 390–91, 175 L.Ed.2d 328 (2009)). *Strickland* does not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in that outcome." *Rodgers*, - So.3d at -.

The victim's hair

Brooks specifically asserts his counsel failed to present evidence that hair collected from the crime scene by FDLE did not match Brooks' hair. IB at 54. Post-conviction counsel also asserts that the jury did not hear that a Caucasian hair was found in the victim, Rachel Carlson's palm. Because the hair was described as Caucasian and Brooks is an African-American, it was presumably not Brooks' hair.

The trial court concluded that defense counsel in fact argued the lack of scientific evidence, such as DNA and blood, linking Brooks to the murders in closing. (PC Vol. 7 1258-1259). The trial court explained, rather than putting on witnesses and losing the sandwich, defense counsel argued the lack of blood and hair evidence was a reasonable tactic. (PC Vol. 7 1259). The trial court also found that counsel's performance was not deficient for not having the hair in the victim's hand tested because the hair

was obviously Caucasian, as was Rachael Carlson. (PC Vol. 7 1259). The trial court also noted that the defendant had present no evidence at the evidentiary hearing regarding the hair, such as DNA testing of the hair, and therefore, he did not meet his burden. (PC Vol. 7 1258-1260). The trial court observed that postconviction relief cannot be based on speculation. (PC Vol. 7 1260).

There was no deficient performance. Mr. Funk testified that the hair was similar in color and length to the victim's hair. Moreover, a hair analyst was called at the first trial and stated that the hair was similar in appearance to the adult victim's hair. (Evid H at 285). Both counsel were aware of this testimony because they wrote the appellate brief of the first trial. It is not deficient not to present evidence regarding a hair that is found in the victim's palm that you have reason to think is just the victim's own hair.

No prejudice was established at the evidentiary hearing either. Post-conviction counsel needed to call a hair expert to establish that the Caucasian hair was not that of the victim or her infant.[11] This seems to be a unfortunate new trend in capital litigation - to be granted an evidentiary hearing on a claim and then not prove the underlying factual basis for the claim. Without any expert hair testimony regarding the hair found in Carlson's hand versus the victims' hair, no prejudice can possibly be established. *Reed*

[11] Because the infant was of mixed race parentage, the description Caucasian hair, may have excluded the infant as well, but we cannot know because post-conviction counsel did not call a hair expert at the evidentiary hearing to establish any of this.

v. State, 875 So.2d 415, 423-427 (Fla. 2004)(rejecting a claim of ineffectiveness for failing to consult with a fingerprint expert because the defendant presented no evidence at the evidentiary hearing indicating that the State's expert's identification of the fingerprint was in error). There was no ineffectiveness.

Another suspect - Gundy

Brooks also asserts his counsel failed to present evidence of another suspect, Gerold Gundy. IB at 55.

The trial court concluded that defense counsel's decision not to present evidence that Gundy was the perpetrator, including that the dog tracked from the crime scene to Gundy's grandmother house, rather than merely point to him as another possible suspect was a "reasonable strategic decision." (PC Vol. 7 1260-1261). The trial court relied on defense counsel's Funk testimony that they "weren't going to be able to prosecute Jerrold Gundy, for goodness' sake." (PC Vol. 7 1261).

There was no deficient performance. Counsel testified at the evidentiary hearing that they could not actually prove that Gundy was the actual perpetrator. For example, the DNA results on the Newport cigarette excluded everyone in the case including Gundy. (Evid H at 147). Mr. Funk knew that the prosecutor had the ability to rebut it if they attempted to seriously claim that Gundy committed these murders. (Evid H at 168). They knew that they could not prosecute Gundy. (Evid H at 168). He thought reasonable doubt based there being no evidence linking Brooks to the murders

was the better defense. (Evid H at 167). One of the dangers of actually attempting to prove that Gundy was the actual killer instead of an empty chair defense is that the jury then tends to balance who did the better job: the prosecutor proving Brooks was the actual killer or the defense proving that Gundy was the actual killer. It was better just to vaguely point the finger at Gundy - which they did. Part of their trial strategy was to put the prosecutor on the defensive and make the prosecutor start defending Gundy which succeeded to some degree because the prosecutor did start defending Gundy. (Evid H at 148).

There was no deficient performance. Defense counsel did point to Gundy. Defense counsel cannot be deficient for failing to do something that he, in fact, did. *Lowe v. State*, 2 So.3d 21, 35 (Fla. 2008)(concluding that "counsel cannot be deemed ineffective for failing to make an argument concerning the excited utterance exception to the hearsay rule because he did, in fact, make this argument."); *Stephens v. State*, 975 So.2d 405, 415 (Fla. 2007)(holding that counsel cannot be deemed ineffective for failing to object when, in fact, he did object).

Additionally, "which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Evans v. Sec'y, Fla Dept. of Corr.*, 699 F.3d 1249, 1268-69 (11th Cir. 2012)(quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)(en banc)). There was no deficient performance.

Furthermore, there was no prejudice. Post-conviction counsel did not call Gundy and attempt to prove that Gundy was the actual

perpetrator at the evidentiary hearing either. It was the prosecutor that presented Gundy at the evidentiary hearing and that was to rebut the newly discovered evidence claim based on Ferguson's affidavit, not to explore this claim of ineffectiveness.

In *Bell v. State*, 965 So.2d 48, 64 (Fla. 2007), the Florida Supreme Court rejected a claim of ineffectiveness for failing to present a self-defense because the defendant offered no evidentiary support of the claim at the evidentiary hearing. Bell was granted an evidentiary hearing on the claim but did not present any witnesses at the evidentiary hearing to support the self-defense theory. The Florida Supreme Court explained that Bell presented no witness at the evidentiary hearing who testified that the victim had a gun, reached for a gun, or in any way committed an overt act that would have caused Bell to react in self-defense. The Florida Supreme Court explained that because no such witnesses were called to testify at the evidentiary hearing, Bell failed to carry his burden of demonstrating prejudice. *Bell*, 965 So.2d at 64; *see also Ferrell v. State,* 29 So.3d 959, 975 (Fla. 2010)(rejecting an ineffectiveness claim for failing to call alibi witnesses because, while granted an evidentiary hearing at which the two alibi witnesses testified, they did not testify as to any alibi on the night of the murder at the evidentiary hearing); *Green v. State*, 975 So.2d 1090, 1104 (Fla. 2008)(rejecting a claim of ineffectiveness premised on a deputy's report to FDLE because the deputy was not called to testify at the evidentiary hearing resulting in no evidence to support the allegations). As the Florida Supreme Court explained in both *Bell* and *Ferrell*, when a

defendant is granted an evidentiary hearing but fails to call the necessary witnesses in support of the claim of ineffectiveness, the defendant necessarily fails to establish either deficiency or prejudice.

Mrs. Orr/Mr. Clark

Brooks claims his attorneys were ineffective for failing to present the testimony of Mrs. Orr that Walker Davis and another black male (presumably Brooks) were at her house on Eglin Air Force base at the time of the murders. IB at 58.

The trial court concluded that the decision not to present Mrs. Orr was reasonable. (PC Vol. 7 1262). Defense counsel discussed the matter and decided it was "best not to go there" and that the "jury would see through that." (PC Vol. 7 1262). The trial court noted that the evidence placed Brooks in Crestview the night of the murders and that it was counsel's opinion that the jury was going to conclude that Brooks was in Crestview that night. Id.

There was no deficient performance. The problem with Mrs. Orr's statement was Mr. Orr said otherwise. He placed the time around 8:00 p.m., not at 8:30 or 9:00 as Mrs. Orr did, which left Walker and Brooks more than sufficient time to drive to Crestview as counsel knew because they drove from Eglin to Crestview as part of their trial preparation. "Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Evans v. Sec'y, Fla Dept. of Corr.*, 699 F.3d 1249, 1268-69 (11th Cir. 2012)(quoting *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)(en banc)).

Nor was there any prejudice. There was objective evidence that Brooks was in Crestview the night of the murders. There was scientific evidence that Brooks was in Crestview at the time in the form of Brooks' DNA on a cigarette in Thomas' house; phone records of Brooks' call from her house at 9:22p.m.; a speeding ticket; and numerous eyewitnesses.

Brooks also claims his attorneys were ineffective for failing to present the testimony of Mr. Tim Clark, a banker, who was working late in Crestview on the night of, and near, the murders.

The trial court concluded that the decision not to present Mr. Clark was reasonable because "his testimony clearly would not have been beneficial to the Defendant." (PC Vol. 7 1262-1263). Defense counsel Szachacz testified that Mr. Clark would positively hurt the defense case he could identify Brooks. (PC Vol. 7 1263).

There was no deficient performance. Mr. Szachacz personally spoke with Mr. Clark and determined that he would hurt the defense case because Mr. Clark now stated that Brooks was one of the two black men he saw with the victim that night. Additionally, "which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess." *Evans v. Sec'y, Fla Dept. of Corr., 699 F.3d 1249, 1268-69 (11th Cir. 2012)(quoting Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)(en banc)).

Nor was there any prejudice. Postconviction counsel did not present the testimony of Mr. Clark at the evidentiary hearing. In absence of such testimony, Brooks cannot establish prejudice. *Bell v. State*, 965 So.2d 48, 64 (Fla. 2007)(rejecting a claim of

ineffectiveness for failing to present a self-defense because the defendant offered no evidentiary support of the claim at the evidentiary hearing); *Green v. State*, 975 So.2d 1090, 1104 (Fla. 2008)(rejecting a claim of ineffectiveness premised on a deputy's report to FDLE because the deputy was not called to testify at the evidentiary hearing resulting in no evidence to support the allegations). Indeed, both these subclaims should be deemed abandoned. *Wickham v. State*, - So.3d -, -, 2013 WL 1830950, 11 (Fla. 2013)(holding that a claim not explored at the evidentiary hearing was abandoned citing *Booker v. State*, 969 So.2d 186, 194–95 (Fla. 2007)). Postconviction counsel was required to present these witnesses in support of this claim and he did not.

Stolen truck - green Nissan Pick-up

Brooks further asserts his counsel failed to present evidence of a stolen green Nissan pick-up truck that may have had blood on it. IB at 62.

The trial court concluded the decision not to pursue the pick-up truck reasonable. (PC Vol. 7 1265). The trial court noted that one of the two retained defense counsel, Mr. Szachacz testified that the stolen truck was "worthless" to the defense. The trial court also noted that Brooks had not established that any further investigation of the truck would have helped the defense. (PC Vol. 7 1265).

There was no deficient performance. Mr. Funk testified that this information was "worthless." As both defense counsel

testified, there was no real link between the stolen truck and these murders.

Nor was there any prejudice. Post-conviction counsel failed to present any evidence at the evidentiary hearing that tied the pick-up to these murders. As the Florida Supreme Court explained in both *Bell v. State*, 965 So.2d 48, 64 (Fla. 2007) and *Green v. State*, 975 So.2d 1090, 1104 (Fla. 2008) when a defendant is granted an evidentiary hearing but fails to call the necessary witnesses in support of the claim of ineffectiveness, the defendant necessarily fails to establish either deficiency or prejudice.

Polygraph results

Brooks asserts that his lawyers are to be faulted for not using the polygraph results to impeach Melissa Thomas. IB at 62. Melissa Thomas was the State's witness who put Brooks in Crestview at the time of, and very near, the murders. The polygraph concerns whether or not Brooks changed his clothes at her house. (Evid H at 259). The polygraph report stated that Thomas was being truthful when she stated that she did not recall Brooks changing clothes at her house the night of the murders. (Evid H at 260). At trial, the prosecutor impeached Thomas regarding her original statement that Brooks changed clothes. (Evid H at 260-261). Postconviction counsel asserted that defense counsel could have rehabilitated Thomas with the polygraph results if they were admissible. (Evid H at 262). Mr. Szachacz testified at the evidentiary hearing that it was unlikely that the polygraph results would have been admissible. (Evid H at 262).

The trial court concluded there was no ineffectiveness because Thomas' statement that she did not remember was "not truly inconsistent" with her polygraph and there was no prejudice. (PC Vol. 7 1265-1267). The trial court also noted that "polygraph evidence is generally inadmissible." (PC Vol. 7 1265). The trial court rejected the *Giglio* claim regarding agent Haley's testimony as well. (PC Vol. 7 1266-67). The trial court noted that Brooks had not proven Agent Haley's testimony was false or that the prosecution knew it was false. (PC Vol. 7 1266). The trial court also found that the Agent's testimony was not material.

First, polygraph results are not admissible. *Davis v. State*, 520 So.2d 572, 573-74 (Fla. 1988)(holding that polygraphs are not "sufficiently reliable or valid instrument to warrant its use in judicial proceedings."); *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)(rejecting an argument that the Sixth Amendment right to present a defense requires courts to allow a defendant to present polygraph results). Nor are polygraphs admissible as impeachment. *Smith v. State*, 931 So.2d 790, 799 (Fla. 2006)(rejecting a *Brady* claim where the defendant did not demonstrate "that polygraph tests were admissible at trial as impeachment evidence.").

Brooks asserts that the prosecutor impeaching Thomas, when the prosecutor knew the results of the polygraph, was a violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). IB at 77. To establish a *Giglio* violation, three prongs must be shown: (1) the testimony was false; (2) the prosecutor knew it was false; and (3) the testimony was material. *Conahan v. State*,

- So.3d -, -, 2013 WL 1149736, 5 (Fla. 2013)(concluding that the defendant did not establish a *Giglio* claim because he did not establish that the testimony was false citing *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003). Brooks bears the burden of establishing the first two prongs. *Wickham v. State*, - So.3d -, -, 2013 WL 1830950, *3 (Fla. 2013). On the issue of materiality or prejudice, the question is whether there is any reasonable likelihood that the false testimony could have affected the jury's verdict. In other words, the State has the burden to demonstrate that the false testimony was harmless beyond a reasonable doubt. *Smith v. State* 931 So.2d 790, 799 (Fla. 2006).

There was no violation of *Giglio*. Postconviction counsel was not only required to prove Thomas' statement was actually false but counsel was also required to prove that the prosecutor knew it was false to establish a *Giglio* violation. The prosecutor knowing the polygraph results does not establish that the prosecutor knew the testimony was false. Prosecutors are not required to believe machines. The prosecutor had no personal knowledge of whether Brooks changed clothes that night or not. This is the reason that most valid *Giglio* claims are limited to false testimony about whether the witness has a deal with the prosecution. The prosecutor, in such situations, has actual personal, knowledge of the veracity of the witness' testimony. But, here, as in most cases, the prosecutor has no personal knowledge of the facts of the murder.

Nor was the testimony material. The issue of whether Brooks changed clothes or not at Thomas' house would not have effected the

jury's verdict. While it was error for the prosecutor to impeach Thomas according to the Florida Supreme Court in the direct appeal of the retrial, it was not a violation of *Giglio*. See also *Brooks*, 918 So.2d at 200 (finding error in the trial court's decision to allow the State to impeach the trial testimony of witness Melissa Thomas).

As a claim of ineffective assistance of counsel, there was no ineffectiveness. Polygraph results are not admissible substantively or for impeachment. Defense counsel cannot be ineffective for failing to do the impossible. *United States v. Cronic*, 466 U.S. 648, 656, n.19, 104 S.Ct. 2039, 2045, n.19, 80 L.Ed.2d 657 (1984)("Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical."); *Thompson v. Nagle*, 118 F.3d 1442, 1451 (11th Cir. 1997)(observing that "[f]ailure to do the impossible cannot constitute ineffective assistance of counsel.").

Brady

Brooks also asserts a *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) violation based on various items of evidence including the polygraph results. IB at 62.

The trial court concluded there was no *Brady* violation. (PC Vol. 7 1267-1268). The trial court found the prosecutor's testimony that he provided the evidence during discovery to be credible (PC Vol. 7 1267). The trial court also noted that polygraph results are inadmissible. (PC Vol. 7 1267).

As original postconviction counsel repeatedly admitted in his written closing argument, defense counsel was aware of the various items. CA at 10; 11; 12. There was no non-disclosure as required by *Brady*. *Pagan v. State*, 29 So.3d 938, 948 (Fla. 2009)(observing that "a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it; the evidence simply cannot then be found to have been withheld from the defendant); *Occhicone v. State*, 768 So.2d 1037, 1042 (Fla. 2000)(explaining that a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant). Brooks did not establish at the evidentiary hearing that any information was not given to defense counsel by the prosecutor during discovery. *Rhodes v. State*, 986 So.2d 501, 508 (Fla. 2008)(noting that without demonstrating that the State suppressed evidence, Rhodes is not entitled to relief under *Brady*.). There was no *Brady* violation.

Specifically, regarding the polygraphs results, the State did not suppress the polygraph results. The prosecutor testified that he gave defense counsel the results of Thomas polygraph and trial counsel testified that he did not remember. The polygraphs results were not suppressed. *Pagan v. State*, 29 So.3d 938, 948 (Fla. 2009)(observing that "a *Brady* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it; the evidence simply cannot then be found to have been withheld from the defendant).

Moreover, for under *Brady*, the evidence or testimony must be admissible to be material, and the polygraphs results are not. *But see Rodriguez v. State*, 39 So.3d 275, 294, n.13 (Fla. 2010)(stating for purposes of determining a *Brady* violation is whether the evidence would lead to admissible substantive or impeachment evidence."). The polygraph cannot be used as impeachment and opposing counsel does not even argue, much less proved at the evidentiary hearing, that the results could have led to any admissible evidence. There was no violation of *Brady*.

Cumulative error

Postconviction counsel asserts that this Court should consider his *Strickland*, *Brady*, and *Giglio* claims cumulatively. IB at 78 at n.71. The State objects to entire arguments being made in a footnote. It is not proper to present entire arguments in a footnote. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001)(stating “we have repeatedly ruled that arguments presented to us only in a footnote are not entitled to appellate consideration”); *Peavy v. WFAA–TV*, 221 F.3d 158, 176 (5th Cir. 2000)(explaining an issue, raised in a footnote, is not adequately briefed); *Hutchins v. District of Columbia*, 188 F.3d 531, 539, n.3 (D.C. Cir. 1999)(en banc)(stating: “We need not consider cursory arguments made only in a footnote.”). This Court should not address the cumulative error argument or any other argument made in the footnotes. *Franqui v. State*, 965 So.2d 22, 34, n.1 (Fla.

2007)(finding an argument raised in a footnote to be insufficiently pled).[12]

Furthermore, this type of cumulative error analysis is improper. It is mix and match law. A defendant raising a cumulative error claim cannot, by definition, meet the existing legal test for individual reversible error. Cumulative error is premised on the notion that while the errors individually do not warrant reversal, when considered together, the errors do warrant reversal. The problem with cumulative error analysis is that it is an open admission that none of the individual errors warrants reversal but somehow together the errors do warrant reversal. So, for example, a defendant who cannot meet the three prongs of *Brady* or the two prongs of *Strickland*, says, yes, but I met two prongs of *Brady* and one prong of *Strickland*, so I'm entitled to reversal. This undermines the actual legal tests of both *Brady* and *Strickland*. The whole is greater than the sum of the parts according to the doctrine of cumulative error. *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir. 1992)(en banc)(noting that the constitutionality of a

[12] The initial brief violates the page limit as well. The initial brief consists of 100 pages and 81 footnotes which is simply a transparent attempt to avoid this Court's page limitations. *Howard v. Hartford Life & Acc. Ins. Co.*, - F.Supp.2d -, 2013 WL 1010360 at *1 n.2 (M.D.Fla. Mar.15, 2013) (finding a motion with 69 footnotes in "small font," some of which "spanned more than half of the page" and included multiple string citations and substantive arguments to have "flagrantly disregarded" the page limit and referring to the use of footnotes as "abusive" because the "pages worth of argument" packed into "dozens of lengthy footnotes" imposed "an unnecessary burden on the Court"); *Bollea v. Clem*, - F.Supp.2d -, 2013 WL 1296076, at *1 n.1 (M.D.Fla. Mar.28, 2013)(finding a response's "extensive substantive footnotes" to be an "apparent effort to circumvent the page limits").

state criminal trial “can be compromised by a series of events none of which individually violated a defendant's constitutional rights seems a difficult theoretical proposition). "Cumulative error" claims should not be entertained. *Forrest v. Florida Dep’t. of Corr.*, 2009 WL 2568185, 5 (11th Cir. 2009)(unpublished)(noting that the absence of Supreme Court precedent applying the cumulative error doctrine to claims of ineffective assistance of counsel claims); *but see Lukehart v. State*, 70 So.3d 503, 524 (Fla. 2011)(stating “this Court considers the cumulative effect of evidentiary errors and ineffective assistance claims together.”)

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING OPENING STATEMENT OF THE GUILT PHASE? (Restated)

Brooks contends that trial counsels, Mr. Funk and Mr. Szachacz, were ineffective for "promising" to present evidence during opening statement and then failing to present that evidence as part of a defense case. Defense counsel did not promise to present any evidence during opening. Rather, defense counsel told the jury: "you're going to learn." But that common phrase is not a promise to present witnesses or evidence. As the trial court found, the decision to present a reasonable-doubt defense based on the lack of scientific evidence was a reasonable strategic decision. Furthermore, there was no prejudice. Brooks would have been convicted of these two murders regardless of defense counsel's opening statement. The trial court properly denied this claim of ineffectiveness.

Evidentiary hearing

The prosecutor asked about opening statements where Mr. Szachacz said that the jury would hear evidence which Mr. Funk explained that they would elicit testimony via leading questions of the State's witnesses on cross. (Evid H at 138-139). Mr. Szachacz said that the jury would hear about a police dog tracking to the home of Orabell Stanley, who was Jerold Gundy's grandmother. (Evid H at 139). They were planning on getting this evidence out on cross-examination of the lead investigator Worley presented by the State. (Evid H at 139-140). They were prevented from presenting this on

cross-examination by the prosecutor's objection beyond the scope of the direct examination. (Evid H at 140). The prosecutor was careful not to ask Worley the type of questions that would open this area. (Evid H at 140). However, this did not hurt their ability to argue the case. (Evid H at 176). While they would have liked to have gotten this information in front of the jury, it was not critical. (Evid H at 176).

Mr. Szachacz testified that when he said in opening to the jury that they would hear evidence it meant either through direct or cross-examination. (Evid H at 249). At the time he gave his opening the final decision about whether to present a defense case had not been made. (Evid H at 250). Their initial thoughts were maybe they should not present a defense case but that decision was not set in stone. (Evid H at 251). Mr. Szachacz noted that the attorney in the first trial, Mr. Beroset had presented a defense case yet there was still a guilty verdict. (Evid H at 251).

The trial court's ruling

The trial court denied this claim of ineffectiveness following an evidentiary hearing. (PC Vol. 7 1268-1271). The trial court found the decision not to present a defense case "was not deficient." (PC Vol. 7 1269). The defense present their theme of the lack of scientific evidence through cross-examination and argument. (PC Vol. 7 1270). The trial court found the decision to be reasonable. (PC Vol. 7 1271). The trial court also found there was no prejudice because the defendant did not show that the result

of the trial would have been different if a different opening statement had been made. (PC Vol. 7 1271).

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. *Rodgers v. State*, - So.3d -, -, 2013 WL 1908640, *3 (Fla. 2013)(explaining that this "Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions *de novo*" citing *Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004)).

Merits

There was no deficient performance. The decision not to present their own defense case was a reasonable trial strategy. Mr. Funk testified he made a tactical decision not to put on a defense case. (Evid H at 269). What witnesses to call, or whether to call any witnesses at all, is the epitome of trial strategy. *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995)(en banc)(observing that which witnesses, if any, to call, and when to call them, "is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess."). Furthermore, it is a very common trial tactic among the defense bar not to present any witnesses and to rely on reasonable doubt, especially in a case with no scientific evidence directly connecting the client to the murders.

Both trial counsel repeatedly testified at the evidentiary hearing that it was more important to have the last word to rebut

the prosecutor's theory than to affirmatively present a defense. Retaining the sandwich is a reasonable trial tactic.

In *Beasley v. State*, 18 So.3d 473 (Fla. 2009), the Florida Supreme Court rejected a similar claim of ineffectiveness. Beasley asserted his counsel was ineffective for failing to investigate and present an alibi defense. Beasley argued that his attorney should have introduced the local bus schedule but did not submit such a general timeline during the evidentiary hearing to support the claim. *Beasley*, 18 So.3d at 491. Nor could he establish prejudice. Beasley's counsel did not present a case-in-chief to retain the "sandwich" closing argument. The Florida Supreme Court determined that not presenting a defense counsel to retain the last word "was a reasonable defense strategy based on the procedural rules in force at the time of trial." *Beasley*, 18 So.3d at 492 citing *Evans v. State*, 995 So.2d 933, 945 n.16 (Fla. 2008) and *Van Poyck v. State*, 694 So.2d 686, 697 (Fla. 1997)); *see also Johnston v. Dugger*, 583 So.2d 657, 661 (Fla. 1991)(finding that presenting a reasonable doubt/identity defense rather than other defenses without presenting any evidence in the defendant's case was not ineffective where counsel felt that the tactical advantage of having opening and closing arguments would be more beneficial).

Brooks' two privately retained trial attorneys were not wedded to retaining the sandwich. Trial counsel Funk testified that if there was a witnesses that could exonerate Brooks or "really put a hole" in the prosecution's case, they would have "given up the sandwich in no time." But no such witness was available and postconviction counsel had not pointed to one.

In *Mendoza v. State*, 87 So.3d 644, 655 (Fla. 2011), this Court rejected a claim of ineffectiveness for not presenting a witness when defense counsel had stated that he was going to present that witness during opening statement. Defense counsel Suri stated in opening statements that he was going to call the co-perpetrator to testify that there was no attempted robbery. But, instead, counsel relied on a reasonable doubt as to who-the-shooter-was defense. Defense counsel testified at the evidentiary hearing that the decision not to present the co-perpetrator as a defense witness was a strategic one made because counsel did not trust the witness to testify consistently with his deposition. The trial court found that the decision not to call the witness was a reasonable strategic decision. This Court agreed concluding that Mendoza failed to establish that counsel's strategy was unreasonable under prevailing norms. *Mendoza*, 87 So.3d at 656.

Here, there was even less of a promise made in opening than in *Mendoza*. Defense counsel certainly did not "promise" to present Gundy as a witness in opening statement. Rather, defense counsel repeatedly used the phrase "you're going to learn" IB at 80-82 (citing T. 1101-1108). This is not a promise to present any evidence or a defense case. The jury can learn through cross-examination as easily as through direct examination. Indeed, it is clear from defense counsel response to the prosecutor's hearsay objection that he was planning on the jury learning about Gundy through cross-examination of Major Worley. IB at n.73 (citing T. 1103).

Post-conviction counsel points to counsel's inability to get some of this information in front of the jury through cross-examine is the deficient performance. IB at 84-85. She claims that counsel should have know that he would not have been permitted to get the information in via cross but what is out-the-scope of direct examination is within the trial court's discretion, not a matter of law. *Bryan v. State*, 533 So.2d 744, 750 (Fla. 1988)(stating that a trial judge has wide discretion in determining permissible scope of cross-examination). Many a trial court allow extensive cross-examination, that is unquestionably outside-the-scope of direct, in an abundance of caution, especially in capital cases. *Cf. Patrick v. State,* 104 So.3d 1046, 1058 (Fla. 2012)(stating: "we have long recognized the right of a defendant in a capital case to fully cross-examine those witnesses called by the prosecution."). And even when a trial court limits cross more severely than defense counsel envisioned, it is not necessarily wise to call the witness as your own. Often, is still better to forgo the area or subject altogether and gain two closing arguments, including the final one.

Post-conviction counsel also asserts that it is not reasonable merely to argue without presenting evidence. Defense counsel used the reasonable inference that if the FDLE people had found anything the prosecutor would have presented it and he did not, so it did not exist. Defense counsel, just like the prosecutor, may make arguments based on reasonable inferences from the evidence, including the reasonable inference that no such evidence exists. It is reasonable to argue rather than present evidence. Whether post-conviction counsel approves or not, defense counsel was able

to argue these points to the jury. The prosecutor did not object. There was no deficient performance.

Nor has post-conviction counsel established any prejudice from opening statement. Brooks would have been convicted of these two murders regardless of defense counsel's opening statement. There was eyewitnesses' testimony and physical evidence tying Brooks to the immediate area at the time of the murders. Brooks' DNA was found at Thomas' apartment which "was located only a few blocks from the scene of the crime." *Brooks*, 918 So.2d at 196, n.10 (noting the "presence of Brooks in the apartment was corroborated by the DNA found on a cigarette butt recovered from Thomas's ashtray which matched Brooks' DNA."). Mark Gilliam testified that Davis and Brooks that attempted to kill Carlson on two prior occasions. Brooks' cousin and co-perpetrator, Walker Davis, that took out a $100,000 life insurance policy on an infant just months before the murder. There is no reason for a Airman that can barely make ends met supporting himself and his three legitimate children to insure the life of an infant to the tune of $100,000, other than murder. *Brooks*, 918 So.2d at 189 (detailing Davis' financial situation). There was no prejudice. The trial court properly denied the claim of ineffectiveness.

ISSUE III

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING PENALTY PHASE FOR NOT PRESENTING MITIGATION EVIDENCE DESPITE BROOKS' WAIVER OF MITIGATION? (Restated)

Brooks contends that trial counsels, Mr. Funk and Mr. Szachacz, were ineffective for not presenting additional mental health mitigation. Defense counsel could not investigate or present mental mitigation because Brooks refused to be examined by a mental health expert. A defendant may not thwart the investigation and then raise a ineffective assistance of counsel claim for not investigating. Furthermore, there was no prejudice. Brooks waived the presentation of mitigation. Additionally, a different defense counsel presented mitigation in the first trial yet the first jury also recommended a death sentence. The trial court properly denied this claim of ineffectiveness.

Penalty phase

At the penalty phase, the defendant waived the right to present mitigation. (T. Vol. 41 2613). The trial court conducted a waiver colloquy. (R. 27 5196-5206). Pursuant to *Koon*,[13] defense counsel placed in the record the following evidence of mitigation that he would have presented: no significant criminal history; accomplice

[13] *Koon v. Dugger*, 619 So.2d 246, 250 (Fla. 1993)(establishing a prospective rule that "when a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision" and "Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.").

in a capital felony committed by another; age; family background including that he is the only living son; military record; regular attendee at church; great potential for rehabilitation; co-perpetrator Walker Davis received a life sentence; jail conduct; life in prison; courtroom behavior; and good character. (T. Vol. 41 2614-2615; R. Vol. 27 5193-5196).

Waiver

Brooks has waived any claim of ineffectiveness involving mental mitigation by his conduct of refusing to allow the State's expert, Dr. McClaren, to examine him during the post-conviction proceedings. A capital defendant may not present his own mental health expert but refuse to allow the State an opportunity to rebut his expert's testimony with its own expert testimony by refusing to be examined by the State's expert. A capital defendant may not tilt the post-conviction proceedings in his favor in this manner.

The trial court's ruling

The trial court rejected this claim of ineffectiveness. (PC Vol. 7 1271-1275). The postconviction court noted the trial court conducted a "very through, detailed and exhaustive" *Koon* colloquy during the penalty phase. (PC Vol. 7 1273-1274). The postconviction court found that the "record conclusively shows that the Defendant instructed his counsel not to put on any mitigating evidence" and therefore, Brooks "cannot establish *Strickland* prejudice." (PC Vol. 7 1274). The trial court relied on *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) and

Allen v. Sec'y, Dep't of Corr., 611 F.3d 740 (11th Cir. 2010). (PC Vol. 7 1274). The trial court observed that counsel cannot deemed ineffective for following his clients wishes. (PC Vol. 7 1275).

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. *Rodgers v. State*, - So.3d -, -, 2013 WL 1908640, *3 (Fla. 2013)(explaining that this "Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing legal conclusions *de novo*" citing *Sochor v. State*, 883 So.2d 766, 771–72 (Fla. 2004)).

Merits

Brooks may not waive the presentation of mitigation after a *Koon* colloquy and then claim ineffective assistance of counsel for failing to investigate and present mitigation. *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)(rejecting a claim of ineffective assistance counsel for failing to investigate mitigating evidence because "regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow him to present it" and "If [defendant instructed his counsel not to offer any mitigating evidence], counsel's failure to investigate further could not have been prejudicial under *Strickland*.").

The Eleventh Circuit rejected a claim of ineffectiveness where the defendant instructed his lawyer not to investigate or present

mitigation to the judge at the *Spencer* hearing. *Allen v. Sec'y, Dep't of Corr.*, 611 F.3d 740 (11th Cir. 2010)(quoting Frank Sinatra's My Way). The Eleventh Circuit rejected Allen's claim that his waiver of mitigation was unknowingly entered and invalid because counsel, having conducted no pre-waiver investigation, failed to inform Allen of the mitigating evidence that he was giving up. The Eleventh Circuit stated: "[t]he United States Supreme Court's *Schriro* decision forecloses that argument." *Allen*, 611 F.3d at 763. The *Allen* Court quoted the Supreme Court's statement in *Schriro*: "We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." *Id.* at 764; *see also Taylor v. Horn*, 504 F.3d 416 (3rd Cir. 2007)(following *Landrigan* and rejecting a claim of ineffectiveness for failing to present mental health mitigation; develop life-history mitigation; evidence of substance abuse because, while the capital defendant was not belligerent and obstructive like Landrigan, he was just as determined not to present mitigating evidence and therefore "whatever counsel could have uncovered, Taylor would not have permitted any witnesses to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence.").

The Florida Supreme Court has also held that counsel is not ineffective for failing to investigate mitigation where a defendant waived presentation of mitigation. *Reynolds v. State*, 99 So.3d 459, 493-95 (Fla. 2012)(rejecting a claim of ineffectiveness for failing to present mitigation evidence because the defendant waived

mitigation); *Dessaure v. State*, 55 So.3d 478, 484 (Fla.2010) (holding counsel is not ineffective for following the wishes of a competent defendant, even if that wish is to not present mitigation to a penalty phase jury); *Grim v. State*, 971 So.2d 85 (Fla. 2007)(concluding that counsel conducted a reasonable investigation in light of defendant's decision to waive mitigation evidence during the penalty phase); *Lamarca v. State*, 931 So.2d 838, 850 (Fla. 2006)(rejecting a claim of ineffectiveness for failing to present mitigating evidence at penalty phase, in part, because the defendant waived mitigation and because "the trial court followed the procedures required to ensure Lamarca knowingly waived his right to present mitigation."); *Hannon v. State*, 941 So.2d 1109, 1126-1127 & n. 8 (Fla. 2006)(holding, in a pre-*Koon* case, that there was no ineffectiveness of counsel for not presenting mitigating evidence where the defendant waived the presentation of mitigation); *but see Simmons v. State*, 105 So.3d 475, 508-9 (Fla. 2012)(finding ineffectiveness where counsel failed to present mitigation of a brain abnormality despite a waiver); and *Ferrell v. State*, 29 So.3d 959, 981-985 (Fla. 2010)(holding that counsel's failure to adequately prepare for mitigation rendered the defendant's waiver of mitigating evidence invalid).[14] The entire point of a *Koon* inquiry is to ensure the waiver is voluntary and to prevent claims of ineffective assistance of trial counsel for

[14] The trial counsel in *Ferrell* was deceased - a "fact presented a challenge for the defense, the State, and the trial court." *Ferrell*, 29 So.3d at 983.

failing to present mitigation. *Chandler v. State*, 702 So.2d 186, 199 (Fla. 1997)(noting the primary reason for requiring the *Koon* procedure was to ensure that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of mitigating evidence and observing "[o]nly then could the trial court, and this Court, be assured that the defendant knowingly, intelligently, and voluntarily waived this substantial and important right. . . "); *Waterhouse v. State*, 792 So.2d 1176 (Fla. 2001)(explaining underlying purpose for this framework is to protect against "the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence" and noting the end sought by the *Koon* decision was a clear record as to defendant's waiver of the presentation of mitigating factors). There is no point in a *Koon* colloquy if we are going to litigate the issue in post-conviction proceedings regardless of such a colloquy.

In *Grim v. State*, 971 So.2d 85, 100-101 (Fla. 2007), the Florida Supreme Court rejected a claim of ineffectiveness in a case where the capital defendant waived presentation of mitigation. The Florida Supreme Court stated that a defendant's waiver of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed. Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an

informed, intelligent decision." *Grim*, 971 So.2d at 100 quoting *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002). However, in *Grim*, the Florida Supreme Court noted that, unlike other cases where they have concluded that counsel's failure to adequately investigate mitigation rendered the defendant's waiver invalid, the record in Grim did not support a claim of failure to investigate. Defense counsel testified that, despite his client's wishes, he recognized he still had a duty to develop mitigation. Moreover, defense counsel repeatedly tried to dissuade Grim from his desire not to present mitigation. Defense counsel's proffer revealed he uncovered a substantial amount of mitigation. Defense counsel filed a motion to appoint Dr. Larson as a mental health expert several months before trial and contacted Grim's mother, sister, stepfather, and two supervisors. *Grim*, 971 So.2d at 100-101.

Here, as in *Grim*, defense counsel tried to dissuade Brooks from not presenting any mitigation. Here, as in *Grim*, defense counsel's proffer at the *Koon* inquiry reveals that he was aware of possible mitigation. And while defense counsel here did not have a mental health expert appointed, that was because of Brooks' refusal to cooperate with an expert (which continued at the post-conviction stage as well). Here, as in *Grim*, defense counsel contacted Brooks' family. Brooks' father was paying their attorneys' fees. Moreover, here, unlike *Grim*, defense counsel had a "jump start" in his words, in two ways. First, he was the appellate lawyer in the first appeal giving him a unique and detailed picture of the mitigation presented at the first penalty phase. Moreover, he had

Mr. Beroset's mitigation investigation from the first penalty phase.

Post-conviction counsel asserts that a waiver of mitigation must be informed and knowing and to be informed and knowing, trial counsel must have throughly investigated all possible mitigation, but the United States Supreme Court has said otherwise. *Landrigan*, 127 S.Ct. at 1942 (rejecting a claim that a capital defendant wavier of the presentation of mitigating evidence was not informed and knowing with the observation that: "[w]e have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence."). Effectiveness of counsel and *Koon* do not require a full investigation prior to waiver. *Mora v. State*, 814 So.2d 322, 331 (Fla. 2002)(explaining that *Koon* does not require a full investigation of that mitigation by counsel before the defendant may waive that mitigation); *but see Boyd v. State,* 910 So.2d 167, 188 (Fla. 2005)(noting that the *Koon* procedure "ensures that a defendant knowingly and intelligently makes a waiver of mitigation" and stating that the record should "reflect a defendant's knowing waiver of his or her right to present mitigating evidence."). There is no requirement that Brooks had to be fully informed of all possible mitigation for his waiver of the presentation of mitigation to be valid. Of course, counsel can make a reasonable decision not to investigate mitigation if he knows that his client will not cooperate despite his repeatedly discussing the importance of mitigation with his clients. For example, there was absolutely no point in hiring a mental health expert when your client refusing to see any expert.

Post-conviction counsel states that "a wealth of mitigation was available" but only identifies two omissions (1) evidence that Brooks had been drinking heavily for months prior to the murders and (2) evidence that Brooks suffered from PTSD and brain impairments. Brooks, of course, was well aware of his own drinking habits when he waived the presentation of mitigation. Furthermore, if Brooks had presented alcoholism as mitigation, the prosecutor could have rebutted such testimony with Brooks' statements in the PSI that he was only an occasional drinker, just as the prosecutor did at the evidentiary hearing.

Even if this Court ignores the waiver, there was no deficient performance. Brooks refused to be examined by a mental health expert. As Mr. Funk explained at the evidentiary hearing, Brooks told him that I didn't do this crime and he was "not having some guy poking around and doing psychological evaluations" on him. Counsel cannot present mental health mitigation at the *Spencer* hearing, if his client refuses to be examined. This is equally true of the claim that counsel should have presented mitigation to the judge at the *Spencer* hearing and written a sentencing memorandum arguing for life. Brooks instructed them not to fight the death penalty through mitigation, cross-examination or argument. (Evid H at 188). Brooks instructed his attorneys not to do these things. *Brown v. State*, 894 So.2d 137, 146 (Fla. 2004)(stating an "attorney will not be deemed ineffective for honoring his client's wishes.").[15]

[15] The Eleventh Circuit, in an unpublished opinion, has found that it is an "unreasonable choice" to ignore the sentencing

Nor was there any prejudice for not presenting a closing argument at the penalty phase or for not writing a sentencing memorandum. These things were done at the first penalty phase yet the jury recommended death and the judge imposed a death sentence. A full mitigation case, minus mental mitigation, was presented at the first penalty phase by Mr. Beroset, but the jury recommend death regardless. The first jury, presented with mitigation recommended death, by a vote of 10 to 2 for both victims but the second jury presented, with no mitigation, recommended death by a vote of 9 to 3 and 11 to 1. (R. Vol. II 209-210 - original recommendation); *Brooks*, 918 So.2d at 187 (noting the "jury recommended the death sentence by a nine-to-three vote for the murder of Carlson, and an eleven-to-one vote for the murder of Stuart."). Not presenting mitigation did not significantly alter the recommendation. No prejudice has been established.

Brooks also asserts his trial counsel was ineffective for relying on the mitigation presented in the previous penalty phase in the prior trial by the prior attorney who represented Brooks. It is not ineffective to rely on information gathered by prior counsel who represented a defendant in the prior penalty phase. *Waterhouse v. State*, 792 So.2d 1176, 1184 (Fla. 2001)(rejecting a claim of ineffective where the defendant waived the presentation of mitigating evidence where "the evidence in support of mitigation

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judge's request for a memorandum on mitigating circumstances but affirmed the denial of habeas relief, finding no prejudice. *Israel v. Sec'y, Fla Dep't. of Corr.*, 2013 WL 1694031 (11th Cir. April 13, 2013). However, *Israel* did not involve a waiver like this case does.

had already been investigated and accumulated as part of Waterhouse's previous collateral and habeas proceedings.”). Furthermore, here, counsel had no choice but to rely on the mitigation in the prior penalty phase because Brooks refused to allow any other mitigation to be presented.

Counsel’s reliance on *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447,175 L.Ed.2d 398 (2009); and *Sears v. Upton*, – U.S. –, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010), is misplaced. IB at 89. Neither *Wiggins*, *Rompilla*, *Porter*, nor *Sears* involved a waiver of mitigation. In none of these cases did the defendant instruct his attorney not to present mitigation and refuse to be examined by a mental health expert, like Brooks did. None of these cases is applicable to this case.

The trial court properly denied this claim of ineffectiveness.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED THE NEWLY DISCOVERED EVIDENCE CLAIM? (Restated)

Brooks contends that he is innocent of these murders based on Ferguson's testimony that he saw the victim alive after the defendant had left town the night of the murder. IB at 96. The trial court rejected Ferguson's testimony on credibility grounds. This Court gives great deference to a trial court's factual findings, including credibility determinations, and should do so in this case. Ferguson had no explanation as to why he did not come forward at the time or why he waited over a decade to report this information. There is competent, substantial evidence to support the trial court's credibility determination. The trial court properly denied this claim of newly discovery evidence.

Evidentiary hearing testimony

Ira Ferguson testified at the evidentiary hearing. (PC Vol. 42 7285-Vol. 43 7416). The prosecutor asked Ferguson why if he had seen the victim in an argument with a man that night and then saw the television report of the murder of that woman and her child, the next day, why he did not report the incident to the police and Ferguson responded: "I'm not a law enforcement." (PC Vol. 42 7398).

Gerrold Gundy also testified at the evidentiary hearing. (PC Vol. 43 7446-7476). The State called Gundy to testify. (PC Vol. 43 7446). He testified that he was not at Club Rachel's arguing with Rachel Carlson on the night of the murder. (PC Vol. 43 7460).

Gundy testified that he did not know Rachel Carlson. (PC Vol. 43 7460, 7463-7464,7475). Gundy testified that he did know Shawna Tatum who had sandy blond hair. She had a baby named Asha and drove a Maroon Grand Am. (PC Vol. 43 7461). Tatum was a girlfriend of his whose husband was a police officer at the Air Force base. (PC Vol. 43 7464).

The police talked with him around the time of the murder. (PC Vol. 43 7462). He told the police where he had been the night of the murder. (PC Vol. 43 7463). Gundy testified that around dusk that night he was with his cousin Jeff Brown near Bay Street. (PC Vol. 43 7467). He spent that night with Tracy Johnson and was with her until the next morning. (PC Vol. 43 7468). At that time, he had a lot of girlfriends. (PC Vol. 43 7471).

The trial court's ruling

The trial court rejected this claim of newly discovered evidence. (PC Vol. 7 1282-1286). The trial court explained that the claim was based on the testimony of Ira Ferguson that he saw Rachel Carlson alive with Gerrold Gundy between 10:30 and 11:00 pm on the night of the murder. (PC Vol. 7 1283). The trial court explained that the claim was governed by the test for newly discovered evidence established in *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)(*Jones II*). The trial court found that the first prong of the *Jones* test was satisfied. (PC Vol. 7 1282, n.16). The trial court, however, concluded that Ferguson's "incredible testimony" would not probably produce an acquittal at any retrial. (PC Vol. 7 1286).

The trial court found that Ferguson's testimony was "not worthy of belief." (PC Vol. 7 1284). The trial court noted that Ferguson did not come forward until 2010. (PC Vol. 7 1282, n.16). The trial court noted that Ferguson did not submit an affidavit until after he met the co-defendant, Walker Davis, in prison. (PC Vol. 7 1284). The trial court noted that Ferguson was aware of this information in 1996 but he did not report this account until 2010. (PC Vol. 7 1284). The trial court also noted that when asked why he did not provide this information at the time, Ferguson responded that he was "not a law enforcer." (PC Vol. 7 1284, n.18). The trial court found this "length delay" to be "one factor" in his decision that Ferguson was "not credible." (PC Vol. 7 1284). Another factor was that during Ferguson's deposition, he asked Davis' attorney, Mr. Swiatek, for the date of the crime, to "test" him. (PC Vol. 7 1284-85). The trial court found Ferguson's explanation for the question to be "not credible." (PC Vol. 7 1285). The trial court also noted that Ferguson's testimony regarding who he gave his affidavit to did not match the facts or the other testimony. (PC Vol. 7 1285). Ferguson testified that he mailed the affidavit to the State Attorney's Office or to the clerk of the court but neither received the affidavit (PC Vol. 7 1285). Ferguson also testified that he sent a copy to Walker Davis' next of kin but Davis' mother testified that she did not receive a copy. (PC Vol. 7 1285).

Standard of review

A trial court's rejection of a claim based on a credibility determination is reviewed for competent, substantial evidence. *Pittman v. State*, 90 So.3d 794, 814 (Fla. 2011)(stating: "[w]ith respect to a trial court's ruling on a newly discovered evidence claim following an evidentiary hearing, as long as the court's findings are supported by competent, substantial evidence, a reviewing court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court quoting *Blanco v. State*, 702 So.2d 1250, 1252 (Fla. 1997)). As this Court has explained, there "should be greater deference to trial court's findings when they are based on assessments of credibility because only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Smith v. State*, 59 So.3d 1107, 1121 (Fla. 2011). This Court has explaining in dealing with claims of newly discovered evidence involving credibility, "the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony" but a "cold record on appeal does not give appellate judges that type of perspective." *Spann v. State*, 91 So.3d 812, 816 (Fla. 2012). And "for that reason, this Court will not substitute its judgment for that of the trial court on issues of credibility." Rather, when "reviewing a trial court's determination relating to the credibility of a recantation, this Court is highly deferential to the trial court and will affirm the

lower court's determination so long as it is supported by competent, substantial evidence." *Spann*, 91 So.3d at 816.

Florida's "competent, substantial evidence" standard of review is akin to the federal "clear error" standard of review. Federal courts have observed that for there to be clear error, the trial court's factual findings must be more than just maybe or probably wrong; rather, they must strike the appellate court as "wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988); *Hiram Walker & Sons, Inc. v. Kirk Line*, 30 F.3d 1370, 1378, n.2 (11th Cir. 1994)(Dubina, J., concurring)(describing this definition as the best explanation of the clearly erroneous standard or review). For there is be clear error, Guardado must establish that there is no basis in the record for the trial court's credibility determination rejecting Ferguson's testimony and he has not done so.

As the trial court noted, Ferguson had no explanation for not coming forward sooner. (PC Vol. 7 1284, n.18). He had no reason, other than his statement he was not "a law enforcement" for not informing the Crestview police that he had allegedly seen the victim of a murder with Gundy the night she was killed. (PC Vol. 42 7398). Ferguson knew the information mattered because he saw the news, the next day, reporting that Carlson had been murdered but he did not come forward at that time or report this information until 2010. He waited nearly 16 years to tell this tale without any explanation for his decade-plus delay. On this basis alone, the trial court's credibility determination should be affirmed. *Jones*,

709 So.2d at 521-22 (holding that a trial court, in evaluating a newly discovered evidence claim, "may consider both the length of the delay and the reason the witness failed to come forward sooner").

Postconviction counsel argues that the trial court erred in its finding that Ferguson was not credible because 1) Ferguson's testimony was corroborated by another person's statement to police; 2) Gundy also had prior convictions; and 3) Ferguson had no motive to lie, unlike Gundy. But Ferguson's testimony about seeing the victim alive was not corroborated. Charles Tucker made a statement to Officer Morgan of the Crestview Police that he saw Gundy at Rachel's Bar on April 24, 1996 at 8:30 p.m. But Tucker's statement does saying anything about Rachel Carlson or her whereabouts on the night of the murder. The statement concerns only Gundy's whereabouts. It is not Gundy's independent whereabouts that matter. What is exonerating about Ferguson's testimony is that, under his version, the victim is alive and well when Brooks is on the road back to Eglin Air Force Base. And that critical part of Ferguson's testimony was not corroborated in any manner.

Moreover, as to Gundy also having felony convictions, fact-finders are often faced with two witnesses, both of whom have criminal records. But fact-finders are still entitled to make credibility determination in such situations and their credibility determination are still entitled to deference. Credibility determinations are not toggles. Rather, they are degrees. Additionally, contrary to opposing counsel's assertion, Gundy has

no real reason to lie either. Gundy is not a "prime suspect." Gundy did not know the victim. Gundy did not take out a $100,000 life insurance policy on the murdered infant just weeks before the murder; Brooks' cousin did. The infant's mother, Rachel Carlson, was not seeking child support from Gundy; she was seeking child support from Brooks' cousin.

Opposing counsel totally ignores Ferguson's delay in coming forward and that that delay was part of the basis for the trial court finding Ferguson incredible. (PC Vol. 7 1284). Opposing counsel must account for the delay to undermine the deference due to trial court's credibility determination and does not.

There is competent, substantial evidence to support the trial court's credibility determination. *Spann v. State*, 91 So.3d 812, 825 (Fla. 2012)(finding competent and substantial evidence in the record to support the trial court's conclusion that the recantation was untruthful).

Merits

To obtain a new trial based on newly discovered evidence, a defendant must two requirements: 1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and 2) the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)(*Jones II*). "Newly discovered evidence satisfies the second prong of the Jones II test if it weakens the

case against the defendant so as to give rise to a reasonable doubt as to his culpability." *Reed v. State*, 2013 WL 709108, 3 (Fla. Feb. 28, 2013).

Ferguson's testimony does not create a reasonable doubt as to Brooks' culpability. It was Brooks' DNA located a few blocks from the murder scene at Melissa Thomas' apartment, not Gundy's. *Brooks*, 918 So.2d at 196 & n.10. It was Brooks and Davis that Rochelle Jones testified she picked up near the murder scene and drove back to the Air Force base that night, not Gundy. It was Davis and Brooks that Mark Gilliam testified attempted to kill Carlson on two prior occasions, not Gundy. It was Brooks' cousin and co-perpetrator Davis that took out a $100,000 life insurance policy on an infant just months before the murder; not Gundy. As the trial court concluded, Ferguson's testimony is unlikely to produce an acquittal at any retrial. The trial court properly denied the claim of newly discovered evidence.

CONCLUSION

This Court should affirm the trial court's denial of postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by email to Linda McDermott of McClain & McDermott, P.A. at lindammcdermott@msn.com this 8th day of July, 2013

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CERTIFICATE OF FONT AND TYPE SIZE

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

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