IN THE SUPREME COURT OF FLORIDA

FRED LORENZO BROOKS,

Appellant,

vs. **CASE NO. 92,011**

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

The only "additional" facts which need to be set forth in this case involve Brooks' pro se claims III and IV (continuance/motion to withdraw). To facilitate review of these *supplemental* claims, the State will rely upon the facts which are set forth within the argument section of the instant brief.

PRELIMINARY STATEMENT

APPLICATION OF §924.051, FLORIDA STATUTES

Section 924.051, Florida Statutes (Supp. 1996), which was created by the Criminal Appeal Reform Act of 1996 (ch. 96-248, §4, at 954, Laws of Fla.) applies to this case. §924.051 became effective on July 1, 1996. Darryl Jenkins was killed on August 28, 1996. Brooks' trial commenced on May 5, 1997 and he was sentenced on October 21, 1997. (II/366-380).

Among other things, the statute provides that the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court and precludes review unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. See, Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773 (Fla. 1996).

Section §924.051(3), Fla. Stat. (Supp. 1996), explicitly states,

> An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

Most recently, in Perez v. State, 23 Fla. L. Weekly D2136a (Fla. 3d DCA Case No. 97-956, Opinion on rehearing, September 16, 1998), the Court noted that §924.051(1)(a), defines "prejudicial error" as "an error in the trial court that harmfully affected the judgment or sentence." And, "section 924.051(1)(b), states that "'preserved' means that an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and that the issue, legal argument, or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor." Because the legislature carefully and specifically defined the degree of specificity necessary to preserve issues which may be raised in criminal appeals, the appellate court in Perez gave great weight to the clearly expressed intent of the Florida Legislature that review of criminal appeals must be limited to those issues which have been properly preserved in the trial court or which constitute fundamental error. Perez, 23 Fla. L. Weekly D2136a.

SUMMARY OF THE ARGUMENT

Issue I: The State presented sufficient evidence, both direct and circumstantial, to prove first-degree murder. Brooks' conviction may be sustained under both premeditated murder and felony murder, based upon the underlying crimes of robbery or trafficking in cocaine, or attempt to commit either crime.

Issue II: The trial court did not abuse its discretion in allowing the experienced cocaine seller to testify as to the weight of the cocaine rocks which had been in his possession.

Issue III: The trial court did not err in finding the merged aggravating factor of robbery/pecuniary gain.

Issue IV: The trial court did not err in finding that the fact that the victim was present at the scene and supplied a baggie of cocaine to the seller did not constitute a mitigating circumstance under §921.141(6)(c), Fla. Stat. (1995).

Issue V: Brooks' death sentence is neither disproportionate nor a disparate penalty based on the two weighty aggravating factors, the minimal mitigation, and the fact that Brooks was the armed gunman who shot and killed the unarmed victim.

Issue VI: The now-challenged comments of the prosecutor during the penalty phase closing argument, the vast majority of which were received without any objection at trial, did not render Brooks' sentencing proceeding fundamentally unfair.

Supplemental Issue I: Sufficient evidence was presented at trial to sustain Brooks' conviction for first-degree murder.

Supplemental Issue II: The trial court did not err in instructing the jury on both premeditated murder and felony murder. This claim is procedurally barred, without merit, and, alternatively, harmless.

Supplemental Issue III: The trial court did not abuse its discretion in denying relief on attorney Nichols' motion to withdraw as counsel, which was withdrawn prior to trial. This issue is procedurally barred and meritless.

Supplemental Issue IV: The trial court granted multiple continuances and gave Brooks and his family several opportunities to retain private counsel. This claim is without merit.

Supplemental Issue V: The trial court did not abuse its discretion in granting the State's unopposed motion for consolidation at trial, and denying Brooks' belated request to have his penalty phase conducted prior to that of his codefendant.

Supplemental Issue VI: The experienced cocaine seller was properly allowed to testify as to the weight, quantity, and content of the cocaine rocks which had been in his possession.

Supplemental Issue VII: The trial court did not abuse its discretion in admitting testimony concerning Brooks' use of Tony Carr's vehicle during the drug trafficking, robbery, and murder.

ARGUMENT

ISSUE I

SUFFICIENT EVIDENCE, BOTH DIRECT AND CIRCUMSTANTIAL, WAS PRESENTED AT TRIAL TO SUPPORT THE DEFENDANT'S CONVICTION FOR FIRST-DEGREE MURDER BASED UPON A THEORY OF EITHER PREMEDITATED MURDER OR FELONY MURDER.
(Restated)

The defendant, Fred Brooks, argues that the evidence presented at trial was insufficient to prove first-degree murder under a theory of either premeditated murder or felony murder.[1] The State's theory of felony murder was premised upon the underlying crimes of robbery or trafficking in cocaine or attempt to commit either of those crimes. For the following reasons, Brooks' appellate challenge to the sufficiency of the evidence must fail.

Procedural Bar

In order to preserve an issue for appellate review, the "specific legal argument or ground upon which it is based must be presented to the trial court." Bertolotti v. Dugger, 514 So.2d

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[1] A conviction for murder in the first degree, a capital felony, may be sustained under §782.04(1)(a), Florida Statutes (1995), for the unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or

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

a. Trafficking offense prohibited by s. 893.135(1)

* * *

d. Robbery

1095, 1096 (Fla. 1987); Steinhorst v. State, 412 So.2d 332 (Fla. 1982). After the State rested its case, Brooks' trial counsel moved for judgment of acquittal, stating:

> [Defense Counsel] Mr. Nichols: I think we may technically have to offer our motions for directed judgment of acquittal, which I do without any further argument.
> (X/949)

A boilerplate motion for judgment of acquittal, without more, is insufficient to preserve this issue for appeal. See, Hornsby v. State, 680 So.2d 598 (Fla. 2d DCA 1996). Admittedly, Brooks' co-defendant, Brown, moved for a judgment of acquittal based upon alleged lack of testimony of premeditated intent. (X/949). Co-defendant Brown also moved for judgment of acquittal on the felony murder theory as to robbery, based on alleged failure to prove that anything was taken or anyone was put in fear prior to the taking, and trafficking, based upon the quality and total quantity of the cocaine. (X/949).[2] In response to co-defendant Brown's argument challenging the theory of first degree felony murder based on the quantity of cocaine, the trial court informed the defense that he would otherwise agree, but "we still have the attempt." (X/950). Neither defendant introduced any witnesses during the guilt phase.

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[2]Prior to trial, the trial court granted Mr. Nichols' [counsel for Brooks] request to adopt all of the prior death penalty motions which had been filed by co-defendant Brown. (III/613). When faced with duplicate objections during the testimony of Michael Johnson, the trial court also agreed that "each counsel will adopt each other's *objections*." (VII/421)

(X/959). When co-defendant Brown renewed his motion for judgment of acquittal, without additional argument, Brooks' trial counsel stated, " . . . and I would join in that." (XI/1096). The fact that Brooks subsequently joined in the renewal of his original bare-bones motion for judgment of acquittal is insufficient to preserve Brooks' particularized appellate challenge to the sufficiency of the evidence. See, Rule 3.380(b), Florida Rules of Criminal Procedure; Archer v. State, 613 So.2d 446, 448 (Fla. 1993) [Defendant argued that motion for judgment of acquittal should have been granted because the victim's murder was independent of agreed-upon plan to kill a different clerk. Archer did not make this argument in the trial court; therefore, this issue was not preserved.]

Standard of Review

Assuming, *arguendo*, that this issue[3] has been preserved, Brooks' arguments still must fail. Moving for a judgment of acquittal "admits not only the facts stated in the evidence

[3]In Brown v. State, 23 Fla. L. Weekly S514 (October 1, 1998), this Court explained that although the defendant did not contest the sufficiency of the evidence for his conviction of first-degree murder, this Court, nevertheless, must make an independent determination that the evidence is adequate. Id, citing § 921.141(4), Fla. Stat. (1997); Fla. R. App. Pro. 9.140(h); Reese v. State, 694 So.2d 678, 684 (Fla. 1997). See also, Urbin v. State, 714 So.2d 411 (Fla. 1998) [Although the defendant did not challenge the sufficiency of the evidence to support his conviction for first-degree murder, this Court's review of the record confirmed that there was sufficient evidence to support the first-degree murder conviction as well as the conviction for robbery.]

adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Orme v. State, 677 So.2d 258 (Fla. 1996), cert. denied, 117 S.Ct. 742 (1997); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). A judgment of conviction comes to this Court with a presumption of correctness, Terry v. State, 668 So.2d 954, 964 (Fla. 1996), and this Court's function is to review the record to determine whether competent substantial evidence supports the defendant's conviction. Foster v. State, 679 So.2d 747 (Fla. 1996), cert. denied, 117 S.Ct. 1259 (1997).

Direct vs. circumstantial evidence

Contrary to Brooks' characterization, this is not a purely circumstantial evidence case. Direct evidence was presented at trial via multiple eyewitnesses to the crime -- Jackie Thompson, Tyrone Simmons, Jesse Bracelet, and Michael Johnson. These eyewitnesses independently (1) placed Brooks at the scene of the murder, (2) identified Brooks and Brown as the ostensible customers who flashed several $100 bills and initially sought 50 rocks of cocaine, (3) identified Brooks as the assailant who pulled the gun on the unarmed drug seller, Michael Johnson, (4) identified Brooks as the man who fired his gun at the unarmed victim, BBQ Jenkins, when Jenkins called out a warning, and (5) identified Brooks as the man who continued to fire his loaded weapon at the unarmed

witnesses. It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Tibbs v. State, 397 So.2d 1120 (Fla.), aff'd., 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Here, as in Orme v. State, 677 So.2d 258 (Fla. 1996), direct evidence placed the defendant at the scene of the crime at the time of the victim's murder. Moreover, in this case, the direct eyewitness testimony unmistakably identified Brooks as the armed gunman who shot and killed Darryl Jenkins. The following evidence presented at trial, both direct and circumstantial, establishes that Brooks' first degree murder conviction may be sustained under a theory of either premeditated murder or felony murder.

On the night of the murder, Michael Johnson sold crack cocaine from Darryl "BBQ" Jenkins' home. (VII/374). Johnson drove his 1973 Chevy Impala to Jenkins' home, parked in the driveway, and soon met up with his girlfriend, Lashan Mahone (VII/376-382; VIII/547; 600-601). Jenkins and a neighbor, Jesse Bracelet, were seated in lawn chairs in the driveway. (VII/383).

Five minutes after Lashan Mahone arrived, a red Camry arrived. (VII/383;VIII/549; 601). Jackie Thompson, who was a regular drug customer,(VII/375-376), got out of the car and Johnson sold her a single, ten dollar cocaine rock. (VII/386; VIII/602). Thompson

had two guys in the car who wanted to buy 50 rocks. (VII/386). Johnson saw Brooks and Brown get out of the Camry, although he did not recognize them immediately. (VII/387). Johnson identified both defendants, Fred Brooks and Foster Brown, at trial. (VII/374-375).

Johnson retrieved a baggie with crack cocaine rocks from Darryl Jenkins. (VII/387-388). Johnson did not know how many rocks were in the bag, but it was enough to sell 50 rocks. Each rock weighed about one gram apiece. (VII/388). Johnson, a crack cocaine dealer for two years, had seen 50 or more rocks together on five occasions. (VII/418-419). Based on his experience as a dealer, each rock was about a gram in weight, and the cocaine was real. (VII/420-421).

The two men who exited the red Camry approached him as he was standing at the trunk of his own car. Johnson recognized the men as Fred Brooks and Foster Brown. (VII/422). Johnson asked if they wanted 50 rocks, and Brown replied that they only wanted 30 rocks. (VII/423).

Brown was on Johnson’s left, Brooks on his right, both within touching distance. (VII/424). Brown had several hundred dollar bills in his hand. (VII/425). As Johnson was counting the cocaine rocks out of the baggie, he spotted Brooks pulling a long chrome gun. Realizing this was a robbery, Johnson dropped the baggie of cocaine "square" onto the trunk and ran. (VII/426; 436).

Johnson heard Darryl Jenkins ask if the man had a gun. (VII/426). Johnson saw Brooks point the gun toward Darryl Jenkins and fire once. (VII/427). When the shooting started, Johnson dropped the cocaine baggie "square on the trunk." (VII/435-436). Johnson never saw the cocaine baggie again. (VII/436). Johnson heard Jenkins scream after Brooks fired a shot at him. (VII/427). Johnson ran past Foster Brown, who was fumbling for something in his pocket. (VII/427). As he ran, Johnson heard a lot of gunshots -- 10 to 12 -- and felt himself get shot in the back. (VII/428). It sounded like two different guns were being fired; one was louder than the other. (VIII/534).

Lashan Mahone was seated in the driver's seat of Johnson's Impala when the shooting started. (VII/430). Lashan Mahone knew Fred Brooks, but not Foster Brown. (VIII/545-547). Mahone heard Jenkins scream and she heard a shot. (VIII/553). She saw Johnson running and one of the men holding a gun. (VIII/553). She saw the man shoot at Johnson. (VIII/554). Mahone crouched down in the driver's seat and heard several more shots. (VIII/554). The man paused for 10 to 15 seconds near Johnson's car, then went to the Camry and drove off. (VIII/554-555). The profile of the gunman she saw looked like Fred Brooks. (VIII/562). Lashan got out of the car immediately after the shooting, and, when she looked on the trunk, the cocaine was gone. (VIII/558)

Jessie Bracelet did not know either Brooks or Brown. (VIII/599). Bracelet saw Johnson start to count his drugs off the trunk of his car with the two men close at hand. (VIII/604). Bracelet heard Jenkins yell, "He's got a gun" and then saw one of the men extend his arm and fire at the victim. (VIII/605). Bracelet glanced at the man, who began firing on him as he ran. Bracelet heard anywhere from 10 to 15 more shots being fired, and it sounded like two different guns were going off. (VIII/606). Bracelet identified Fred Brooks as the gunman he saw that night. (VIII/608).

Tony Carr knew Brooks and Brown and identified them in court. (IX/667-669). Carr owned a 1995 red Toyota Camry. (IX/669-670). Somewhere between 4:00 and 6:00 p.m. on the day before the shooting, Carr was parked at a convenience store when Brooks and Brown approached him and first asked for a ride and then to borrow his car for a few hours for $50, to which Carr agreed. (IX/670-673). Fred Brooks drove the Camry; Brown was the passenger. (IX/674). The two never returned the car that night, nor on any of the two following nights. The red Camry was eventually found by the police, abandoned, approximately one week later. (IX/674-675).

Jackie Thompson also identified Brooks and Brown in court. (IX/751-752). On the night of the shooting, she was "hanging out" with Tyrone Simmons. (IX/753). Brooks and Brown pulled up to them

in a red Camry. (IX/753). They asked Thompson if she knew where they could get “juggler action,” street slang for large, dealer sized cocaine rocks. (IX/754-755). When Thompson asked if they had any money, Fred Brooks showed her five one hundred dollar bills. (IX/755). In exchange for setting up the purchase, they would give her $80 worth of cocaine. (IX/755).

Thompson and Tyrone Simmons got in the red Camry, with Simmons driving. (IX/756). They drove to the victim’s house. (IX/756). During the trip, Brooks and Brown told her they wanted to buy 50 rocks of cocaine, 500 dollars worth. (IX/757). Thompson suggested buying a ten dollar rock first, so they could see what they were getting. (IX/757-758).

At Jenkins’ house, Jackie got out of the car and dealt with Michael Johnson. (IX/758). She told Johnson she had two friends in the car who wanted to spend $500. (IX/758-759). She showed Brooks and Brown the $10 rock she had just purchased from Johnson. (IX/759). Believing that the rocks were "too flat," Brooks stated that he wanted 30, instead of 50 rocks. (IX/759).

Jackie Thompson got into the back seat of the Camry and Brooks and Brown walked to Johnson’s car. (IX/760). Tyrone Simmons was behind the wheel of the Toyota, listening to the radio. (IX/760). Thompson heard somebody “call out a name, yell out, scream something out” from the direction of the driveway behind her.

(IX/760-761). She then heard gunfire from behind her. (IX/760). She turned around, looked through the rear window, and saw Brooks firing over the top of Johnson's car. (IX/761). She ducked down and heard about 10 to 15 more shots. (IX/762). After the gunfire ceased, Brooks and Brown came running back to the car. (IX/762). Brown climbed into the front seat, with a dark colored gun in hand. (IX/764). Brooks jumped in on top of him. (IX/764). Brooks had a "big silver automatic gun." (IX/765).

They told Tyrone Simmons to drive away. Thompson panicked, asking what the hell is going on and why were they shooting. (IX/765). They both told Simmons to tell her to shut up. (IX/766). The two later dropped her and Simmons off, and then left in the Camry. (IX/767). The next day Brooks came to her house, told her the victim was dead and "Bitch, you didn't see nothing" which Thompson took as a threat. (IX/767). Three or four days later, she saw Foster Brown who told her "Tell them we [sic] from Georgia." (IX/768).

Tyrone Simmons also knew both Brooks and Brown and identified them in court. (X/864-866). Simmons was with Jackie Thompson when Brooks and Brown arrived in a red Camry. (X/867). They talked first to Thompson, and she then asked Simmons to ride with them. (X/868). Simmons drove because he had a valid license. (X/868). They drove to the victim's house. (X/869).

There, Jackie Thompson got out to buy a cocaine rock. (X/869). Brooks and Brown wanted to buy 50 rocks. (X/869). Thompson returned to the Toyota and showed them the sample rock. (X/870). Thompson got in the back seat of the car and Brooks and Brown walked up the driveway. (X/871). Simmons heard a loud voice and gunshots coming from the rear of the car. (X/871). He looked in the rear view mirror and saw Brooks with a gun in his hand, shooting. (X/871-872). Simmons turned and saw Brooks shooting at a man running to the rear of the house. (X/872). Simmons ducked down and heard several more shots. (X/873). After the shooting stopped, Brown ran and jumped in the front seat of the car. (X/874). Brooks climbed in on top of Brown. (X/874). Brooks was armed with a chrome-plated .9 mm pistol. (X/875). Both of them yelled at him to crank up and drive. (X/875). Thompson was shrieking hysterically, like she had lost her mind. They told her to shut up. (X/875-876). They told Simmons to drive to 14th Street, where he and Thompson got out of the car. (X/876).

Premeditation

Premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." Asay v. State, 580 So.2d 610, 612 (Fla.), cert. denied, 502 U.S. 895, 112

S.Ct. 265, 116 L.Ed.2d 218 (1991). Premeditation may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act. Spencer v. State, 645 So.2d 377, 380-381 (Fla. 1994). Whether or not the evidence shows a premeditated design to commit a murder is a question of fact for the jury, which may be established by circumstantial evidence. Penn v. State, 574 So.2d 1079, 1081-1082 (Fla. 1991).

The State agrees with the defendant that the circumstances which support a finding of premeditation include the nature of the weapon, the presence or absence of provocation, previous difficulties between the parties, the manner in which the homicide was committed, the nature and manner of the wounds, and the accused's actions before and after the homicide. Holton v. State, 573 So.2d 284, 289 (Fla. 1990), citing Larry v. State, 104 So.2d 352, 354 (Fla. 1958). Evaluating the evidence presented at trial in light of these standards, Brooks' premeditation was proven beyond a reasonable doubt. Brooks came to the scene armed with the most lethal of weapons -- a loaded gun, which was concealed from view. There is no evidence of any rage or prior difficulties between the parties. Instead, this homicide was committed when Brooks removed the secreted gun, drew the loaded gun on the unsuspecting drug seller, Michael Johnson, and, when BBQ Jenkins alerted his friends to the danger, Brooks aimed the loaded gun

directly at the unarmed Jenkins, pulled the trigger, and fired, striking Jenkins directly in his chest -- the bullet piercing Jenkins' heart. Aiming a gun at Jenkins' chest and firing the weapon at the most vulnerable part of his body, the heart, showed not an intent to wound but an intent to kill. (See also, II/371). The shot fired through the heart, not through his arm or leg, is additional evidence of premeditation. Brooks didn't just fire one shot. Instead, there was a barrage of gunfire, evidencing that the defendants also tried to kill the remaining unarmed witnesses. Michael Johnson was struck in the back by one of the bullets fired by the defendants and bullets were also fired at Jesse Bracelet, an unarmed, innocent bystander, as he ducked and ran. There were at least ten shell casings from a .9 millimeter pistol fired by the defendant at the scene.

A murderous intent may be established by facts and circumstances of the case such as a weapon being directed at some vital spot on the victim's body, Edwards v. State, 302 So.2d 479 (Fla. 3d DCA 1974), and a single gunshot can support a finding of premeditation. Peterka v. State, 640 So.2d 59 (Fla. 1994). Brooks did not fire a "single shot reflexively." Instead, Brooks continued to shoot at the unarmed bystanders who desperately ran from the cannonade of bullets and as Jenkins staggered to his inevitable death. Brooks' concealment of the loaded .9 mm gun, retrieval of the concealed weapon, deliberate aim of his loaded

firearm at the unarmed man who called out a warning, strategic shot directly into the chest of his unarmed target, *and* continuing barrage of gunfire supported the State's theory of premeditation.

This Court has affirmed first degree murder convictions, based on premeditation, in cases involving similar circumstances. For example, in Griffin v. State, 474 So.2d 777 (Fla. 1985), the victim, a store clerk, was shot twice during a robbery. This court found that Griffin used a particularly lethal gun, there was an absence of provocation of the part of the victim, and the wounds were inflicted at close range and, thus, "unlikely to have struck the victim unintentionally." Id. at 780. In light of Brooks' use of the loaded .9 mm weapon, absence of struggle or provocation, and strategic placement of Brooks' deadly shot, as in Griffin, it was unlikely that this deadly bullet "struck the victim unintentionally." See also, Alcott v. State, 1998 WL 347149 (Fla. 4th DCA 1998) ["We find that Appellant used a lethal weapon, a gun; there was an absence of provocation on the part of the victim; and the wounds were inflicted immediately and at close range. This is sufficient to support a finding of premeditation."]

In Hamblen v. State, 527 So.2d 800 (Fla. 1988), Hamblen shot a store employee once in the head after she angered him by triggering a silent alarm button. While this Court stated that Hamblen's conduct was "more akin to a spontaneous act without reflection," this Court found that the evidence “unquestionably”

demonstrated premeditation. Id. at 805. In this case, when Jenkins called out a verbal alarm, Brooks shot him directly in the chest. Here, as in Hamblen, there was no evidence of a struggle over a weapon or a frenzied rage suggesting that this was an emotional crime. To the contrary, Brooks, as in Hamblen, shot the victim when he sounded an alarm and Brooks fired directly at the victim's most vulnerable target -- striking his heart. (II/371).

In support of his challenge to the State's theory of premeditation, Brooks relies primarily upon Mungin v. State, 689 So.2d 1026 (Fla.), cert. denied, --- U.S. ----, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997) and Jackson v. State, 575 So.2d 181, 186 (Fla. 1991). In Mungin, the victim was a convenience store clerk killed during a robbery. This Court found the evidence to be insufficient to establish premeditation where the murder was consistent with a killing that occurred on the "spur of the moment." There were no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and *"no continuing attack that would have suggested premeditation."* Id. at 1029 (e.s.). In Mungin, this Court nevertheless affirmed the defendant's first-degree murder conviction, based on the theory of felony murder, with robbery or *attempted* robbery as the underlying felony. In [Clinton] Jackson, there were no eyewitnesses to the crime, the evidence was consistent with the theory that the victim "bucked the jack" (resisted the robbery), inducing the gunman to

fire a "single shot reflexively," and there was no evidence that Clinton Jackson actually fired the shot which killed the victim. Although the evidence was insufficient to establish premeditation, as in Mungin, it was sufficient to support Jackson's first degree murder conviction based on felony murder.

In San Martin v. State, 705 So.2d 1337, 1345-1346 (Fla. 1997), this Court found the evidence sufficient to support San Martin's first-degree murder conviction under a theory of either premeditated murder or felony murder. On the day of the murder, the Cabanases, father and son, and a companion, Lopez, left the bank with $25,000 in cash. As the Cabanases rode together in one vehicle, Lopez followed in his pickup truck. As the trio drove alongside the expressway, their vehicles were "boxed in" at an intersection by two Chevrolet Suburbans. Two masked men exited from the front Suburban and began shooting at the Cabanases. When Cabanas Sr. returned fire, the assailants returned to their vehicles and fled. Following this exchange of gunfire, Lopez was found outside his vehicle with a bullet wound in his chest. Lopez died shortly thereafter. Among other factors, premeditation was established by evidence that the defendants initiated shooting immediately upon exiting their vehicle and physical evidence confirmed extensive bullet damage to the victims' vehicles. At least four shells were ejected at the murder scene from San Martin's gun. Here, as in San Martin, numerous spent shells were

ejected at the murder scene. Ten spent shells were recovered from the area surrounding Michael Johnson's Impala -- the exact spot where Brooks had been standing and firing his weapon at the unarmed targets. In fact, Brooks concedes that the State presented evidence that Brooks fired the bullet that killed Jenkins. (Initial Brief of Appellant at 68). Alternatively, the evidence in San Martin also supported a conviction under a theory of felony murder. San Martin was a principal and an active participant in the attempted robbery which resulted in the victim's murder and his actions clearly indicated a reckless indifference to human life. Id. citing, Tison v. Arizona, 481 U.S. 137, 158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987). In San Martin, as here, the defendant was properly convicted of first-degree murder under either theory of premeditated murder or felony murder.

Felony Murder: Robbery or Attempted Robbery

Brooks' conviction alternatively may be sustained under a theory of felony murder based on robbery or attempted robbery. §782.04(1)(a)2, Florida Statutes (1995). See, Terry v. State, 668 So.2d 954 (Fla. 1996); Jackson v. State, 575 So.2d 181 (Fla. 1991); Sliney v. State, 699 So.2d 662 (Fla. 1997); Finney v. State, 660 So.2d 674 (Fla. 1995), cert. denied, 116 S.Ct. 823 (1996); Jones v. State, 652 So.2d 346 (Fla.), cert. denied, 116 S.Ct. 202 (1995); Mungin, [Evidence supported alternative theory of felony murder based on robbery or attempted robbery: defendant was carrying a

gun when he entered store in which victim was killed, $59.05 was missing from the store, money from the cash box was gone, someone tried to open the cash register, and Mungin left the store carrying a paper bag]; San Martin, supra.

In this case, when Jackie first arrived, she informed Michael Johnson that Brooks and Brown wanted to buy 50, i.e. $500 worth of cocaine. Johnson began to count out the cocaine rocks after Jackie's "buyers" displayed their cash. Once the cocaine was produced, Brooks pulled his gun, Jenkins sounded an alarm, Brooks extended his arm and started shooting, and Johnson dropped the cocaine "square" on the trunk and fled. The entire baggie of cocaine was missing immediately after the shooting and the defendants were the only ones who had access to the baggie of cocaine when Michael Johnson dropped the cocaine and ran. Even if the robbery failed, proof of attempted armed robbery is sufficient to support the defendant's first degree murder conviction. See also, Mendoza v. State, 700 So.2d 670 (Fla. 1997).

Trafficking or Attempted Trafficking

Alternatively, Brooks' first degree murder conviction may be sustained under a theory of felony murder based on either trafficking or an *attempt* to perpetrate any trafficking offense under §893.135(1), Florida Statutes. See, §782.04(1)(a), Florida Statutes (1995). Virtually the same facts supporting the robbery theory also support the State's theory of trafficking or attempted

trafficking. The underlying felony, trafficking in cocaine, includes the purchase or actual or constructive possession of 28 grams or more of cocaine, or of any mixture containing cocaine.

The defendants displayed several hundred dollars in cash, initially requested 50 rocks of cocaine, and upon inspecting the sample, agreed on 30 rocks of cocaine. Michael Johnson testified that he sold cocaine for approximately two years. He had seen crack cocaine before, and knew what it looked like. Johnson knew that the baggie contained "real" crack cocaine. The cocaine was divided into one-gram rocks and there were at least 50 in the bag. That amount is well over the 28 gram amount that the State needed to establish trafficking. There was no evidence the defendants voluntarily withdrew from their criminal enterprise. At the very least, the State proved an attempt to traffic in cocaine -- the defendants went there trying to buy 50 to 30 rocks of crack cocaine. Even if the cocaine turned out to be fake, which the State does not concede, the defendants acts still constitute, at least, an attempt. And, even if the defendants didn’t get any of the cocaine, for example, if the drugs were lost in the confusion of the gunfire, the evidence still supported a finding of attempted robbery and attempted trafficking. Although the State maintains that there was a completed trafficking and a completed robbery, even an attempt qualifies and was met in this case. Even if the defendants bought or tried to buy what they believed to be crack

cocaine, whether it was real or not, just going to the scene and trying to "purchase" either 50 or 30 rocks, of cocaine constitutes an attempted trafficking because they were attempting to gain control, to possess, 28 grams or more. See also, Reyes v. State, 581 So.2d 932 (Fla. 3d DCA 1991) [Defendants were found guilty of killing a Colombian drug dealer in the course of a "drug rip-off." The State established the defendants' guilt based on felony murder pursuant to Section 782.04, Florida Statutes (1987). At a post-trial hearing, the State agreed that, absent expert testimony concerning the nature and quantity of the cocaine, the defendants should be convicted of attempted trafficking, rather than trafficking. 581 So.2d 933-934. In Velunza v. State, 504 So.2d 780 (Fla. 3d DCA 1987), the Court found that the State was not required to prove the precise weight of cocaine contained in the contraband in order to sustain a conviction of trafficking in cocaine by possession of 400 grams or more, but rather, was only required to prove that defendant possessed 400 grams or more of *mixture* containing cocaine.

In Hallman v. State, 633 So.2d 1116 (Fla. 3d DCA 1994), the defendant was validly convicted of attempted trafficking in cocaine, even though evidence was negligently destroyed before his trial; his conviction for attempt did not require proof that substance involved was actually cocaine. Under §893.135(1)(b)1, Florida Statutes (1991), the offense is complete once the defendant

is "knowingly in actual or constructive possession of" the cocaine. With respect to attempt, it does not matter whether the substance is introduced, or is even real. See Tibbetts v. State, 583 So.2d 809 (Fla. 4th DCA 1991) [Substance defendant attempted to purchase in reverse sting operation did not have to actually be cocaine, in order for defendant to be found guilty of attempting to purchase cocaine.]; Louissaint v. State, 576 So.2d 316 (Fla. 5th DCA 1990) [Charge of "attempt" does not require proof that the substance involved was actually cocaine. Defendant was validly convicted of attempted trafficking in cocaine, even though evidence was negligently destroyed before trial.]

In the instant case, a review the evidence presented, in the light most favorable to the prosecution, demonstrates that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Brooks' conviction may be sustained under both premeditated murder and felony murder, based upon the underlying crimes of robbery or trafficking in cocaine, or attempt to commit either crime.

ISSUE II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE EXPERIENCED COCAINE DEALER, MICHAEL JOHNSON, TO TESTIFY AS TO THE WEIGHT OF THE COCAINE ROCKS IN HIS POSSESSION. (Restated)

Procedural Bar

Brooks next argues that the trial court erred in allowing Michael Johnson to testify, over "strenuous" defense objections, as to the weight of the cocaine rocks in his possession. (Initial Brief of Appellant at 49). However, when Michael Johnson initially testified on direct examination as to the quantity and size of the cocaine rocks, his testimony was introduced without objection (VII/388), as the following record excerpt demonstrates.

> [Prosecutor/Mr. Bateh]: Q. . . . - - you said you got a sandwich baggie from Darryl Jenkins?
>
> [Michael Johnson]: A Yes, I did.
>
> Q What was in there?
>
> A It was rock cocaine, crack cocaine.
>
> Q Do you know how much was in it?
>
> A Not the exact number, but I know it was enough to sell 50 rocks.
>
> Q All right. Did you look at that crack cocaine that was in that sandwich baggie?
>
> A Yes.
>
> Q What did you observe about the size of the rocks of crack cocaine that were in it?

A They was [sic] about a gram in size and identical in shape.

Q Mr. Johnson, how large was this baggie that you were holding?

A It's a sandwich bag . . .

(VII/387-388)

Absent an objection when Johnson initially disclosed the identity and weight of the drugs, this issue has not been preserved for appeal. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); See also, §924.051, Florida Statutes (Supp. 1996). Although the defense subsequently objected to the prosecutor's additional questions -- based on the grounds of leading, relevance, and alleged failure to lay a proper predicate (VII/389-392), there was no objection or request to strike the original, unobjected-to testimony. Because any additional challenged testimony was merely cumulative to the unobjected-to evidence previously presented, error, if any, is harmless.

Standard of Review

Johnson's testimony, as to the identity and weight of the cocaine, was admissible both as a lay opinion, under §90.701, Florida Statutes (1995), and as an expert opinion under §90.702, Florida Statutes (1995). The decision whether to allow lay witness opinion testimony is within trial court's discretion. Fino v. Nodine, 646 So.2d 746 (Fla. 4th DCA 1994). Likewise, the determination of a witness's qualifications to express an expert

opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. Geralds v. State, 674 So.2d 96, 100 (Fla. 1996).

Lay witness opinion

The trial court did not abuse its discretion in allowing Johnson to testify as to the weight of the cocaine which had been in his possession. Brooks concedes that lay witnesses generally are permitted to testify or give opinion testimony on matters such as distance, time, size, and weight. §90.701, Florida Statutes (1995); Ehrhardt, s. 701., p 516-17; See also, Fino v. Nodine, 646 So.2d 746 (Fla. 4th DCA 1994).

Indeed, in State v. Gilbert, 507 So.2d 637 (Fla. 5th DCA 1987), the District Court concluded that the trial court erred in ruling that an experienced narcotics officer could not testify as to the weight of a bag containing cocaine which he observed the defendant remove from his back, tear open and throw into a pond. In Gilbert, the Court held that "an experienced narcotics officer (as well as a lay witness) can testify to the approximate weight of a given matter." Id. at 638, citing Madruga v. State, 434 So.2d 331 (Fla. 3d DCA 1983); Capo v. State, 406 So.2d 1242 (Fla. 1st DCA), pet. for rev. denied, 413 So.2d 875 (Fla. 1982).

Brooks argues that Gilbert is distinguishable because the officer's testimony in Gilbert was offered only to establish the corpus delicti for the defendant's confession, and not as critical

evidence to prove the crime charged. Brooks' distinction is unavailing. In Madruga, cited by the Gilbert court, the State presented evidence from an experienced drug enforcement officer that the substance he delivered to the defendants was marijuana in excess of 100 pounds, to wit: 75 bales of a minimum weight of 41 to 55 pounds a bale. Unfortunately, the contraband was destroyed by federal authorities before it could be tested by the defendants before trial. Notwithstanding the destruction of the marijuana, the evidence was sufficient to support a finding of trafficking in contraband in excess of 100 pounds.

Expert witness opinion

Section 90.702, Florida Statutes (1995), provides a witness is qualified as an expert by "knowledge, skill, experience, training, or education." See also, Terry v. State, 668 So.2d 954, 960 (Fla. 1996). In the instant case, the prosecutor established a proper predicate for the admissibility of the testimony of the experienced drug dealer, Michael Johnson, based on Johnson's prior knowledge, skill, and experience. Furthermore, outside the presence of the jury, the defense conducted a detailed *voir dire* examination as to the number, weight, and composition of the drugs contained in the baggie obtained from Darryl Jenkins. (VII/396-403). Johnson confirmed that he was familiar with the appearance of crack cocaine, knew what crack cocaine looked like, and he'd sold it daily during the preceding two years. (VII/389). Johnson, an

experienced cocaine seller, had an opportunity to examine the size and quantity of the cocaine in the baggie which he had obtained from Jenkins. Johnson's two years worth of daily experience qualified him to express his opinion as to the amount (at least 50), weight (one-gram each), and contents of the baggie (crack cocaine). The trial court found that Johnson's testimony was corroborative evidence of, at least, an attempt to traffic in cocaine. In the instant case, even if there weren't 50 grams of cocaine in the baggie, as originally requested, and even if the defendants efforts to obtain at least 30 rocks (still in excess of the requisite 28 grams) had failed, the State nevertheless established a sufficient predicate to introduce Johnson's testimony to establish an attempt to traffic in cocaine. The trial court specifically found that Johnson's testimony was in the nature of expert testimony, it would be subject to cross-examination, and the defense concerns went to the weight of the evidence. (VII/413).

When the jury returned, Johnson testified, *inter alia*, that he'd sold crack cocaine for about two years, had observed a quantity of 50 rocks of crack cocaine on more than five prior occasions, knew there were at least 50 rocks of cocaine in the baggie, the rocks were identical in shape and size, they were a gram apiece, he knew a "juggler" consisted of one gram; and, when Johnson picked up the entire baggie, he felt the rocks individually, and in his opinion, the 50 rocks each weighed a gram,

and the rocks were crack cocaine, real crack cocaine. (VII/418-421). The trial court did not abuse its discretion in allowing the experienced narcotics dealer to testify as to the identity and weight of the cocaine in his possession. See, Gilbert, supra.

As argued in Issue I, Brooks' first degree murder conviction also may be sustained under a theory of premeditated murder, based, in part, on the use of the loaded 9 .mm automatic weapon, the deadly shot fired directly into the victim's heart when he sounded an alarm and the continued barrage of gunfire at the scene--unmistakably evidencing an intent to kill. Thus, admission of Johnson's evaluation of the weight of the cocaine, even if error, was clearly harmless in light of the independent evidence of premeditation.

Brooks' conviction for first degree murder, based on a theory of felony murder, may be sustained on any of the underlying felony offenses of robbery, attempted robbery, trafficking or attempted trafficking in cocaine. Even if Brooks and Brown ultimately failed in their effort to obtain a trafficking amount of cocaine, Brooks' first degree murder conviction nevertheless remains intact in light of the independent evidence of attempt to commit either underlying felony. Johnson's testimony as to the weight of the cocaine was merely cumulative to the independent evidence of, at least, an attempt to commit either robbery or trafficking in cocaine: Brooks and Brown displayed $500 in cash, initially requested 50 rocks of

crack cocaine, negotiated the ostensible purchase of 30 rocks, and Brooks drew his gun as the trafficking amount of cocaine was produced by Johnson. When Brooks drew the gun and shot BBQ Jenkins, Johnson immediately left the drugs on the trunk lid of the Impala and fled, only to be shot in the back by the armed assailants. Not surprisingly, when the shooting stopped, Lashan got out of the car and the drugs which Brooks and Brown had agreed to "purchase" were gone.

Under the facts of this case, error, if any, in admitting Johnson's testimony as to the weight of the cocaine is clearly harmless. §924.051, Florida Statutes (Supp. 1996).

ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING, AS A SINGLE AGGRAVATING CIRCUMSTANCE, THE MERGED ROBBERY / PECUNIARY GAIN AGGRAVATING FACTOR. (Restated)

In imposing the death penalty, the trial court found the following two aggravating factors: (1) prior violent felony conviction and (2) the merged robbery or attempted robbery (of the trafficking amount of cocaine)[4] and pecuniary gain. (II/366-380;

[4]As this Court explained in Blanco v. State, 706 So.2d 7 (Fla. 1997), the "list of enumerated felonies in the provision defining felony murder is larger than the list of enumerated felonies in the provision defining the aggravating circumstance of commission during the course of an enumerated felony. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance." Id. at 11. In this case, trafficking in cocaine was the motive for the robbery, which was properly merged with the pecuniary gain aggravating factor.

XXII/1720). Brooks does not challenge the first aggravating factor -- that he was previously convicted of another capital felony or a felony involving the use or threat of violence. §921.141(5)(b), Florida Statutes (1995). Brooks previously had been convicted of five felonies involving the use or threat of violence: three armed robberies, a kidnaping, and aggravated assault, all prior to the commission of the murder of Darryl Jenkins. Brooks also was convicted in this trial of a sixth violent felony, aggravated battery, based on the shooting of his second victim, Michael Johnson. This unchallenged single aggravating circumstance, embracing multiple violent felony convictions, was accorded great weight by the trial court. This unchallenged, well-documented prior violent felony aggravator, based on multiple felony convictions, must be affirmed. See, Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990); Buenoano v. State, 708 So.2d 941, 952 (Fla. 1998).

Standard of Review

In evaluating a challenged aggravating circumstance on appeal, this Court's task is to "review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding." Willacy v. State, 696 So.2d 693, 695-696 (Fla.), cert. denied, 118 S.Ct. 419 (1997).

Merged Robbery/Pecuniary Gain

The merged aggravating circumstance of robbery/pecuniary gain was clearly established in this case. Robbery and financial gain were a central part of the defendants' plan on August 28, 1996. Their joint plan was to rob a drug dealer of a large amount of drugs at gun point. And, they succeeded. These defendants solicited Jackie Thompson to take them to a drug dealer to rob, participated in the robbery of drugs from Michael Johnson, and possessed and fired guns during the robbery. The drugs taken by the defendants during the robbery had a street value of at least $500.00.

The State need not charge and convict a defendant of felony-murder or any felony in order for the Court to properly find the aggravating factor of murder committed during the course of a designated felony under §921.141, Florida Statutes. Occhicone v. State, 570 So.2d 902 (Fla.), cert. denied, 111 S.Ct. 2067, 500 U.S. 938, 114 L.Ed.2d 471 (1990). In evaluating this merged aggravating factor, the trial court stated:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or attempt to commit, or escape after committing robbery and trafficking in cocaine.
>
> This aggravating circumstance merges with that of:
>
> The capital felony was committed for pecuniary gain.
>
> The facts of the case show that the defendants planned to traffic in cocaine. They solicited Jackie Thompson and Tyrone Simmons to take them to buy $500 worth of crack cocaine,

eventually leading them to the murder victim's home. Both defendants carried concealed handguns. As soon as the cocaine was produced, the defendant pulled his handgun to rob the seller, Michael Johnson. When Darryl Jenkins attempted to warn Johnson, the defendant shot and killed Jenkins, who stood fifteen feet away. (See state's exhibit 11, showing the bullet hole to victim's heart). It was absolutely proven beyond any reasonable doubt that Fred Brooks shot and killed Darryl Jenkins. Foster Brown did not shoot or kill Darryl Jenkins. Both defendants fired at the fleeing Johnson, who was wounded with a bullet in the back. Each defendant fired numerous shots in the direction of the victims and witnesses, then fled. The cocaine was not found at the scene.

The capital felony was committed, therefore, while the defendant was engaged in the commission of, or the attempt to commit robbery and trafficking in cocaine. This aggravating circumstance was proven beyond a reasonable doubt, and was accorded great weight in determining the appropriate sentence in this case.

* * *

WEIGHING STATUTORY
AGGRAVATING AND MITIGATING CIRCUMSTANCES

There are two aggravating circumstances and one mitigating circumstance. The Court cannot and does not decide the greater number prevails but must weigh each individually. This has been done.

* * *

AGGRAVATING OUTWEIGH MITIGATING CIRCUMSTANCES

The Court finds that the two aggravating circumstances in the aggregate outweigh the one mitigating circumstance and that each aggravating circumstance, itself and apart from the other aggravating circumstance, outweighs the mitigating circumstance. (II/370; 378-379)

In Mungin v. State, 689 So.2d 1026 (Fla. 1997), the trial judge found that Mungin committed the capital felony during a robbery or attempted robbery and committed the capital felony for pecuniary gain. In Mungin, as here, the trial judge recognized

that these two aggravating factors merged and treated them as one aggravator under §921.141(5)(d),(f), Florida Statutes. On appeal, this court upheld the merged aggravating factor of robbery/pecuniary gain. Id. at 1031. In order to establish the "pecuniary gain" aggravator the state must prove beyond a reasonable doubt only that "the murder was motivated, at least in part, by a desire to obtain money, property or other financial gain." Finney v. State, 660 So.2d 674, 680 (Fla. 1995); see also, Mendoza, supra [The State proved that appellant's entire episode was motivated by the prospect of pecuniary gain. *See Allen v. State,* 662 So.2d 323, 330 (Fla. 1995). The trial court properly merged the pecuniary-gain aggravating factor with the factor of commission during an attempted robbery.] In Larkins v. State, 655 So.2d 95 (Fla. 1995), the defendant entered a convenience store, pointed a rifle at the store clerk, demanded money, and shot the store clerk. Evidence of the robbery and killing of store clerk supported beyond reasonable doubt that murder was committed for pecuniary gain. And, in Melton v. State, 638 So.2d 927 (Fla.), cert. denied 115 S.Ct. 441, 513 U.S. 971, 130 L.Ed.2d 352 (1994), the evidence supported a finding of aggravating circumstance that felony-murder committed during course of robbery was committed for pecuniary gain; Melton carried gun when he went to pawn shop to steal some rings, he held the gun on shop clerk while a codefendant gathered up proceeds from robbery, and, after defendant shot the

clerk, he did not throw down the gun, but put gun back into his waistband. In the instant case, as in Mungin, Finney, and Mendoza, competent, substantial evidence supports the trial court's finding of the merged aggravating factor of robbery/pecuniary gain. Willacy, supra.

ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE CONDUCT OF THE VICTIM, WHO WAS PRESENT AT THE SCENE AND SUPPLIED A BAGGIE OF CRACK COCAINE TO MICHAEL JOHNSON FOR ITS ANTICIPATED SALE TO THE DEFENDANTS, DID NOT CONSTITUTE A MITIGATING CIRCUMSTANCE UNDER §921.141(6)(c), FLORIDA STATUTES.
(Restated)

Brooks next argues that the trial court erred in failing to find the statutory mitigating factor described in §921.141(6)(c), Florida Statutes (1995), that the "victim was a participant in the defendant's conduct or consented to the act." For the following reasons, Brooks is not entitled to any relief on this claim.

Standard of Review

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court established the relevant standards of review for mitigating circumstances:

> 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court;
>
> 2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence

standard;

3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Campbell, 571 So. 2d at 419; Blanco v. State, 706 So.2d 7, 11 (Fla. 1997). Applying this law to the present case, it is clear that the trial court did not err in finding that the fact that the victim was present at the scene and provided the baggie of cocaine to Michael Johnson did not constitute a mitigating circumstance in this case.

Section §921.141(6)(c), Florida Statutes (1995), sets forth, as a statutory mitigation factor, the circumstance that the "victim was a participant in the defendant's conduct or consented to the act." It is true that the victim, BBQ Jenkins, was present at the scene and furnished the baggie of cocaine to Michael Johnson for its anticipated sale to the defendants. However, in finding that this conduct did not fairly qualify as a mitigating factor under §921.141(6)(c), Florida Statutes (1995), the trial court reasoned:

1. The victim was a participant in the defendant’s conduct or consented to the act.

The victim, Darryl Jenkins was in no way a participant in the murder, the armed robbery or the aggravated battery. In fact, he was a victim.

The evidence does indicate that Darryl Jenkins was a participant in the trafficking in cocaine. However, Darryl Jenkins was not the person with whom the defendants were dealing at the time of the cocaine transaction. That person was Michael Johnson. Darryl Jenkins was unarmed and standing fifteen feet away when the defendant shot him in the heart, killing him. The defendant’s attention was only diverted to

> Darryl Jenkins when Jenkins yelled out a warning upon seeing the defendant draw his gun. It was for sounding this alarm that Darryl Jenkins was killed.
>
> Viewing the evidence in the light most favorable to the defendant, the victim was, at most engaged in some unlawful and dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. In Wuornos v. State, 676 So.2d 972 (Fla. 1996), the Florida Supreme Court upheld the lower court's decision not to find this statutory mitigating factor, under similar circumstances. The Court noted that this factor applies when the victim is a participant in a transaction that, in and of itself, would be likely to cause death, for example dueling.
>
> Accordingly, the mitigating circumstance that Darryl Jenkins was involved in the defendant's conduct or consented to the act does not exist.
>
> (II/366-380)

Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard. Raleigh v. State, 705 So.2d 1324, 1330 (Fla. 1997), citing Blanco, supra. In the instant case, this statutory mitigating factor was not reasonably established under the facts of this case, and the record contains competent substantial evidence to support the trial court's conclusion. Here, BBQ Jenkins was, at most, remotely engaged in some unlawful transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. Thus, the trial court properly found the instant case is comparable to Wuornos v. State, 676 So.2d 972 (Fla. 1996), wherein this Court upheld the trial court's decision not to find this statutory mitigating factor under similar circumstances.

In Wuornos, the defendant argued that the trial court erred in not finding in mitigation the alleged fact that the victim contributed to the acts leading to his death. Wuornos argued that the victim, by seeking the services of a prostitute, "assumed the risk" of suffering bodily harm. On appeal, this Court found that theory insufficient as a matter of law to establish this mitigating factor. As this Court explained,

> . . .It would be absurd to construe this language as applying whenever victims have engaged in some unlawful or even dangerous transaction that merely provided the killer a better opportunity to commit murder, which the victim did not intend. What the language plainly means is that the victim has knowingly and voluntarily participated with the killer in some transaction that in and of itself would be likely to result in the victim's death, viewed from the perspective of a reasonable person. An example would be two persons participating in a duel, with one being killed as a result. The statute does not encompass situations in which the killer surprises the victim with deadly force, as happened here under any construction of the facts.

Wuornos, 676 So. 2d at 975.

The trial court may reject a defendant's claim that mitigating circumstance has been established, so long as record contains substantial competent evidence to support the trial court's rejection of proposed mitigator. Valdes v. State, 626 So.2d 1316 (Fla.), cert. denied, 114 S.Ct. 2725, 512 U.S. 1227, 129 L.Ed.2d 849 (1993).

Brooks criticizes this court's example of duel as an instance where this mitigator would apply, arguing that this restricts this mitigator "right out of existence." (Initial Brief of Appellant at

57). Contrary to Brooks' conclusion, this factor is not restricted to "dueling," but, rather, applicable to those situations which are permitted by §921.141(6)(c), i.e, where the "victim was a participant in the defendant's conduct or consented to the act." One example might be a situation where a codefendant is killed during the crime. This case does not even present any claim of self-defense or even a scenario involving a spontaneous fight, occurring for no discernible reason, between the defendant and the victim. See, Kramer v. State, 619 So.2d 274 (Fla. 1993). Nor did the victim arguably consent to the violence which led to his death. See e.g., Chambers v. State, 339 So.2d 204 (Fla. 1976), England, J., concurring [Murder victim voluntarily shared a long-standing sado-masochistic relationship which included severe and disabling beatings by the defendant. Id. at 209]

Even if it were error for the trial court not to consider this purported "mitigating" factor, it was so insubstantial given the facts and circumstances of the instant offense any such error must be deemed harmless. Cf. Wickham v. State, 593 So.2d 191, 194 (Fla. 1991).

ISSUE V

BROOKS' DEATH SENTENCE IS NEITHER DISPROPORTIONATE NOR A DISPARATE PENALTY WHERE THERE ARE TWO VALID AGGRAVATING FACTORS AND BROOKS WAS THE ARMED TRIGGERMAN WHO SHOT AND KILLED THE UNARMED VICTIM.
(Restated)

According to Brooks, the death penalty is disproportionate because this case allegedly involves only (1) a reflexive shooting, (2) a single aggravating circumstance, and (3) an equally culpable codefendant. (Initial Brief of Appellant at 60). For the following reasons, Brooks is not entitled to prevail on any of these theories.

Standard of Review

This Court has described the "proportionality review" conducted by this Court in every death case as follows:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) (citation omitted) (emphasis added); see also Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991); Urbin v. State, 714 So.2d 411 (Fla. 1998). While the existence and number of aggravating or mitigating factors do not prohibit or require a finding that death is nonproportional, this Court nevertheless is "required to weigh the nature and quality of those

factors as compared with other similar reported death appeals." Kramer v. State, 619 So.2d 274, 277 (Fla. 1993).

"Reflexive Shooting"

Brooks concedes that the State presented evidence that Brooks fired the bullet that killed Jenkins. (Initial Brief of Appellant at 68). Nevertheless, Brooks argues that this case involved only a "reflexive" shooting and, therefore, the death penalty is inappropriate. Brooks did not fire just a single shot and run away from the scene. Instead, Brooks methodically fired his .9 mm. directly into Jenkins' chest and continued firing his loaded weapon repeatedly at the unarmed witnesses who ran for their lives. Ten spent shells were recovered from the murder scene. The fact that it was unnecessary for Brooks to shoot his first target, Jenkins, more than once in the heart does not fairly support Brooks' claim that the death penalty is disproportionate.

Proportionality review involves consideration of the "totality of the circumstances in a case" in comparison with other death penalty cases. Urbin, 714 So. 2d at 416, citing Sliney v. State, 699 So.2d 662, 672 (Fla. 1997). The death sentence is proportionate in this case, which is comparable to Mendoza v. State, 700 So.2d 670, 679 (Fla. 1997). In Mendoza, the defendant argued that the death penalty was disproportionate because the murder took place during a robbery and the shooting was a "reflexive" response to the victim's resistance to the robbery. In

Mendoza, the trial court also found the identical aggravating factors presented here: prior violent felony and murder committed during robbery for pecuniary gain. In finding the death penalty proportionate in Mendoza, this Court explained,

> Finally, we consider whether the death sentence is proportionate in this case. Appellant argues that the death penalty is disproportionate here because the murder took place during a robbery and the shooting of Calderon was a reflexive action in response to Calderon's resistance to the robbery. Appellant cites three robbery-murder cases to support his contention that this crime does not warrant the death penalty because the murder was not planned but was committed on the spur of the moment during a robbery gone awry. *See Terry v. State,* 668 So.2d 954 (Fla.1996); *Jackson v. State,* 575 So.2d 181 (Fla.1991); *Livingston v. State,* 565 So.2d 1288 (Fla.1988). We find no merit in this argument. In *Terry* and *Jackson,* as in this case, the trial court found two aggravating circumstances and no mitigating circumstances in imposing the death penalty. In both of those cases, we vacated the death sentences on proportionality grounds. However, in *Terry* and *Jackson,* the trial courts based prior-violent-felony aggravating circumstances upon armed robberies which were contemporaneous with the murders. By contrast, the trial court in this case based the prior-violent-felony circumstance upon appellant's previous armed robbery conviction in the Robert Street case. Thus, appellant's prior conviction of an entirely separate violent crime differs from the aggravation found in *Terry* and *Jackson.* In *Livingston,* the trial court found two mitigating circumstances: Livingston's age (seventeen years) and Livingston's unfortunate home life and upbringing. By contrast, appellant was twenty-five years old at the time of this murder, and the trial court considered but found no mitigation in the form of appellant's history of drug use and mental problems. Therefore, under the circumstances of this case, the death penalty is not disproportionate.

See also, Mungin v. State, 689 So.2d 1026 (Fla. 1995).

Multiple Aggravating Factors

Citing approximately two dozen "single-aggravator" cases, Brooks also argues that this case involves only a lone aggravating

circumstance and, therefore, the death penalty is disproportionate. (Initial Brief of Appellant at 60-62). Contrary to Brooks' conclusion, this is not a single aggravator case. As previously argued in Issue III herein, the trial court below properly found the following two valid aggravating factors: (1) prior violent felony conviction and (2) the merged robbery or attempted robbery (of the trafficking amount of cocaine) and pecuniary gain. (II/366-380; XXII/1720). A comparison of Brooks' case with other cases involving two aggravating factors, including those cases with substantial mitigation, demonstrates that Brooks' death sentence is both proportionate and appropriate. See e.g., Kilgore v. State, 688 So.2d 895 (Fla. 1996) [two aggravating factors: Kilgore was under sentence of imprisonment and previously convicted of a felony involving the use or threat of violence; two statutory and several nonstatutory mitigators]; Pope v. State, 679 So.2d 710 (Fla. 1996), cert. denied, 117 S.Ct. 975 (1997) [Pope previously was convicted of a felony involving the use or threat of violence and pecuniary gain; two statutory and several nonstatutory mitigators]; Geralds v. State, 674 So. 2d 96 (Fla.), cert. denied, 117 S.Ct. 230 (1996) [HAC and murder committed during the course of a robbery and/or burglary; one statutory and several nonstatutory mitigators], Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 116 S.Ct. 946 (1996) [prior violent felony conviction and capital felony committed during a robbery; ten nonstatutory mitigators], Gamble v.

State, 659 So.2d 242 (Fla. 1995), cert. denied, 116 S.Ct. 933 (1996) [CCP and pecuniary gain; one statutory and several nonstatutory mitigators]; Windom v. State, 656 So.2d 432 (Fla.), cert. denied, 116 S.Ct. 571 (1995) [defendant previously convicted of another capital offense or felony involving the use of threat or violence and CCP; three statutory and several nonstatutory mitigators], Smith v. State, 641 So.2d 1319 (Fla. 1994), cert. denied, 115 S.Ct. 1125 (1995)[murder committed while Smith was attempting to commit a robbery and previous conviction for a violent felony; one statutory and several nonstatutory mitigators]; Melton v. State, 638 So.2d 927 (Fla.) cert. denied, 513 U.S. 971 (1994) [Melton was previously convicted of a violent felony (first-degree murder and robbery) and pecuniary gain; nonstatutory mitigators]; Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 510 U.S. 845 (1993) [previous conviction of a violent felony and HAC; nonstatutory mitigators]; Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991) [Freeman had previously been convicted of first-degree murder, armed robbery, and burglary to a dwelling with an assault, and merged factor of murder committed during a burglary/pecuniary gain; nonstatutory mitigation]; Lowe v. State, 650 So.2d 969 (Fla. 1994), cert. denied, 116 S.Ct. 230 (1995) [defendant previously convicted of a felony involving the use or threat of violence and capital felony was committed while the defendant was engaged in or was an

accomplice in attempt to commit robbery; insignificant mitigators]; Brown v. State, 644 So.2d 52 (Fla. 1994), cert. denied, 115 S.Ct. 1978 (1995) [defendant previously convicted of a violent felony and murder committed during the course of robbery; insignificant mitigation]; Larzelere v. State, 676 So.2d 394 (Fla. 1996) [CCP and pecuniary gain]; Mungin v. State, 689 So. 2d 1026 (Fla. 1995) [prior conviction of a felony involving the use or threat of violence to another person and merged factor of robbery or attempted robbery/pecuniary gain; insignificant mitigation]. Likewise, in Hunter v. State, 660 So.2d 244 (Fla.), cert. denied, 116 S.Ct. 946, 133 L.Ed.2d 871 (1995), death was not a disproportionate penalty for murder committed in course of robbery; the statutory aggravating circumstances of prior violent felony conviction and capital felony committed during robbery outweighed nonstatutory mitigating factors.

Even if this were only a single aggravator case, which it is not and which the State does not concede, Brooks' argument still must fail. Brooks' prior violent felony record is "especially weighty." Ferrell v. State, 680 So.2d 390 (Fla. 1996) (death sentence affirmed where sole aggravator was prior second-degree murder), cert. denied, --- U.S. ---, 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997); Duncan v. State, 619 So.2d 279 (Fla. 1993) (death sentence affirmed where sole aggravator was prior second-degree murder). As the trial court explained in its detailed order

evaluating Brooks' prior violent felony record,

A. AGGRAVATING FACTORS

1. The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

The State established that the defendant had been previously convicted of five felonies involving the use or threat of violence, all prior to the commission of the instant murder in the first degree:

1) The armed robbery of Sam A. Kasseese committed on January 17, 1979.

2) The armed robbery of Paul Salmonto committed on January 17, 1979. Facts introduced during the penalty phase revealed that the defendant, fifteen years old at the time, entered Mr. Kasseese's grocery store, armed with a sawed-off shotgun. The defendant and his accomplice, who was armed with a handgun, robbed both Mr. Kasseese and his customer, Mr. Salmonto at gunpoint. On June 20, 1979, the defendant was certified and adjudicated guilty as an adult, and sentenced to four years imprisonment, as a youthful offender, followed by two years community control.

3) The armed robbery of Carlton Kellam committed on September 20, 1983.

4) The kidnaping of Carlton Kellam committed on September 20, 1983. Facts introduced during the penalty phase revealed that the victim, Mr. Kellam, was driving in his car, and asked the defendant and his accomplices for directions. The defendant and his accomplices told Mr. Kellam that they would show him to his destination if they could ride along. Once inside the car, the defendant and his accomplices threatened the victim with a handgun. The defendant, then nineteen, tied up the victim with the victim's own belt. The defendant and his accomplices next took Mr. Kellam to a wooded area and robbed him of his money and jewelry. They then tied the victim to a tree, and abandoned him, fleeing in his automobile. Once spotted, the defendant and his accomplices led the police on a chase, eventually wrecking the victim's car. The defendant was found hiding under a car nearby. On March 9, 1994, the defendant was found guilty by the jury of kidnaping and armed robbery (the jury further specifically found that the defendant carried a pistol at the time of the

robbery). The defendant was sentenced to seventeen years on each count, to be served concurrently with one another, as well as with his sentence for violating parole on the 1979 armed robbery convictions.

5) The aggravated assault of Kevin Mitchell on August 16, 1987. The evidence concerning this prior violent conviction was not made known to the jury, but the judgment of guilty of aggravated assault, and sentence of 3 years imprisonment was introduced during the Spencer hearing.

Documents were introduced in the penalty and Spencer phases to prove that the defendant had been adjudicated guilty of all the above charges.

In addition to the murder conviction in the instant case, the jury convicted the defendant of aggravated battery for the related shooting of Michael Johnson. Craig v. State, 510 So.2d 857 (Fla. 1987) held that this aggravating circumstance can be established by contemporaneous and subsequent convictions. Therefore, the Court will also consider a sixth prior violent felony:

6) The aggravated battery of Michael Johnson on August 28, 1996. Facts revealed during the guilt phase establish that the defendant first shot and killed Darryl Jenkins, and then the defendant and his co-defendant both shot at Michael Johnson as he fled for his life. Either the defendant or his co-defendant shot Michael Johnson in the back. Both were convicted as principals, of aggravated battery.

Accordingly, the defendant has previously been convicted of six other felonies involving violence. This aggravating factor was proven beyond a reasonable doubt and was accorded great weight in determining the appropriate sentence in this case.

(II/367-369)

In rejecting Brooks' suggestions that he was led to a life of crime by others, the trial court further explained,

b) The defendant was led to crime by others.

Carolyn Bird testified that the defendant was led into committing armed robberies by others, and that during the commission of the 1983 robbery/kidnaping, the defendant

dissuaded his accomplices from killing the victim.

Once again, the credible evidence introduced concerning the defendant's prior convictions refutes the claim that the defendant was anything but a major participant, if not a leader in his prior violent criminal episodes. In the 1979 armed robbery, it was the defendant who carried and threatened the victims with a sawed-off shotgun. In the 1983 armed robbery and kidnaping, it was the defendant who tied the victim to the tree. The jury specifically found that the defendant carried a pistol during the commission of the robbery. This court is not reasonably convinced that others led the defendant into committing these violent felonies. Even if the court were reasonably convinced that this was so, in light of all of the facts and circumstances surrounding the instant offense and the defendant's prior violent convictions, the court would attach very little weight to this circumstance.

Likewise, even if the court were to be reasonably convinced that the defendant persuaded his accomplices not to kill the victim in the 1983 armed robbery and kidnaping case, this information has only marginal, if any, relevance. The court has only weighed as aggravation the fact that the defendant intended to, and did rob and kidnap the victim. The fact that this defendant abstained from committing additional violent crimes on that occasion, or on any other occasion in his life is not compelling mitigation.

Accordingly, this factor does not exist. (Even if the court were persuaded that it did exist, the court would give slight weight to this circumstance).

C. ENMUND/TISON FINDINGS

The Court makes these findings for appellate purposes only. These findings are in no way considered as aggravating factors, or as any part of the weighing process.

Based upon the credible evidence produced at trial, the Court finds that:

1. The defendant did kill Darryl Jenkins;
2. The defendant did intend that a killing would take place.
3. The defendant did contemplate that lethal force would be used during the course of the robbery and the trafficking in cocaine;
4. The defendant was a major participant in the robbery and trafficking in cocaine and the

defendant's act demonstrated a reckless disregard for human life.

WEIGHING STATUTORY
AGGRAVATING AND MITIGATING CIRCUMSTANCES

There are two aggravating circumstances and one mitigating circumstance. The Court cannot and does not decide the greater number prevails but must weigh each individually. This has been done.

JURY RECOMMENDED DEATH BY A VOTE OF 7 TO 5

The jury, having heard all the facts of the murder and aggravated battery at trial and having considered the defendant's background and other evidence brought forth at the advisory sentence proceeding, recommended by a vote of 7 to 5 that the defendant be sentenced to death. The law requires that the judge give the jury's recommendation great weight. This has been done.

AGGRAVATING OUTWEIGH MITIGATING CIRCUMSTANCES

The Court finds that the two aggravating circumstances in the aggregate outweigh the one mitigating circumstance and that each aggravating circumstance, itself and apart from the other aggravating circumstance, outweighs the mitigating circumstance.

(II/376-379)

Based upon a review of all of the aggravating and mitigating factors, including their nature and quality according to the facts of this case, the totality of the circumstances justifies the imposition of the death sentence. This case is proportionate to other cases where this Court has upheld the death sentence. See, Mendoza, Mungin, supra; Pope v. State, 679 So.2d 710 (Fla. 1996), cert. denied, 117 S.Ct. 975 (1997); Hayes v. State, 581 So.2d 121 (Fla.), cert. denied, 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991), Smith v. State, 641 So.2d 1319 (Fla.1994), cert. denied,

--- U.S. ----, 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995), and Eutzy v. State, 458 So.2d 755 (Fla.1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985).

Brooks argues that this Court's decision in Wilson v. State, 493 So.2d 1019 (Fla. 1986) supports a life sentence. In Wilson, the murder was the result of a heated domestic confrontation. Likewise, neither Ross v. State, 474 So.2d 1170 (Fla. 1985), nor Blair v. State, 406 So.2d 1103 (Fla. 1981) entitles Brooks to any relief. In Blair, several aggravating factors had been improperly found and there was a significant mitigating factor--Blair had no prior history of criminal activity. In Ross, the death sentence was found to be disproportionate where the record evidenced significant mitigating circumstances which the trial court had failed to consider. In Ross, the defendant had no prior history of violence, he killed his wife during an angry domestic dispute, Ross was an alcoholic and there was evidence that he had been drinking at the time of the killing. 474 So.2d at 1174.

In Kramer v. State, 619 So.2d 274 (Fla. 1993), this Court found that the evidence showed that this was a spontaneous fight, occurring for no apparent reason between the defendant, a disturbed alcoholic, and the victim, who was legally drunk. Id. at 278. Based on this finding and the mitigating circumstances of alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment

of prison, this Court found death not to be proportionate despite the two aggravating factors of prior violent felony conviction and HAC. Brooks also relies on Voorhees v. State, 699 So.2d 602 (Fla. 1997), in which this Court found that the two aggravators were overshadowed by the mitigating circumstances and the circumstances of the murder, which occurred after a drunken episode between the victim and the defendant.

In Terry v. State, 668 So.2d 954 (Fla. 1996), the murder took place during the course of a robbery. However, the circumstances surrounding the actual shooting were unclear. This court also found that the aggravation was not extensive given the totality of the underlying circumstances. Brooks' case is also distinguishable from other robbery-murder cases like Sinclair v. State, 657 So.2d 1138 (Fla. 1995), and Thompson v. State, 647 So.2d 824 (Fla. 1994). In Sinclair, the defendant robbed and fatally shot a cab driver in the head. There was only one valid aggravator and there was evidence in the record of mental health mitigators which had substantial weight. In Thompson, the defendant walked into a sandwich shop, fatally shot the clerk in the head, and robbed the shop. On appeal, this Court found there was only one valid aggravator (murder committed in the course of a robbery) and "significant" nonstatutory mitigation. Id. at 827.

Life sentence for codefendant:

Brooks also claims that his death sentence is disproportionate because the participation of his codefendant, Foster Brown, was allegedly identical to Brooks and Brown received a life sentence. (Initial Brief of Appellant at 67, e.s.). As the trial court found, and as Brooks concedes, Brooks' was the one who shot and killed BBQ Jenkins. The jury recommended a life sentence for codefendant, Foster Brown. Here, as in San Martin, the variation in the codefendants' active participation in the shooting provides a reasonable explanation for the jury's disparate sentencing recommendations.

Disparate treatment of defendants is not impermissible in situations where a particular defendant is more culpable. See e.g., Howell v. State, 707 So.2d 674, 683 (Fla. 1998); Larzelere v. State, 676 So.2d 394 (Fla.), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996); Cardona v. State, 641 So.2d 361 (Fla. 1994). Based on the evidence presented regarding Brooks' greater culpability in the murder as compared to his codefendant, his death sentence is proportional.

In the instant case, the distinction in the co-defendant's sentences was logical and warranted due to lesser role played in the actual killing. See, Raleigh v. State, 705 So.2d 1324 (Fla. 1997). In Sims v. State, 602 So.2d 1253 (Fla.), cert. denied, 113 S.Ct. 1010, 506 U.S. 1065, 122 L.Ed.2d 158 (1992), the

codefendant's lesser sentence did not constitute a mitigating factor to be considered by jury in determining whether to impose the death penalty where the evidence showed that Sims was the triggerman. See also, Sims v. Singletary, 12 FLW Fed. C113 (11th Cir. 97-3355, Opinion filed September 22, 1998), citing Marek v. Singletary, 62 F.3d 1295, 1302 (11th Cir. 1995).

In [Paul Anthony] Brown v. State, 23 Fla. L. Weekly S514 (Fla. October 1, 1998), the defendant argued that his death sentence was disproportionate in light of the lesser sentence received by his codefendant. In rejecting Brown's claim, this Court reiterated, "Where the circumstances indicate that the defendant is more culpable than a codefendant, disparate treatment is not impermissible despite the fact the codefendant received a lighter sentence for his participation in the same crime." Id. at S517, citing, Howell v. State, 707 So. 2d 674, 682 (Fla.), cert. denied, 118 S.Ct. 2381 (1998); Raleigh v. State, 705 So. 2d 1324, 1331 (Fla. 1997), petition for cert. filed (U.S. May 20, 1998) (No. 97-9226)[cert. denied, October 5, 1998]; Sliney v. State, 699 So.2d 662, 672 (Fla. 1997), cert. denied, 118 S.Ct. 1079 (1998); Heath v. State, 648 So.2d 660, 665-66 (Fla. 1994).

Where codefendants are not equally culpable, death sentence of the more culpable defendant is not unequal justice when another codefendant receives life sentence. Steinhorst v. Singletary, 638 So.2d 33 (Fla. 1994). In Sliney v. State, 699 So.2d 662 (Fla.

1997), the defendant was convicted for the brutal murder of a pawn shop owner during a robbery. The jury returned a death recommendation by a vote of 7 to 5, the trial court properly found two aggravating factors (murder committed while Sliney was engaged in or was an accomplice in the commission of a robbery and murder committed for the purpose of avoiding or preventing a lawful arrest), two statutory mitigating factors (youthful age and no significant prior criminal history), and minimal nonstatutory mitigation. In affirming Sliney's death sentence, this Court agreed with the trial court that the codefendant's life sentence did not require a life sentence for Sliney because Sliney was more culpable than his codefendant. Id. at 672, citing Heath v. State, 648 So.2d 660 (Fla.), cert. denied, 515 U.S. 1162, 115 S.Ct. 2618, 132 L.Ed.2d 860 (1995).

In Hayes v. State, 581 So.2d 121 (Fla.), cert. denied, 112 S.Ct. 450, 502 U.S. 972, 116 L.Ed.2d 468 (1991), the death sentence was not disproportional punishment, though codefendants that participated in armed robbery were given lesser sentences, where there was evidence that defendant, who actually shot victim, was more culpable than codefendants. This Court has repeatedly upheld death sentences when codefendants that participated in the crime, but did not actually kill were sentenced to less than death. See, Raleigh v. State, supra; Johnson v. State, 696 So.2d 317, 326 (Fla. 1997); Armstrong v. State, 642 So.2d 730, 738 (Fla.), cert. denied,

514 U.S. 1085 (1995); Hall v. State, 614 So.2d 473, 479 (Fla. 1993), cert. denied, 510 U.S. 834 (1993); Coleman v. State, 610 So.2d 1283, 1287-88 (Fla.), cert. denied, 510 U.S. 921 (1993); Robinson v. State, 610 So.2d 1288 (Fla.), cert. denied, 510 U.S. 1170 (1994). When, as here, codefendants are not equally culpable, the death sentence of the more culpable codefendant is not unequal justice when another codefendant receives a life sentence. Steinhorst v. Singletary, 638 So.2d 33, 35 (Fla. 1994), citing Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, 479 U.S. 1022 (1986). See, also, Cardona v. State, 641 So.2d 361 (Fla.), cert. denied, 513 U.S. 1160 (1995); Colina v. State, 634 So.2d 1077 (Fla.), cert. denied, ___ U.S. ___, 115 S.Ct. 330 (1994); Mordenti v. State, 630 So.2d 1080 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 2726 (1994); Cook v. State, 581 So.2d 141 (Fla.), cert. denied, 502 U.S. 890 (1991); Hayes v. State, 581 So.2d 121, 127 (Fla.), cert. denied, 502 U.S. 972 (1991).

A review of the facts established in the instant case clearly demonstrates the proportionality of the death sentence imposed. The circumstances of this murder compels the imposition of the death penalty.

ISSUE VI

BROOKS IS NOT ENTITLED TO ANY RELIEF ON APPEAL BASED ON ANY OF THE PROSECUTOR'S PENALTY-PHASE ARGUMENTS.
(Restated)

Procedural Bar

Allegedly improper prosecutorial comments are not cognizable on appeal absent a contemporaneous objection. Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996), cert. denied, ___ U.S. ___, 118 S.Ct. 103, 139 L.Ed.2d 58 (1997). Because the defendant did not object to the vast majority of prosecutor's comments about which he now complains, this claim has not been preserved for review. Davis v. State, 698 So. 2d 1182, 1190 (Fla. 1997); §924.051, Florida Statutes (Supp. 1996).

Standard of Review

As long ago recognized by this Court, a prosecutor is the advocate for the State and "has the duty, not only to present evidence in support of the charge, but likewise the duty to advocate with all his talent, vigor and persuasion, the acceptance by the jury of such evidence." Robles v. State, 210 So.2d 441 (Fla. 1968). The control of the prosecutor's comments to the jury is a matter of the trial court's discretion, and the exercise of that discretion will not be disturbed absent a clear showing of abuse. Pacifico v. State, 642 So.2d 1178, 1182 (Fla. 1st DCA 1994). The purpose of closing argument is to "help the jury understand the issues by applying the evidence to the law."

Haliburton v. State, 561 So.2d 248, 250 (Fla. 1990), and to "review the evidence and explicate those inferences which may reasonably be drawn from the evidence." Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1988). Consequently, wide latitude is allowed; counsel may advance all legitimate arguments and draw logical inferences from the evidence. Bonifay v. State, 680 So.2d 413 (Fla. 1996).

The prosecutor may submit his view of the evidence

The prosecutor below fairly submitted his conclusions which the jury could permissibly draw from the evidence presented. Thus, his now-challenged arguments were not error. In Davis v. State, 698 So.2d 1182 (Fla. 1997), this Court explained, "When it is understood from the context of the argument that the charge is made with reference to the evidence, the prosecutor is merely submitting to the jury a conclusion that he or she is arguing can be drawn from the evidence. Craig v. State, 510 So.2d 857, 865 (Fla.1987). . . . Nor do we agree with the contention that the prosecutor's characterization of the crime and its perpetrator as "vicious" and "brutal" was improper argument in view of the evidence in the case." Davis, 698 So.2d 1190-1191.

Directing this Court's attention to Urbin v. State, 714 So.2d 411 (Fla. 1998), Brooks argues that some of the now-challenged comments involve the arguments criticized in Urbin, and, therefore, Brooks is entitled to a new penalty phase proceeding. In Urbin, this Court affirmed the defendant's first-degree murder and robbery

convictions, but found the death sentence disproportionate. Thereafter, this Court, pursuant to its supervisory responsibility, went on to address a "number of improprieties" which it found in the prosecutor's argument. In so doing, this Court did not find the comments to constitute an independent basis for reversal. Furthermore, to the extent that Urbin arguably sets forth a new rule of law, unless this Court explicitly states otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced. See, Armstrong v. State, 642 So.2d 730, at 737-38 (Fla. 1994), cert. denied, --- U.S. ---, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995); Boyett v. State, 688 So. 2d 308, 310 (Fla. 1996).

According to Brooks, the unobjected-to comments set forth at pages 72-75 of his initial brief served only to inflame the jury and incite sympathy for the victim. This claim is not only procedurally barred, but without merit. Brooks is not entitled to any relief based on the prosecutor's statement that Jenkins was executed or based on the prosecutor's summary of the facts, which was fully and fairly supported by the evidence. Jenkins, who was killed by a bullet fired directly through his heart, was executed. See, Jones v. State, 652 So.2d 346 (Fla. 1995) [Assassination was a reasonable characterization of the murder. Even if it were not, use of the term was not so prejudicial as to warrant a mistrial. Id., at 352, citing, Burr v. State, 466 So.2d 1051, 1054 (Fla.)

(prosecutor's statements that people were afraid and that defendant "executes" people were fair comment on evidence and were not so inflammatory or prejudicial as to warrant a mistrial), cert. denied, 474 U.S. 879, 106 S.Ct. 201, 88 L.Ed.2d 170 (1985).

With regard to Brooks' appellate conclusion that the prosecutor's unobjected-to remarks invited sympathy for the victim, the remarks were fairly based on the unobjected-to evidence and entirely proper. See, §921.141(7), Florida Statutes. Furthermore, these remarks in no way resulted in a more severe verdict than it otherwise would have. Esty v. State, 642 So.2d 1074 (Fla. 1994).

At pages 75-76, Brooks faults the prosecutor's portrayal of Brooks as a man of deep-seated violence. (XV 1531, 1535-9). The defense objected at trial on the basis of the "repetitive nature" of the comments. Any statements which are merely cumulative to the unobjected-to prior comments cannot credibly form a basis for relief. Furthermore, the prosecutor's portrait was entirely accurate. During the penalty phase of a capital case, the focus is substantially directed toward the defendant's character. Valle v. State, 581 So.2d 40, 45 (Fla. 1991). The defendant's undisputed criminal history showed better than any words of family members his true character and placed his actions in the context of his chosen lifestyle. Moreover, since Campbell v. State, 571 So.2d 415 (Fla. 1991), this Court has made it clear that the State is to be afforded the opportunity to rebut the existence of mitigating

factors and to introduce evidence tending to diminish their weight. Ellis v. State, 622 So.2d 991 (Fla. 1993). The State was entitled to rebut Brooks's suggestion that he was a man of good and peaceful character who was merely led to a life of crime by others.

As to Brooks' challenge to the prosecutor's suggestion that the jury show the defendants the same mercy or pity they showed Darryl Jenkins, this issue was not preserved, and if deemed inappropriate under Urbin, does not constitute reversible error on this record. §924.051, Florida Statutes (Supp. 1996).

The State is entitled to highlight inconsistencies in evidence and testimony, and the prosecutor's penalty phase closing argument must be viewed in context. At page 76 of his initial brief, Brooks accuses the prosecutor of making an improper "Golden Rule" argument. The unobjected-to description of the murder did not constitute any "Golden Rule" violation. (XV/1513-1514) The unobjected-to comments, taken in context, were an accurate portrayal of the uncontroverted evidence presented at trial. The prosecutor did not misrepresent the facts of this case, his comments were fairly supported by the evidence, and the jury was not put in the place of the victim. At page 77, Brooks accuses the prosecutor of improperly arguing prosecutorial expertise. Although co-defendant Brown objected at trial "to that comment about what the State seeks. . ." (XV/1517), the State disputes Brooks' characterization of the prosecutor's closing. The prosecutor's

comment merely pointed out that every defendant in a murder case does not meet the death penalty weighing *test* required by Florida law. The prosecutor repeatedly referred to the death penalty weighing test, the necessity to meet the test, and fairly informed the jurors that "Where, under the facts of the case in the law of Florida, that death penalty weighing test is met, it is proper to seek a death penalty. (XV/1518). The prosecutor's example of an instance where the death penalty would not be appropriate, i.e., a 16-year old first-time offender under the domination of a 30-year old convicted felon, did not mislead the jury or misstate the law in Florida. The prosecutor is permitted to give truthful examples to explain a legal point. In this case, it was necessary for the judge and jury to evaluate the relative culpability of each defendant. See, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 72 L.Ed.2d 222 (1982). The prosecutor's explanation included a permissible example to demonstrate that application.

In Hawk v. State, 23 Fla. L. Weekly S473a (Fla. Case No.88,179, September 17, 1998), the defendant argued that several of the prosecutor's statements were impermissibly inflammatory and required reversal. This Court found that the issue is "whether the trial court abused its discretion in responding to defense counsel's objections. See, e.g., Bonifay v. State, 680 So. 2d 413 (Fla. 1996). A trial court's ruling on a discretionary matter will be sustained unless no reasonable person would agree with the view

adopted by the court. Huff v. State, 569 So. 2d 1247 (Fla. 1990)." In Hawk, this court concluded,

> . . . As to the "amoral, vicious, cold-blooded killer" comment, the court instructed the jury to disregard the comment; as to the "outrageous" comment, the statement in context was innocuous; as to the "taking life for granted" comment, the issue was not preserved; as to the "savage killer" comment, the matter was not preserved; and as to the "insult to all who have achieved greatness" comment, the statement was inappropriate but does not constitute reversible error on this record. See Jones v. State, 652 So. 2d 346 (Fla. 1995). We cannot say on this record that no reasonable person would agree with the trial court's handling of the prosecutor's comments. We find no error. . .

This Court has consistently held that prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding. Garron v. State, 528 So.2d 353 (Fla. 1988); James v. State, 695 So. 2d 1229 (Fla. 1997); Crump v. State, 622 So. 2d 963, 972 (Fla. 1993), citing Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).

At page 79, Brooks argues that the prosecutor misstated the law when he advised the jury that, "*if sufficient* aggravating factors are proved beyond a reasonable doubt, you must recommend a death sentence, unless those aggravating circumstances are outweighed, outweighed by the mitigating circumstances." (XV/1520) The prosecutor did not say "any" aggravators, but, rather, "sufficient" aggravating factors, not outweighed by the mitigating circumstances. Upon objection, the trial court promptly gave a curative instruction, and the defense did not seek any further

relief. As to the prosecutor's unobjected-to argument that the merged robbery/pecuniary gain aggravating factor was "more weighty," this claim is procedurally barred. (XV/1544). Furthermore, the prosecutor merely submitted *his view* that the merged factor was more powerful, and it was appropriate for the prosecutor to argue the weight warranted under the facts of this case. As to the prosecutor's unobjected-to concern that the jury may be tempted to "want to take the easy way out and just quickly vote for life," (XV/1555), this procedurally barred claim likewise does not entitle Brooks to any relief. The prosecutor simultaneously urged jury to "follow the law, do your duty. Weigh everything all out." (XV/1555). Viewing the prosecutor's comments in context (XV1554-1556), it is clear that the prosecutor did not tell the jury it was their duty to vote for death, but, rather, they must consider the facts of the case, and it was their duty to follow the law which required them to weigh all of the aggravating circumstances and mitigating factors. Recognizing that it is difficult and unnatural for anyone to vote for death, the prosecutor fairly asked the jury to "weigh everything all out." The prosecutor's unobjected-to comments, taken in context, do not warrant relief.

As to the prosecutor's reference to the mitigators as "excuses," Brooks alleges that the defense objection to "this argument" was overruled. (Initial Brief of Appellant at 82, citing

XV/1553). In fact, the defense did not object to this argument, but, instead, objected only to the prosecutor's reference to the weight to be given the mitigation. (See, XV/1553). This claim is procedurally barred. Even assuming error under Urbin, which did not find per se reversible error and which arguably does not apply to pipeline cases, error, if any, is harmless.

Brooks also is not entitled to any relief based on the prosecutor's unobjected-to, purported reference to Biblical law when discussing co-defendant Brown. Although the prosecutor noted that he did not even mention "Biblical," the trial court, *sua sponte*, immediately instructed the jury to disregard the comment. Brooks is not entitled to a new penalty phase based on this unobjected-to comment concerning his co-defendant. Lastly, as to Brooks' claim that the prosecutor improperly engaged in a personal attack on defense counsel, the trial court specifically found that the prosecutor's comment was "*not* a personal attack. Each side is able to tell the jury what the other side said in opening statements and whether they were proven or not." (XV/1545-1546). As the trial court recognized, the prosecutor's remark was a fair comment on the circumstances presented at trial.

Brooks has failed to demonstrate any entitlement to relief under the facts of the instant case. Error, if any, is harmless. §924.051, Florida Statutes (Supp. 1996).

SUPPLEMENTAL ISSUE I

SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT BROOKS' CONVICTION FOR FIRST DEGREE MURDER UNDER A THEORY OF FELONY MURDER AND/OR PREMEDITATED MURDER.
(Restated)

At page 8 of his pro se brief, Brooks admits that he and Brown inspected the sample of cocaine and attempted to purchase 30 rocks of cocaine. Brooks' concession is dispositive of this issue, and, therefore, Brooks' challenge to the sufficiency of the evidence to sustain his conviction based on a theory of felony murder (attempted trafficking in cocaine) should be summarily denied. Brooks' appellate contention -- that he and Brown actually intended to obtain a smaller quantity of inferior cocaine for the same amount of money -- is procedurally barred, belied by the evidence presented at trial, and patently incredible. Furthermore, Brooks' appellate challenge regarding the purity of the cocaine is unavailing. Any complaint that the cocaine rocks were "too flat" is irrelevant; a mixture containing cocaine will suffice. See, §893.13, Florida Statutes (1995).

At pages 9 and 10 of his pro se brief, Brooks emphasizes that this drug deal took place "in the dark." Brooks' reliance on the nighttime factor is critically misplaced. As Johnson started to count out the rocks of cocaine on the trunk of his Impala, Brooks drew his concealed handgun, and, when Jenkins spotted the gun from across the driveway and yelled out a warning, Brooks aimed his gun

and fired. Brooks first, deadly "shot in the dark" struck Jenkins, the unarmed, stationary target, directly in the center of his chest and a successive "shot in the dark" also struck the intended running target, Michael Johnson, directly in his back. Contrary to Brooks' conclusion, the element of darkness obviously was no impediment to this drug deal, rip-off, and murder.

At pages 11 and 12 of his pro se brief, Brooks suggests that the evidence of trafficking or attempted trafficking in cocaine in this case was "entirely circumstantial." This is not true. Direct eyewitness testimony, from Jackie Thompson, Tyrone Simmons, and Michael Johnson, established that these defendants (1) initiated contact and used Jackie Thompson as their indispensable lead to a drug dealer who could supply some "juggler" action, (2) announced their goal of obtaining 50 rocks of cocaine, (3) displayed $500 to insure that the requisite quantity of cocaine would be produced, (4) inspected the sample of cocaine, and (5) pulled a gun as soon as the trafficking amount of cocaine was produced and in the process of being counted.

At page 14 of his pro se brief, Brooks contends that a felony murder theory cannot be sustained on the basis of robbery or attempted robbery because Brooks and Brown "had paid for the drugs already." This argument fails for the following reasons. First, acceptance of this concession by Brooks again is dispositive of the State's alternative theory of trafficking or attempted trafficking

in cocaine. Consequently, Brooks' alternate challenge to the sufficiency of the evidence based on an underlying theory of trafficking or attempted trafficking conclusively must fail. Second, this newly-asserted hypothesis -- that Brooks and Brown paid for the drugs and merely took what they'd already purchased, was not raised at trial and, therefore, is procedurally barred. Furthermore, as confirmed by Michael Johnson's testimony, the baggie of cocaine contained more than merely the 30 rocks which Brooks now claims he purchased. Third, Brooks does not dispute that he, his codefendant, Brown, and the drug seller, Michael Johnson, were the only three individuals standing at the back of the Impala during the drug deal, and that Johnson left the cocaine on the trunk of the Impala when the one-way gun battle erupted. Lashan Mahone, who had been hiding in the front seat of the Impala during the gunfire, got out of the car immediately after the defendants fled, and, without delay, she looked on the trunk of the car, but the baggie and rocks of cocaine were gone.

Not surprisingly, Brooks and Brown did not inform Jackie Thompson in advance of their plan to rob and shoot her friends. Jackie was duped into taking Brooks and Brown to her drug supplier for some "juggler" action, and Brooks now argues that the State's evidence proved only the "existence of a gun and the missing cocaine." (Pro se supplemental brief at 14). Contrary to this defendant's self-serving recollection, the State's evidence also

included direct evidence that Brooks and his codefendant (1) deliberately used a car which belonged to someone else when committing the crime, (2) used a pretext of a $500 drug buy in order to secure Jackie and Tyrone's unwitting participation, as the necessary drug contact and getaway driver, (3) came to the scene armed with concealed, fully-loaded handguns, (4) pulled the gun as soon as the requisite amount of cocaine was in close proximity, (5) were the only ones who were armed at the scene and fired multiple rounds of live ammunition, striking two unarmed targets, and (6) were the only ones in touching distance of the sought-after cocaine -- all of which was missing immediately after the shooting.

At page 17 of his pro se brief, Brooks now offers another "reasonable hypothesis of innocence" -- that he might have been acting in self-defense or to retrieve $300 in cash. Again, this newly-asserted theory was not argued at trial and, therefore, is procedurally barred. Furthermore, there is absolutely no evidence that anyone other than these defendants were armed or that anyone other than Brooks shot the unarmed Jenkins when he sounded an alarm. Furthermore, the evidence is uncontroverted that Brooks continued to shoot his .9 mm automatic weapon as the unarmed targets tried to flee the scene.

In challenging the State's evidence of premeditation at pages 15-18 of his pro se brief, Brooks relies on the recent cases of [Curtis Champion] Green v. State, 715 So.2d 940 (Fla. 1998),

Cummings v. State, 715 So.2d 944 (Fla. 1998), and Norton v. State, 709 So.2d 87 (Fla. 1997). For the following reasons, Brooks is not entitled to relief under any of these cases.

In Green, this Court found the evidence, under the "unusual" factual circumstances of the case, insufficient to prove premeditation. However, the record did support a conviction of second-degree murder. On the night of the murder, the victim, Karen Kulick, was intoxicated and had a heated argument with Gulledge, her former boyfriend and employer. Kulick was arrested and charged with disorderly conduct and resisting arrest, and she was angry and intoxicated upon her release from custody. Although one witness testified that Green confessed that he and a friend picked Kulick up in front of the jail and "did things" to her, that "the bitch got crazy" and he and his friend killed her, there were no witnesses to the events immediately preceding the homicide. Although the victim had been stabbed three times, no weapon was recovered and there was no testimony regarding Green's possession of a knife. According to this Court, there was little, if any, evidence that Green committed the homicide according to a preconceived plan.

In Cummings, this Court could not rule out the possibility that Cummings and his cohorts merely intended to frighten the victim or to damage his car, which was struck by several bullets. As in Green, however, the proof was sufficient to sustain a

conviction of second-degree murder, for the "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." §782.04(2), Florida Statutes (1993). This Court found that the circumstances leading up to the murder, as well as Cummings' effort to concoct a false alibi, provided more than enough evidence to convict him as a principal in the crime of second-degree murder.

In Norton v. State, 709 So.2d 87 (Fla. 1997), although the victim was killed by a single gunshot wound to the back of the head, this Court found an absence of premeditation based on several factors, including the ***absence*** of evidence of (1) any motive, (2) eyewitnesses to the shooting and how the shooting occurred, (3) any continuing attack, and (4) any indication that Norton procured a murder weapon in advance of the crime. However, in Young v. State, 579 So.2d 721 (Fla. 1991), cert. denied, 112 S.Ct. 1198, 502 U.S. 1105, 117 L.Ed.2d 438 (1991), a finding of premeditation was supported by evidence that the defendant deliberately armed himself, expressed his willingness to use his shotgun, took shotgun with him when he exited his car at the armed victim's direction, shot first, and manually reloaded shotgun before firing it a second time.

SUPPLEMENTAL ISSUE II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON BOTH FIRST-DEGREE PREMEDITATED MURDER AND FELONY MURDER. (Restated)

In this pro se supplemental issue, Brooks argues that the trial court erred in instructing the jury on both premeditated murder and felony murder. (Pro se supplemental brief at 19-20). For the following reasons, this argument must fail.

Brooks did not raise any objection to the jury instructions given at the time of trial. Therefore, any appellate challenge to the jury instructions given by the trial court is procedurally barred. See, Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Kearse v. State, 662 So.2d 677 (Fla. 1995).

In support of this claim, Brooks relies primarily upon McKennon v. State, 403 So.2d 389 (Fla. 1981) and Mungin v. State, 689 So.2d 1026 (Fla. 1995). In McKennon, the defendant challenged his conviction on the basis of error committed by the trial court in instructing the jury on robbery as it related to felony murder where there was no basis in the evidence for the robbery instruction. McKennon's trial counsel specifically objected to the trial court giving any instruction on robbery. Id. at 390.

In Mungin v. State, 689 So.2d 1026 (Fla. 1995), this Court found any error in instructing the jury on both premeditated and felony murder to be harmless, and this Court painstakingly explained,

Because the evidence does not support premeditation, it was error to instruct the jury on both premeditated and felony murder. *See McKennon v. State, 403 So.2d 389 (Fla.1981)* (finding error to instruct on robbery as it relates to felony murder where there was no basis in the evidence for the robbery instruction). However, the error was clearly harmless in this case. The evidence supported conviction for felony murder and the jury properly convicted Mungin of first-degree murder on this theory.

While a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground (FN5) or a legally inadequate theory, (FN6) reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient. *Griffin v. United States,* 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). The Supreme Court explained this distinction in *Griffin* as follows:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite, the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence, *see, Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). As the Seventh Circuit has put it:

"It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance--remote, it seems to us--that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient." *United States v. Townsend,* 924 F.2d 1385, 1414 ([7th Cir.] 1991).

Griffin, 502 U.S. at 59-60, 112 S.Ct. at 474.

Based upon the foregoing, we find no reasonable

> possibility that the erroneous instruction contributed to Mungin's conviction, and thus the error was harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). Therefore, Mungin is not entitled to relief on this basis.
>
> Mungin, 689 So.2d 1029-1030

Likewise, in San Martin v. State, 1998 WL 303859 (Fla. 1998), this Court found that, "while it may have been error to instruct the jury on both premeditated and felony murder, see Mungin v. State, 689 So.2d 1026, 1029 (Fla.1995), any error in this regard was clearly harmless. The evidence supported conviction for felony murder and the jury properly convicted San Martin of first-degree murder on this theory." See also, Jordan v. State, 694 So.2d 708 (Fla. 1997) [No merit to defendant's claim that the jury's general verdict was invalid. Furthermore, the record supported both theories of first-degree murder. Jordan, 694 So.2d 712-713]

Even if properly preserved, any error would be harmless beyond a reasonable doubt when viewed in the context of the jury instructions given and the evidence of first degree murder in this case. §924.051, Florida Statutes (Supp. 1996).

SUPPLEMENTAL ISSUE III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF OF ATTORNEY NICHOLS' MOTION TO WITHDRAW AS COUNSEL.

Brooks' next pro se claim challenges the trial court's denial of his attorney's motion to withdraw prior to trial. According to Brooks, the trial court's *in camera* hearing was insufficient because the judge did not adequately explore the basis of Brooks'

dissatisfaction with counsel and did not advise Brooks of his right to self-representation. In addition, Brooks maintains that the court below erred in determining that the legal standard warranting discharge of counsel had not been met in this case. For all of the reasons that follow, Brooks is not entitled to relief.

Attorney Jeff Morrow was appointed to represent Brooks on September 24, 1996, following certification of conflict by the public defender's office (I/ 7-9). Attorney Richard Nichols was appointed to replace Morrow on February 3, 1997, after Brooks advised the trial judge that he was not satisfied with Morrow's representation (II/ 203; XXI/ 1696-97). On February 24, 1997, Nichols filed a Motion to Withdraw, citing Brooks' indications that Brooks no longer had confidence in Nichols and Brooks' increasing hostility and threats (II/ 210). On April 21, 1997, the trial court held an *in camera* hearing on counsel Nichols' motion to withdraw (SR/ 1, 3). At the beginning of the hearing, Nichols advised the court that he was withdrawing his motion (SR/ 3). Nichols indicated that he had spoken to Brooks at length and that they had reviewed the things which Brooks wanted Nichols to do before the trial, which Nichols believed he would be able to do (SR/ 3, 4). Based on this conversation, Nichols stated that he was withdrawing the motion (SR/ 4). Brooks told the court, however, that he did not agree that the motion should be withdrawn, so the court conducted a hearing in chambers (SR/ 4, 5).

The record reflects that Brooks previously indicated to the court that defense counsel Nichols had not spoken with Brooks about his whereabouts at the time of the crimes (SR/ 6). Nichols subsequently filed the motion to withdraw as counsel, “primarily on the basis of a personal hostility” between Brooks and Nichols (SR/ 6). The hostility initially arose when Nichols confronted Brooks with witness' statements indicating that Brooks had been the shooter, and Brooks maintained that he was not the shooter (SR/ 6). Nichols told Brooks that it was important for Brooks to tell him where he had been if not at the scene (SR/ 7). Nichols stated that he may have misunderstood Brooks’ response, but thought Brooks essentially said that he didn’t know where he was, but that he had a friend in Sanford that would say Brooks had been there (SR/ 7). Nichols’ reaction was to emphasize that he would not suborn perjury (SR/ 7). The hostility escalated; at one point, Brooks threatened to strike Nichols during a conversation at the jail (SR/ 7).

At the *in camera* hearing, Nichols informed the trial court that he believed that he could still represent Brooks and go forward with the case, as he now understood Brooks was not asking him to suborn perjury but only to check with some other individuals that might confirm where Brooks was at the time of these crimes (SR/ 8). He indicated that this personal hostility as to this one issue had been the basis of the only conflict that he had with Brooks, and since he now understood what Brooks was asking and

since the general tone of their conversation that morning had not been as belligerent or hostile as before, he did not feel there was any legal cause for him to be discharged as counsel (SR/ 8).

At that time, the trial judge noted that he was aware of a case on point which indicated that a defense attorney did not have to withdraw under similar circumstances [Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985)]. (SR/ 9). He ruled that the existence of some personal hostility did not require the court to grant Nichols' motion (SR/ 9). At Nichols' suggestion, the trial judge then gave Brooks the opportunity to address the facts Nichols had outlined (SR/ 10-11). Brooks agreed that things had happened "[e]xactly the way you said it happened," and that the hostility between them had been based on a misunderstanding (SR/ 11-12). Following this hearing, Nichols' motion was denied (II/ 219).

It must be noted initially that this claim has not been preserved for appellate review. At the end of the *in camera* hearing on the motion to withdraw, Brooks appears to acquiesce in his attorney's decision to withdraw the motion to withdraw, noting that the personal hostility between Brooks and Nichols was based on a misunderstanding (SR/ 11-12). Although Brooks initially advised the trial court that he did not think the motion should be withdrawn, after the matter was discussed in chambers, Brooks never again indicated any objection to proceeding with Nichols as counsel. In addition, the record fails to support Brooks' current

appellate assertions that he informed the trial judge that Nichols was not investigating the case, that Nichols had not prepared a defense, that Brooks had no faith in Nichols and did not trust him, and that there had been "a total breakdown in communication" between Brooks and Nichols.

Brooks also contends that the court below should have conducted a Faretta[5] hearing in response to his request to represent himself. However, a review of the record clearly establishes that Brooks never unequivocally requested permission to represent himself. Since a Faretta inquiry is only required where there has been a clear and unequivocal request for self-representation, no error has been demonstrated. Capehart v. State, 583 So.2d 1009, 1014 (Fla. 1991), cert. denied, 502 U.S. 1065 (1992); Hill v. State, 549 So.2d 179, 181 (Fla. 1989). To the extent that Brooks suggests that his statements expressing dissatisfaction with his attorney required the court below to presume that he was attempting to represent himself, requiring a Faretta inquiry, this Court has rejected this suggestion. In State v. Craft, 685 So.2d 1292 (Fla. 1996), this Court specifically held that expressions of disagreement or dissatisfaction with trial counsel do not require a trial judge to inform a defendant about his right to represent himself or conduct a Faretta inquiry. Such comments only require an inquiry into the competence of counsel.

[5]Faretta v. California, 422 U.S. 806 (1975).

The record reflects that the judge below discussed the concerns raised with defense counsel to everyone's apparent satisfaction at the time.

On these facts, Brooks has failed to demonstrate any error in the trial court's ruling on Nichols' motion to withdraw. Therefore, he is not entitled to relief on this issue.

SUPPLEMENTAL ISSUE IV

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN RULING ON BROOKS' MOTIONS FOR CONTINUANCE AND BROOKS WAS NOT DENIED ANY RIGHT TO HIRE PRIVATE COUNSEL OF CHOICE.

According to Brooks, approximately one week prior to his trial, the trial court improperly denied his request for a continuance to enable him to hire private counsel. (Pro se supplemental brief at 27). However, the facts set forth in the instant record do not support Brooks' self-serving version of what actually transpired in the court below. On February 7, 1997, the trial court informed the defendant that he would be going to trial on February 24th. (XXI/1696-97). In fact, this case, which was originally set for trial in November of 1996, was continued at the request of the defense until February of 1997, it was again continued until March of 1997, trial was again reset for April 21, 1997, and Brooks' trial finally commenced on May 5, 1997. (III/588)

The victim, BBQ Jenkins, was murdered on August 28, 1996, Brooks was arrested for the murder on September 20, 1996, and the public defender was originally appointed to represent Brooks. (I/1-

2; 4). On September 24, 1996, following certification of conflict by the public defender's office, attorney Jeff Morrow was then appointed to represent Brooks. (I/ 7-9). On November 21, 1996, the trial court granted Brooks' first motion for continuance of trial. (I/33-35).

On February 3, 1997, attorney Richard Nichols was appointed to replace attorney Morrow, after Brooks advised the trial judge that he was not satisfied with Morrow's representation (II/ 203; XXI/ 1696-97). During a hearing held on February 7, 1997, Brooks informed the trial court that his family "is supposed to have a lawyer by the 21st," but jury selection was set for the 24th [of February]. (XXI/1696). At that point, the trial judge explained that he had (1) previously appointed a very able counsel, Mr. Morrow, but Brooks couldn't get along with him, (2) there had been no showing that Mr. Morrow was incompetent, however, in an abundance of caution, the trial court appointed Mr. Nichols to represent Brooks, and (3) if Brooks intended to hire private counsel, he needed to do so very soon because his trial would begin on the 24th [of February] and the trial court did not "want to hear about any last minute requests." (XXI/1697-1698).

Contrary to the trial court's admonition, on February 24, 1997, the day Brooks' trial was set to begin, the trial court did grant Brooks' motion for continuance to enable Brooks to retain private counsel, Wade Rolle, and to give attorney Rolle an

opportunity to prepare for trial. (III/472-475; 545-550). The following day, February 25, 1997, attorney Rolle was present before the court and the trial judge agreed to pass the case for one week to determine if, in fact, attorney Rolle would represent Brooks, and to set a new trial date. (III/480; 555) On March 3, 1997, defense attorney Nichols was present in court, but attorney Rolle did not appear. Instead, the prosecutor advised that attorney Rolle had left a phone message that "he had not been retained yet." (III/563). One of Brooks' family members then replied, "We're supposed to take care of it today." (III/563). The trial court agreed to pass Brooks' case once again, and explained, "If y'all are going to hire Mr. Rolle, you need to hire Mr. Rolle." (III/563). Apparently, satisfactory financial arrangements could not be reached with Mr. Rolle. Then another attorney, Butch Berry, informed the prosecutor that he might represent Brooks, but Mr. Berry never entered an appearance in this case. (III/592)

Thereafter, on March 11, 1997, yet another attorney, Donald Mathews, appeared in court and announced that the [Brooks] "family has approached me to retain my services." (III/571). Once again, this defense attorney "had not yet been retained." The trial court advised that the next pretrial was to be held on March 18th, and attorney Mathews would have to tell the Court at that time whether or not he would actually represent Brooks. At this point, Mr. Nichols still continued to represent the defendant. (III/571-572).

On March 18th, Brooks' case again was passed; attorney Nichols was "still in the case." (III/577).

On April 9, 1997, not surprisingly, the name of yet another defense attorney, Janine Sasser, surfaced in this never-ending saga. Attorney Nichols, the only constant in this revolving-door roster of private attorneys, stated that he had been advised that Ms. Sasser, in fact, had been retained and was going to make an appearance. (III/580). The trial judge, noting that he wouldn't "believe it until I see the whites of her eyes," announced that jury selection was set for the 21st [of April] and attorney Nichols agreed that he was ready to try it on the 21st of April, as scheduled. (III/581).

On Tuesday, April 15, 1997, Ms. Sasser was present in court and stated that she would like to come in on the case, but she could not try the case on the following Monday, April 21st, and she would need a continuance. (III/586). Noting that this case might be the oldest one in the trial court's division and the case had been continued several times to enable Brooks' family to hire private counsel, the trial court agreed that a defendant has the right to hire private counsel, but Brooks remained indigent and "at a certain point the court cannot be manipulated further." (III/594-596). Recognizing that this defendant had been "quite a problem" and deliberately couldn't get along with either of his court-appointed attorneys, the trial court announced that it did not plan

on continuing this case any further, unless there was some independent reason for continuing the case. Although the trial court stated that he would require Mr. Nichols, who was prepared for trial, to represent the defendant, (III/587), the trial court also specifically asked the attorneys, including Ms. Sasser, if they had any caselaw indicating that the defendant had the "right" to a continuance under these circumstances. (III/597; 599) The trial court then explained, "I'm not going to be granting a continuance *unless* its required by caselaw." (III/599).[6] This case was reset for the following day to enable the parties to research the issue of whether the defendant was entitled to have this latest attorney, Ms. Sasser, "come in at the last minute." (III/600). As it turned out, Ms. Sasser was unable to represent Brooks due to a conflict of interest. In 1989, attorney Sasser previously had represented codefendant, Foster Brown, when Foster Brown had been convicted of second-degree murder. (III/606-608). Thus, because Ms. Sasser could not represent Brooks, her oral motion for a continuance to prepare for the trial scheduled for April 21, 1997, was no longer pending before the trial court and this claim was rendered moot. (III/608-609).

As previously addressed in supplemental Issue III, on February 24, 1997, the day of Brooks' trial was previously scheduled to

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[6] This Court has long recognized that the appellate court cannot presume that the trial court would have erred if given supporting authority. See, Lucas v. State, 376 So.2d 1149 (Fla. 1979).

begin, attorney Nichols filed a motion to withdraw, citing Brooks' hostility and threats. (II/210; III/468-471). Because Brooks announced his family's intention to hire private counsel (attorney Rolle) on February 24, 1997, the trial court generously continued this case repeatedly to give Brooks and his family the opportunity to hire his "counsel of choice." Because Brooks' family never retained any of the private attorneys they'd contacted between February and April, and because the latest private attorney, Ms. Sasser, was faced with a conflict of interest, there was no motion for continuance pending before the trial court at the time of trial. On April 21, 1997, the trial court held an *in camera* hearing on the remaining motion outstanding, attorney Nichols' motion to withdraw, and denied relief on the authority of Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985). (SR/ 1, 3; II/219). After granting several pre-trial continuances to accommodate the defense, jury selection finally commenced on May 5, 1997, with attorney Nichols representing Brooks. (V/1-291).

The trial court's ruling on a motion for continuance will not be overturned on appeal unless a defendant demonstrates a palpable abuse of discretion. Sliney v. State, 699 So.2d 662, 671 (Fla. 1997). In the instant case, Brooks has not, and cannot, show any error by the trial court. In Grossman v. State, 525 So.2d 833 (Fla. 1988), this Court found no abuse of discretion in denying the defendant's third request for a continuance which was filed four

days prior to trial. Id. at 836. Likewise, in Hunter v. State, 660 So.2d 244 (Fla. 1995), this Court found that, given that the case was pending for at least ten months and that defense counsel still had over three weeks to prepare for trial, the trial court did not abuse its discretion in denying a second motion for continuance. Importantly, there was also no indication that the defendant was actually prejudiced in any way by the denial of the continuance. 660 So. 2d at 249-250.

In the instant case, Brooks' trial was finally held some eight months after he was arrested for the murder of BBQ Jenkins. The trial court continued this case on several occasions to enable Brooks' family to retain private counsel. The trial court did nothing to impede their efforts and did not deny Brooks' any "right to hire counsel of choice." The trial court's eventual enforcement of a trial schedule, which had been repeatedly extended to benefit the defendant, did not constitute any error at all, much less reversible error. §924.051, Florida Statutes (Supp. 1996).

SUPPLEMENTAL ISSUE V

THE TRIAL COURT DID NOT ERR IN (1) GRANTING THE STATE'S UNOBJECTED-TO MOTION FOR CONSOLIDATION OF THE CO-DEFENDANTS AT TRIAL AND (2) DENYING THE DEFENDANT'S MOTION TO BIFURCATE THE PENALTY PHASE PROCEEDINGS.

In this supplemental claim, Brooks alleges that he was denied a fundamentally fair trial because the trial court granted the State's motion for joinder/consolidation of Brooks' trial with that

of his codefendant, Foster Brown. (Pro se supplemental brief at 31). Brooks' pro se claim must fail for the following reasons.

Procedural Bar

On February 10, 1997, the trial court granted the State's motion to consolidate Brooks' trial with the trial of his codefendant, Foster Brown (II/205-206). Brooks did not object to the consolidation. In fact, on February 7, 1997, Brooks' trial counsel affirmatively stated that there was no objection to consolidation, and defense counsel did not "see any reason the court would not consolidate." (XXI/1692). Significantly, this case did not involve antagonistic defenses at trial or any violation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The failure to object, the explicit approval of consolidation/joinder at trial, and the failure to move for severance constitutes a clear procedural bar. See also, Rule 3.153, Florida Rules of Criminal Procedure; §924.051, Florida Statutes (Supp. 1996).

Moreover, Brooks and Brown arrived together at the site of the anticipated drug deal, armed with loaded weapons, and they promptly carried out the robbery and drug trafficking together. Both were present at the same time and place at the onset of the drug deal, robbery, and shooting of the unarmed witnesses. Both arrived together and fled the scene together. This Court has consistently recognized that severance of codefendants' trials is not necessary

"when all relevant evidence regarding criminal offense is presented in such manner that jury can distinguish evidence relating to each defendant's acts, conduct, and statements, and can then apply law intelligently and without confusion to determine individual defendant's guilt or innocence. Coleman v. State, 610 So.2d 1283 (Fla.), cert. denied, 114 S.Ct. 321, 510 U.S. 921, 126 L.Ed.2d 267 (1992).

Penalty Phase

On May 19, 1997, the first day of the penalty phase, Brooks' counsel did ask the trial court to bifurcate the penalty phase proceedings. The defense did not request separate juries, only that the penalty phase of Brooks be conducted first. (XIV/1316). According to the defense counsel,

> [Defense Counsel/MR. NICHOLS]: . . . I have talked with Mr. Brooks at some length this morning about it and he's asked me to orally move that the Court bifurcate these proceedings with regard to the sentencing between the two defendants. *Although there were not issues that would cause separate trials,* the situation that's going to exist if the jury hears the aggravating circumstances as to both of these defendants before going back to deliberate with regard to the recommendation of death creates an opportunity for confusion and for the jury to hold against Mr. Brooks the significantly different violent record of Mr. Brown, and *he's asked that I ask the Court that the procedure be that the aggravating circumstances and mitigating circumstances be presented to this jury as to Mr. Brooks first, that they deliberate and return their recommendation, and then that the aggravating circumstances with regard to Mr. Brown be presented to him.*
>
> We object to the jury -- I'm trying to -- I'm trying to say this simply, but I think the simple way to say it is that *we object to this jury deliberating on the aggravating and mitigating circumstance with regard to Mr. Brooks, if they do it after having heard the aggravating circumstances that apply*

to Mr. Brown. We think that unfairly prejudices Mr. Brooks and would ask the process be separated.

(XIV, 1315-1316, e.s.)

It is undisputed that defendants frequently have to make difficult choices during a trial, McGautha v. California, 402 U.S. 183, 213, 28 L.Ed.2d 711, 729 (1971); and, in evaluating Brooks' request to bifurcate the penalty phase proceedings, the trial court recognized the dilemma and stated,

> THE COURT: You could say -- . . . if the jury hears bad things about the co-defendant they may bleed over to my client and to his prejudice. On the other hand, it could be just as well argued that if they hear bad things about the co-defendant that benefits your client because they go, well, then Mr. Brooks is not as bad in comparison --
>
> MR. NICHOLS: I just need to preserve the issue for the record.

(XIV/1317-1318).

In response to the defendant's request, the prosecutor argued that the defendant's 11th hour request was untimely, the evidence was "pared down" in order to be tried in front of one jury, the aggravating circumstances were comparable for both defendants because each had prior violent felony convictions and the merged factor of robbery/pecuniary gain, and the jury would be provided with separate verdict forms for each defendant. (XIV/1318-1320). In denying Brooks' belated request to bifurcate the penalty phase proceedings, the trial court reasoned,

> THE COURT: Let me say one more thing about that. What could happen by trying -- by having these penalty phases together is the jury could -- they might feel that based upon the evidence

> they heard in the guilt phase that Mr. Brooks was the shooter or the killer, and then they might say, well, his record is not as bad as Mr. Brown's. Mr. Brown has got the worst record, but Mr. Brown was not the shooter, therefore, they both have reasons to not recommend death. That may happen. That well may not happen. Something the opposite of that may happen. But the point is we could speculate into eternity under any scenario so at this point I'm not going to grant the oral request to bifurcate.
>
> (XIV, 1322-1323)

Brooks' request to conduct his penalty phase proceeding prior to that of his co-defendant fails to preserve any other claim for appeal. See, Gordon v. State, 704 So.2d 107 (Fla. 1997) [Defendant's motion, filed after the conclusion of the penalty phase, did request "a new penalty phase of the trial," but, it did not address the discrete appellate issue of separate penalty-phase juries for each defendant. The issues not raised contemporaneously with the penalty phase proceedings are procedurally barred. Id. at 113-114]

It is also important to note that Brooks' pro se severance argument is directly at odds with his explicit reliance on Brown's prior record and proportionality claim on appeal. Brooks cannot credibly have it both ways. As evidenced by Issue V of Brooks' initial brief, it is abundantly clear that Brooks wants this court to consider his co-defendant's prior record. Because there was a joint penalty phase, the instant record includes evidence of codefendant Brown's prior criminal history -- and this is evidence upon which Brooks significantly relies. Even if Brooks' pro se

argument is considered, no relief is warranted under the facts of this case. Brooks has not cited any authority requiring separate death penalty phase proceedings or juries under these circumstances. In fact, this Court has expressly rejected the argument that separate juries should be empaneled for the guilt and penalty phases of a capital trial. Melton v. State, 638 So.2d 927, 929 (Fla.), cert. denied, ___ U.S. ___, 115 S. Ct. 441, 130 L. Ed. 2d 352 (1994); Riley v. State, 366 So.2d 19, 21 (Fla. 1978), cert. denied, 459 U.S. 981 (1982). No reasonable justification for reconsideration of this issue has been offered. Therefore, Brooks is not entitled to relief on this issue.

The trial court did not abuse its discretion in denying the defendant's last-minute request to conduct Brooks' penalty phase prior to that of his codefendant Brown. Brooks has failed to establish both preservation of error and resulting prejudice. See, §924.051, Florida Statutes (Supp. 1996).

SUPPLEMENTAL ISSUE VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING MICHAEL JOHNSON TO TESTIFY AS TO THE WEIGHT, QUANTITY, AND GENUINENESS OF THE COCAINE ROCKS WHICH WERE IN HIS POSSESSION.

In addition to the arguments previously presented in Issue II herein, the State submits the following response to Brooks' supplemental complaints.

Procedural Bar

When Michael Johnson initially testified on direct examination as to the quantity, size, and content of the cocaine rocks, his testimony was introduced without objection (VII/388). Brooks' supplemental appellate complaints are procedurally barred. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Moreover, Brooks has not demonstrated any prejudicial error under §924.051, Florida Statutes (Supp. 1996).

Standard of Review

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. Kearse v. State, 662 So.2d 677, 684 (Fla. 1995); Cummings v. State, 1998 WL 303862 (Fla. 1998).

Weight, Quantity and Content

Testimony of how many rocks were in the bag is a matter requiring no expert testimony. It is well within the capability of a witness who had the opportunity to examine the baggie containing the rocks (VIII/418) to estimate how many rocks were within the baggie. Counting or estimating the number of discrete objects in a clear plastic bag required no special expertise.

As previously argued in Issue II herein, Johnson's testimony concerning the size and weight of the cocaine rocks was admissible both as lay witness and expert witness opinion. See also, State v. Gilbert, 507 So.2d 637 (Fla. 5th DCA 1987).

As to the genuineness of the cocaine, this is a subject upon which an experienced drug dealer would be qualified. In U.S. v. Jones, 480 F.2d 954 (5th Cir.), cert. denied, Stockmar v. U.S., 94 S.Ct. 582, 414 U.S. 1071, 38 L.Ed.2d 476 (1973), a witness who had been a member of a marijuana smuggling operation, had smoked marijuana on two or three occasions, and had examined the contents of smuggled shipment was competent to testify that the substance smuggled into the United States and disposed of by the defendants was marijuana. On appeal, the Fifth Circuit found that the trial court did not abuse its discretion in admitting the testimony of the lay witness and concluded that the defendant's objections went to the weight of the evidence and not its admissibility. Jones, 480 F.2d at 959-960. Finally, error, if any, is clearly harmless under the facts of this case. §924.051, Florida Statutes (Supp. 1996).

SUPPLEMENTAL ISSUE VII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF TONY CARR THAT (1) BROOKS AND BROWN PAID TONY CARR $50 FOR THE USE OF HIS RED TOYOTA CAMRY ON THE DAY BEFORE THE MURDER, (2) BROOKS AND BROWN FAILED TO RETURN THE CAMRY THAT NIGHT, AS AGREED, AND (3) THE ABANDONED TOYOTA CAMRY WAS RECOVERED BY THE POLICE APPROXIMATELY ONE WEEK AFTER THE SHOOTING.

In the instant case, multiple eyewitnesses independently confirmed at trial, without objection, that Brooks and Brown used a red Toyota Camry as their transportation to and from the scene of

the drug deal and murder on August 28, 1996. [Michael Johnson (VII/387, 422); Lashan Mahone (VIII/550-551; 555-556); Jesse Bracelet (VIII/601-604); Jackie Thompson (VIII/753-754, 756, 758, 760, 765, 767); Tyrone Simmons (X/876, 917)] In fact, all of the eyewitnesses at the scene testified, without objection, that they saw the red Camry arrive, Brooks and Brown got out of the car in order to participate in the drug deal, the shooting took place shortly thereafter, and the defendants fled the scene in the red Camry. The defense did not dispute the relevance of evidence placing both defendants in the red Camry observed by the eyewitnesses at the time of the homicide. (VII/308). Nevertheless, in this final supplemental claim, Brooks now argues that the trial court erred in admitting evidence that Brooks and Brown paid Tony Carr $50 for the use of his red Toyota Camry on August 27, 1996, the defendants agreed to return the Camry that night, the red Camry was not returned that night or the following night of the murder on August 28, 1996, and Tony Carr did not see his car again until the Sheriff's Office found the abandoned vehicle approximately one week after the shooting.

Procedural Bar

Failure to object to collateral crime evidence at the time it is introduced at trial violates the contemporaneous objection rule and waives the issue for appeal. See, Lindsey v. State, 636 So.2d 1327, 1328 (Fla. 1994); Pomeranz v. State, 703 So.2d 465, 470 (Fla.

1997). According to Brooks, Tony Carr's alleged "collateral crimes" testimony was admitted over both of the defendants' objections at trial. (Pro se supplemental brief at 39). For the following reasons, the State does not agree that this issue has been preserved for appeal.

Admittedly, prior to jury selection, the defense did announce an objection to the State's disclosure of testimony that the defendants never returned Tony Carr's 1995 Toyota Camry, and the trial court instructed the prosecutor not to bring up this issue during jury selection or opening statement. (V/15). Following jury selection, the trial court heard arguments from both sides and agreed that the defendants' use of the red Camry was inextricably intertwined with this criminal episode. (VII/305).

When the trial court questioned the relevance of evidence that Brooks and Brown did not return the Camry to Tony Carr when they were supposed to, and never returned the car as agreed, the prosecutor explained,

> . . . The relevance is this: The individual that loaned them the car, it is unusual to take a relatively valuable automobile that's fairly new and loan it to people. The evidence is going to be the owner of the car did not know these people. He knew them but didn't know them. He turns around and loans them, for the price of 50 dollars for a few hours, a relatively new car. And if the testimony comes out he loaned them this car, an individual they didn't know very well, and it just seems odd, it's going to really question his credibility, coupled with the fact that he's going to be established that he's a convicted felon, but the fact that he loaned it to these individuals that he knew for 50 bucks for a few hours, and his testimony would be -- is that they didn't bring it back that night and he obtained it about a week

> later, not from the defendants. What I don't want to have -- the problem I want to avoid is the rather incredible story that he would have loaned this car to people he didn't know real well for an indeterminate amount of time.
>
> (VII/307).

The prosecutor further explained that he would not be arguing the defendants' actions as a theft and the evidence was also offered to show the totality of the circumstances under Griffin v. State, 639 So.2d 966 (Fla. 1994). (VII/310). The trial court agreed that the evidence was relevant, that the State was entitled to establish the credibility of their witnesses, and, after weighing the evidence under §90.403, Florida Statutes, the trial court deemed the evidence admissible at trial. (VII/311).

When Tony Carr testified at trial, no objection was raised by the defense. (X/668-675). No objection was made when Tony Carr identified both defendants, testified that Brooks and Brown approached him in a convenience store parking lot on August 27, 1996, asked to borrow his car for a few hours for $50, never returned it, and the car was found by the police about a week later, abandoned. (See, X/668-675). The failure to contemporaneously object at trial fails to preserve this issue for appeal. Routly v. State, 440 So.2d 1257, 1260 (Fla. 1983); Correll v. State, 523 So.2d 562 (Fla. 1988); Pomeranz v. State, 703 So.2d 465 (Fla. 1997) ["Even when a prior motion in limine has been denied, the failure to object at the time collateral evidence is introduced waives the issue for appellate review." Id. at 470.]

Standard of Review

Assuming, *arguendo*, this issue has been preserved for appeal, which the State does not concede and specifically denies, Brooks still is not entitled to any relief. A trial court has broad discretion in determining the relevance of evidence and such a determination will not be disturbed absent an abuse of discretion. Jorgenson v. State, 1998 WL 306593 (Fla. 1998), citing Heath v. State, 648 So.2d 660, 664 (Fla. 1994).

Williams Rule[7]

The unobjected-to evidence at trial of Brooks and Brown's continued, unauthorized use of Tony Carr's automobile did not constitute objectionable Williams Rule evidence under §90.404(2), Florida Statutes (1995). Evidence of uncharged crimes which are inseparable from crime charged, or evidence which is inextricably intertwined with crime charged, is not Williams rule evidence; rather, it is admissible under other crimes provision because it is relevant and inseparable part of act which is in issue. Griffin v. State, 639 So.2d 966 (Fla. 1994)

Inextricably intertwined evidence

In proving its case, State is entitled to paint accurate picture of events surrounding crimes charged. Smith v. State, 699 So.2d 629 (Fla. 1997). Inextricably intertwined evidence or inseparable crime evidence may be admitted at trial to establish

[7] Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

the entire context out of which a criminal act arose. State v. Cohens, 701 So.2d 362, 364 (Fla. 2d DCA 1997); Hunter v. State, 660 So.2d 244, 251 (Fla. 1995), cert. denied, --- U.S. ---, 116 S.Ct. 946, 133 L.Ed.2d 871 (1996). As explained in Cohens, this "intertwined" evidence may also be admitted because it is relevant and necessary to adequately describe the events leading up to the crime. Id. at 364, citing Griffin. See also, Pomeranz, 703 So.2d at 470, citing Remeta v. State, 522 So.2d 825, 827 (Fla. 1988) [Collateral murder admissible because the same gun was used in both crimes and the evidence established defendant's possession of the murder weapon and counteracted defendant's statements blaming the crimes on a companion.]

In Griffin, the defendant was convicted of first degree murder for shooting a police officer who stopped the stolen car in which Griffin and two cofelons were riding after they had burglarized a motel room. Evidence was introduced concerning how Griffin had stolen the car and taken the murder weapon during another crime, a home invasion robbery. On appeal, this Court held evidence of how the stolen car and the murder weapon were obtained was relevant, and that the probative value outweighed any prejudice. Griffin at 968. Assuming, *arguendo*, this issue has been preserved for appeal, the trial court did not abuse its discretion in light of Griffin. See also, Hunter v. State, 660 So. 2d 244 (1995); Caruso v. State, 645 So.2d 389 (Fla. 1994) [Evidence regarding Caruso's drug-related

activities established relevant context in which the crimes occurred, the defendant's state of mind at the time of the murders, and his motive to commit a burglary, which was relevant to the State's theory of felony-murder.]

Brooks also directs this courts attention to Jorgenson v. State, 1998 WL 306593 (Fla. 1998). In Jorgenson, this Court found that the trial court did not abuse its discretion in ruling that evidence that Jorgenson was a drug dealer was relevant at his murder trial to support the State's theory of motive underlying the murder.

Harmless Error

Any possible error regarding the admission of Tony Carr's brief testimony clearly would be harmless beyond any reasonable doubt. Brooks has not, and credibly cannot, show any prejudicial, reversible error in this case. See, §924.051, Fla. Stat. (1996).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Nada M. Carey, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301; and Fred Lorenzo Brooks, #068676, Appellant, Florida State Prison, P. O. Box 181, Starke, FL 32091, this 20th day of October, 1998.

COUNSEL FOR STATE OF FLORIDA