No. _____

IN THE

Supreme Court of the United States

LAMAR Z. BROOKS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S APPENDIX

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APPENDIX A1

Eleventh Circuit Order Denying a COA (January 11, 2024)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10765

LAMAR Z BROOKS,

Petitioner-Appellant.

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:15-cv-00264-MW-ZCB

ORDER:

Lamar Brooks, a Florida prisoner serving a life sentence for two counts of first-degree murder, moves for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), following the district court's denial of his counseled, second amended 28 U.S.C. § 2254 habeas corpus petition. Because reasonable jurists would not debate the district court's denial of Brooks's § 2254 petition, his motion for a COA is DENIED, and his motion for IPF status is DENIED AS MOOT. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

APPENDIX A2

Eleventh Circuit Order Denying a Motion for Reconsideration (March 21, 2024)

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-10765

LAMAR Z BROOKS,

Petitioner-Appellant.

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 3:15-cv-00264-MW-ZCB

Before WILSON and GRANT, Circuit Judges.

BY THE COURT:

Lamar Brooks has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated January 11, 2024, denying his motion for a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition and his motion for leave to proceed *in forma pauperis*. Upon review, Brooks's motion for reconsideration is DENIED because he has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions.

APPENDIX A3

District Court Order Denying Habeas Relief (December 14, 2022)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

LAMAR Z. BROOKS,

***Petitioner*,**

v. **Case No. 3:15cv264-MW/ZCB**

RICKY D. DIXON, Secretary, Florida Department of Corrections, And ASHLEY MOODY, Attorney General,

***Respondents*.**

_____/

ORDER ON SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Before this Court is a second amended petition for writ of habeas corpus filed by Lamar Z. Brooks, a Florida prison inmate, pursuant to Title 28, United States Code, Section 2254. ECF No. 58. Respondents have filed an answer, ECF No. 69, and Brooks has filed a reply, ECF No. 73. After careful consideration of the issues raised in the pleadings and for the reasons stated below, the second amended petition is denied.

I. FACTS AND PROCEDURAL HISTORY

A. Procedural History

Petitioner Brooks was indicted on May 23, 1996, in Okaloosa County, Florida Circuit Court case no. 1996-CF-735 for the first-degree murder of Rachel Carlson and her three-month-old daughter on April 24, 1996. ECF No. 69-1 at 2. Brooks's first trial was held in 1998 at which he was found guilty on both counts and sentenced to death for each murder. ECF No. 69-3 at 2–7; ECF Nos. 78-1 through 78-16. On direct appeal, his convictions and sentences were reversed by the Florida Supreme Court. *Brooks v. State*, 787 So. 2d 765, 782 (Fla. 2001). The Florida Supreme Court found that the numerous errors in the first trial, including admission of improper hearsay, the State's attempts to impute codefendant Davis's actions, motive and intent to Brooks, and the circumstantial nature of the evidence against Brooks, required a new trial.[1] *Id.* at 779.

Brooks's second trial commenced January 7, 2002. ECF Nos. 69-4 through 69-11. This trial also resulted in verdicts of guilty on each count. The jury recommended death sentences by a nine-to-three vote for the murder of Carlson and an eleven-to-one vote for the murder of her daughter. Brooks was again sentenced

[1] Codefendant Walker Davis was not tried with Brooks and did not testify in Brooks' original trial or retrial. Davis was given a life sentence after he was convicted of two counts of first-degree murder in 1997. *See* ECF No. 78-50 at 136; *Davis v. State*, 728 So. 2d 341 (Fla. 1st DCA 1999).

to death for each murder. ECF No. 69-13 at 2–7. The convictions and sentences were affirmed by the Florida Supreme Court in *Brooks v. State*, 918 So. 2d 181 (Fla. 2005), *cert. denied*, *Brooks v. Florida*, 547 U.S. 1151 (2006).[2]

Brooks filed a motion and amended motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851, ECF Nos. 69-20, 69-21 at 2, and an evidentiary hearing was held in January and May 2008. However, after the original presiding judge died, a new evidentiary hearing was held May 10–12, 2010. ECF No. 69-26. Before a ruling was issued, Petitioner was allowed to file a second or successive motion for postconviction relief alleging newly discovered evidence. ECF No. 69-32 at 2–23. Another evidentiary hearing addressing the newly discovered evidence claim was held on March 1, 2012. ECF No. 69-34 at 2–364. On March 12, 2012, the postconviction court issued an order denying relief, with attachments. ECF No. 69-35 at 2–292.[3]

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[2] On direct appeal from retrial, Petitioner asserted the following claims of error: (1) Confrontation Clause error in admission of insurance agent Mantheny's testimony; (2) Confrontation Clause error in admission of irrelevant testimony regarding child support; (3) error in admission of notes seized from Walker Davis; (4) error in allowing the state to impeach witness Thomas; (5) error in allowing witness Gilliam to say Petitioner told him he had to shoot a cop and can't go back to jail; (6) error in denying objections to prosecutorial argument; (7) error in refusing to give instruction required by § 90.308(18)(e), Fla. Stat.; (8) error in denying motions for mistrial relating to comments about the original trial; (9) error in denying motion for change of venue; (10) death sentence is disproportionate; and (11) error in finding murder in course of child abuse aggravator. ECF No. 69-14 at 2–115.

[3] The postconviction claims denied by the circuit court were: (1) ineffective assistance of trial counsel (IAC) in guilt phase for failing to present exculpatory evidence, with multiple subparts; and violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); (2) IAC for failing to present evidence promised in opening statement; (3) capital

Petitioner appealed to the Florida Supreme Court and also filed a petition for writ of habeas corpus in that court alleging ineffective assistance of appellate counsel in the direct appeal. ECF No. 69-36; ECF No. 69-39. On May 7, 2015, the Florida Supreme Court affirmed denial of postconviction relief and denied the petition for writ of habeas corpus.[4] *Brooks v. State*, 175 So. 3d 204 (Fla. 2015).

On September 30, 2015, Petitioner timely filed his federal petition for writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 4. Pursuant to the motion filed on March 27, 2016, the case was stayed to allow Petitioner to bring a motion to vacate his death sentence in state court based on the United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016).[5] ECF No. 27. Petitioner then filed a successive petition for writ of habeas corpus in state court, ECF No. 69-44 at 2–22, and on March 10, 2017, the Florida Supreme Court granted the petition and

penalty phase claim; (4) penalty phase claim re mitigation; (5) challenge to Florida Bar rule prohibiting lawyers from making certain inquiries of jurors after trial; (6) challenge to lethal injection; (7) challenge to death sentence (8) challenge to death sentence; (9) challenge to eligibility for death sentence; and, in separate motion, a newly discovered evidence claim regarding witness Ira Ferguson. ECF No. 69-35 at 2–42.

[4] The state-court claims of ineffective assistance of appellate counsel were: (1) failure to argue due process claim regarding State's inconsistent theories in Petitioner's trial and that of co-defendant regarding who did the actual killing and its effect on sentence; (2) failure to argue error in limitation of cross-examination of State's witnesses; (3) failure to challenge certain prosecutorial comments and arguments; (4) failure to argue error in admission of gruesome and repetitive photographs. ECF No. 69-39 at 2–45.

[5] The United States Supreme Court held in *Hurst v. Florida* that Florida's capital sentencing scheme violated the Sixth Amendment because it impermissibly allowed "a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." 577 U.S. at 102–03.

remanded for a new penalty phase trial. *See Order, Brooks v. Jones*, No. SC16-532 (Fla. Mar. 10, 2017), 2017 WL 944235. ECF No. 69-45 at 2. After the new penalty phase trial, Petitioner was resentenced on August 27, 2019, to life in prison without the possibility of parole. ECF No. 69-46. No appeal of the sentence was taken.

Petitioner filed an amended § 2254 petition for writ of habeas corpus on August 24, 2020. ECF No. 48. Petitioner was given leave to file a second amended § 2254 petition, which he filed on August 30, 2021. ECF No. 58. The second amended petition raised eight claims, some with multiple subparts. Discussion of the pertinent evidence adduced at the retrial and at the several evidentiary hearings, when necessary, will be included in the discussion of the individual claims.

B. Facts

The relevant facts giving rise to the indictment and convictions are summarized as follows in the Florida Supreme Court's opinion affirming Brook's convictions and sentences after his retrial:

> In the late night hours of April 24, 1996, Rachel Carlson and her three-month-old daughter, Alexis Stuart, were found stabbed to death in Carlson's running vehicle in Crestview, Florida. Carlson's paramour, Walker Davis, and Brooks were charged with the murders. Davis was married and had two children, and his wife was pregnant with their third child. However, the victim [incorrectly] believed Davis was also the father of her child and demanded support from him. Davis became concerned about this pressure. He was convicted of the murders and sentenced to life imprisonment. However, he did not testify at Brooks' trial.

> Brooks lived in Pennsylvania but had traveled to Florida from Atlanta with his cousin Davis and several friends on Sunday, April 21, 1996. Brooks stayed with Davis at Eglin Air Force Base for a few days before returning to Pennsylvania. In interviews with the police, he informed them that on the following Wednesday evening, the night of the murders, he helped Davis set up a waterbed, watched some movies, and walked Davis's dog.
>
> Contrary to Brooks' statements, several witnesses placed him and Davis in Crestview on the night of the murders, although no physical or direct evidence linked him to the crimes.

Brooks v. State, 918 So. 2d 181, 186–87 (Fla. 2005) (bracketed material added) (quoting *Brooks*, 787 So. 2d at 768–69). The Florida Supreme Court further detailed pertinent testimony at the retrial:

> At trial, the State established the existence of a conspiracy to kill the victims through the testimony of Mark Gilliam, a fellow member of the military and a friend of Brooks, who accompanied Brooks and Davis to Eglin Air Force Base on April 21, 1996. Gilliam testified that in the early evening hours of Monday, April 22, 1996, Davis expressed his desire to murder a woman who had been pestering him for money. According to Gilliam, the conversation proceeded with the three men each suggesting the best way to murder the woman. Gilliam stated that although he initially thought the discussion was in jest, a murder plan developed pursuant to which Davis would lure the woman, Carlson, to his apartment to pick him up, and Gilliam and Brooks would then follow behind in Gilliam's vehicle to a predesignated place in Crestview, at which time Brooks would exit the car and shoot the victim, Carlson. Gilliam testified that the three attempted to actually execute the plan that evening and the following evening, but that each attempt ended in failure.

Brooks, 918 So. 2d at 188 (footnote omitted). Gilliam also testified that Davis promised to pay Brooks $10,000 to commit the murders. *Id.* at 188. Evidence was admitted that although Davis appeared to have little available money, he had

purchased a $100,000 life insurance policy on Carlson's daughter with himself as the beneficiary. *Id.* at 188–89.

The Florida Supreme Court further summarized evidence presented at the retrial to show that Brooks was the individual who killed Carlson and her child:

> Forensic evidence established that both Carlson and Stuart were killed by a person seated in the rear driver's-seat of the vehicle, and that no one occupied the front passenger's seat at the time of Carlson's stabbing. Other evidence demonstrated that Brooks was the individual seated in the back seat of Carlson's vehicle. Importantly, Davis was in a leg cast at the time of the murder. That fact renders it highly unlikely that Davis would have been able to sit in the back seat of a car in a position that would have left him able to muster the leverage utilized to mount this attack from behind. Moreover, a shoe print was found on Carlson's shoulder. A forensic expert opined that the print was consistent with the killer extricating himself from the vehicle by climbing over the victim's body, which was found in the front seat, or opening the driver's-side front door and kicking Carlson over. Either feat would have been almost impossible for a man in a leg cast.

Id. at 197 (footnotes omitted).

II. STANDARD OF REVIEW

A. Section 2254 Standard of Review

A federal court "shall not" grant a habeas corpus petition on any claim that was adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor described the appropriate test:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id., 529 U.S. at 412-13 (O'Connor, J., concurring).

Under the *Williams* framework, the federal court must first determine the "clearly established Federal law," namely, "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). After identifying the governing legal principle, the federal court determines whether the state court's adjudication is contrary to the clearly established Supreme Court case law. The adjudication is "contrary" only if either the reasoning or the result contradicts the relevant Supreme Court cases. *See Early v. Packer*, 537 U.S. 3, 8 (2002) ("Avoiding th[e] pitfalls [of § 2254(d)(1)] does not require citation to our cases—indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.").

If the "contrary to" clause is not satisfied, the federal court determines whether the state court "unreasonably applied" the governing legal principle set forth in the Supreme Court's cases. The federal court defers to the state court's reasoning unless

the state court's application of the legal principle was "objectively unreasonable" in light of the record before the state court. *See Williams*, 529 U.S. at 413; *Holland v. Jackson*, 542 U.S. 649, 652 (2004).

Section 2254(d) also allows habeas relief for a claim adjudicated on the merits in state court where that adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The "unreasonable determination of the facts" standard is implicated only to the extent the validity of the state court's ultimate conclusion is premised on unreasonable fact finding. *See Gill v. Mecusker*, 633 F.3d 1272, 1292 (11th Cir. 2011). As with the "unreasonable application" clause, the federal court applies an objective test. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (holding that a state court decision based on a factual determination "will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding").

"The question under AEDPA ("Anti-terrorism and Effective Death Penalty Act") is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citing *Williams*, 529 U.S. at 410). AEDPA also requires federal courts to "presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and

convincing evidence.' " *Landrigan*, 550 U.S. at 473–74 (quoting 28 U.S.C. § 2254(e)(1)).

The Supreme Court has often emphasized that a state prisoner's burden under § 2254(d) is "difficult to meet . . . because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Court elaborated:

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. *Jackson v. Virginia*, 443 U.S. 307, 332, n. 5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring in judgment). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Id. at 102–03.

"[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102. Federal habeas review cannot serve as a substitute for ordinary error correction, but must function as an "extraordinary remedy" that guards only against "extreme malfunctions in the state criminal justice systems." *Id.* at 102–03. A petitioner is "never entitled to habeas

relief" but "must still 'persuade a federal habeas court that law and justice require [it].' " *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022) (quoting *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022)).

B. Exhaustion And Procedural Default

It is a long-standing prerequisite to the filing of a federal habeas corpus petition that the petitioner exhaust available state court remedies, *see* 28 U.S.C. § 2254(b)(1), thereby giving the State the " 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citation omitted)). The petitioner must "fairly present" his claim in each appropriate state court, alerting that court to the federal nature of the claim. *Duncan*, 513 U.S. at 365–66; *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Picard*, 404 U.S. at 277–78.

An issue that was not properly presented to the state court and which can no longer be litigated under state procedural rules is considered procedurally defaulted—that is, procedurally barred from federal review. *See Bailey v. Nagle*, 172 F.3d 1299, 1302–03 (11th Cir. 1999). Courts will also consider a claim procedurally defaulted if it was presented in state court and rejected on the independent and adequate state ground of procedural bar or default. *See Coleman v. Thompson*, 501 U.S. 722, 734–35 & n.1 (1991); *Caniff v. Moore*, 269 F.3d 1245, 1247 (11th Cir. 2001) ("[C]laims that have been held to be procedurally defaulted under state law

cannot be addressed by federal courts."); *Chambers v. Thompson*, 150 F.3d 1324, 1326-27 (11th Cir. 1998) (holding that applicable state procedural bar should be enforced by federal court even as to a claim which has never been presented to a state court); *Tower v. Phillips*, 7 F.3d 206, 210 (11th Cir. 1993). In the first instance, the federal court must determine whether any future attempt to exhaust state remedies would be futile under the state's procedural default doctrine. *Bailey*, 172 F.3d at 1303. In the second instance, a federal court must determine whether the last state court rendering judgment clearly and expressly stated that its judgment rested on a procedural bar. *Id.*

A federal court is not required to honor a state's procedural default ruling unless that ruling rests on adequate state grounds independent of the federal question. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). The Eleventh Circuit has set forth a three-part test to determine whether a state court's procedural ruling constitutes an independent and adequate state rule of decision. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). First, the last state court rendering judgment must clearly and expressly state it is relying on state procedural rules to resolve the federal claim. *Id.* Second, the state court's decision on the procedural issue must rest entirely on state law grounds and not be intertwined with an interpretation of federal law. *Id.* Third, the state procedural rule must be adequate. *Id.* The adequacy requirement has been interpreted to mean the rule must be firmly established and regularly followed,

that is, not applied in an arbitrary or unprecedented fashion. *Id.* The adequacy of a state procedural bar to the assertion of a federal question is itself a federal question. *Lee v. Kemna*, 534 U.S. 362, 375 (2002). The federal court "lacks jurisdiction to entertain a federal claim on review of a state court judgment, if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision." *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (internal quotation marks and citation omitted).

To overcome a procedural default, the petitioner must show cause for the default and prejudice resulting therefrom, or that the federal court's failure to reach the merits of the claim would result in a fundamental miscarriage of justice. *Tower*, 7 F.3d at 210; *Parker*, 876 F.2d 1470. "For cause to exist, an external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim." *McCleskey v. Zant*, 499 U.S. 467, 497 (1991) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To satisfy the miscarriage of justice exception, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him." *Id.* at 327. Further:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. To be credible, such a claim requires [a] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.

*Id.*at 324 (internal citation omitted).

C. Federal Law Governing Claims of Ineffective Assistance of Counsel

The Supreme Court follows a two-pronged test for evaluating claims of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner must show (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced him. *Id.* This two-pronged test has been further described: "First, petitioner must show that 'counsel's representation fell below an objective standard of reasonableness.' Second, petitioner must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Darden v. Wainwright*, 477 U.S. 168, 184 (1986) (quoting *Strickland*, 466 U.S. at 694). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

The inquiry under *Strickland*'s performance prong is "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. "Judicial scrutiny of counsel's performance must be highly deferential," and courts should make every effort to "eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Trial counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. The burden to overcome that presumption and show that counsel's performance was deficient "rests squarely on the defendant." *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) ("To overcome that presumption, a defendant must show that counsel failed to act reasonably considering all the circumstances." (quotation marks and alterations omitted)); *see also Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) ("[B]ecause counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take."). *Strickland*'s prejudice prong requires a defendant to establish a "reasonable probability" of a different trial outcome. *See Strickland*, 466 U.S. at 694. A reasonable probability is one that undermines confidence in the outcome. *Id.*

When a district court considers a habeas petition, the state court's findings of historical facts in the course of evaluating an ineffectiveness claim are subject to the presumption of correctness, while the performance and prejudice components are mixed questions of law and fact. *See Strickland*, 466 U.S. at 698. "Surmounting

Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105 (citations omitted). The Supreme Court in *Richter* explained:

> The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Id. (citations omitted).

D. Federal Law Governing Claims Under *Brady* and *Giglio*

Suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment, irrespective of good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose applies to favorable, material evidence—regardless of request—if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he

received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434.

To establish a *Brady* claim, the defendant must show that (1) the government possessed evidence favorable to the defendant, including impeachment evidence; (2) the defendant did not possess the evidence, nor could he have obtained it with any reasonable due diligence; (3) the government suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. It includes evidence known to police investigators but not to a prosecutor. *Kyles*, 514 U.S. at 438. The suppressed evidence must be material, meaning there is a reasonable probability that the evidence would have changed the outcome of the trial. *Id.* at 433–35. The petitioner need not show that he more likely than not would have been acquitted if the new evidence been admitted, but must show that the new evidence is sufficient to undermine confidence in the verdict. *Wearry v. Cain*, 577 U.S. 385, 392 (2016).

Under *Giglio v. United States*, 405 U.S. 150 (1972), due process bars a prosecutor from knowingly presenting false or misleading evidence at trial or from failing to correct false evidence, even when that evidence was unsolicited. *Id.* at 153. This rule applies to impeachment as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). The evidence must be material to constitute a constitutional violation—materiality being any reasonable likelihood that the false

testimony could have affected the judgment of the jury. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

III. PETITIONER'S CLAIMS

Ground I: Ineffective assistance of trial counsel for failing to present critical exculpatory evidence; and/or the state's failure to disclose exculpatory evidence (*Brady*) or presentation of false or misleading evidence (*Giglio*)

Brooks contends that trial counsel was ineffective for failing to present critical exculpatory evidence thus depriving him of a constitutionally fair trial. ECF No. 58 at 65. He raised this same claim in his amended motion for postconviction relief in state court. ECF No. 69-21 at 8. The critical evidence he contends should have been presented by trial counsel involved forensic testing that showed no evidence tying Brooks to the murders; existence of a different suspect; a timeline that shows he could not have committed the crimes; a stolen vehicle that was suspected in the murders; and a statement of Melissa Thomas, a state's witness, made during a polygraph examination. These issues are presented in subparts as ineffective assistance of counsel claims.

Brooks also argues that the State violated *Giglio v. United States*, 405 U.S. 150 (1972), by presenting "misleading" evidence when Florida Department of Law Enforcement Agent Dennis Haley testified that witness Thomas told him in an interview that Brooks changed clothes in her apartment on the night of the murders.

ECF No. 58 at 98–99. Also related to witness Thomas, Brooks contends, without elaboration, that the State committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose critical impeachment evidence consisting of statements made by Thomas in a polygraph examination. ECF No. 58 at 76–77, 98. These subclaims will be addressed separately.

A. Lack of forensic evidence

In this first subpart of Ground I, Brooks argues that his trial counsel rendered ineffective assistance in failing to present critical exculpatory evidence that hairs found at the scene were compared to Brooks's hair samples and were not consistent with his; that no hairs consistent with the victim were found on Brooks's clothing or personal items; that none of the vacuum sweeping from the car and clothing of the victims tied Brooks to the crimes; that none of Brooks's personal belongings tested positive for blood; and that an untested Caucasian hair was found in Carlson's hand (Carlson was Caucasian and Brooks is African-American).

1. State Court Proceedings

Brooks exhausted this claim in his amended motion for postconviction relief and was provided an evidentiary hearing. The postconviction court denied the claim, concluding that Brooks postconviction counsel did not show that trial counsel failed to present "critical exculpatory evidence." ECF No. 69-35 at 10. The court also concluded that trial counsel's decision not to present the evidence in question does

not constitute deficient performance and that prejudice was not demonstrated. The court cited testimony of trial counsel that the decision not to present forensic evidence was tactical in order to keep the first and final closing argument, referred to as "the sandwich," which the law provided for at that time for cases in which the defense presents no evidence. ECF No. 69-35 at 11–13. The postconviction court cited the closing argument of defense counsel emphasizing the reasonable inference that the State's lack of blood and hair evidence means that no such evidence existed. *Id.* at 13. The postconviction court also noted that Brooks affirmatively agreed at trial with the decision not to present any evidence and not to testify. *Id.* at 11.

The Florida Supreme Court affirmed denial of this claim, first noting that Brooks "clearly and unequivocally waived his right to present a defense case in chief during his retrial." *Brooks*, 175 So. 3d at 219. The court then quoted excerpts of defense counsel's closing argument emphasizing the fact that the State had numerous experts whose job it was to discover any evidence linking the defendant to the crime and none could do so in this case. *Id.* at 221. The Florida Supreme Court concluded that Brooks failed to establish deficiency in the decision not to present expert testimony about forensic testing and, for that reason, it need not address the prejudice prong of *Strickland*. *Id.* at 222.

2. Clearly Established Supreme Court Law

The Florida Supreme Court correctly identified *Strickland* as the clearly established Supreme Court law governing this claim. *Brooks*, 175 So. 3d at 218–19.

3. Federal Review of Claim

At the postconviction evidentiary hearing on this claim, trial counsel Kepler Funk testified that he and co-counsel Keith Szachacz were prepared to present a defense case, but did not make the final decision until after hearing all the state's evidence and after consulting with Brooks.[6] ECF No. 69-26 at 119. Funk testified that counsel recognized the importance of retaining the first and last closing argument if, after the state rested, it appeared unnecessary to present witnesses. *Id.* at 121. He said that "in the end, we made the decision not to call witnesses." *Id.* He testified that he, co-counsel Szachacz, and Brooks made the decision together. *Id.* at 122.

As to the defense theory of the case, Funk recalled that the murders were bloody, and "with all of the FDLE folks doing their job, they could not link [Brooks] to those homicides and so, of course, we saw that and perceived that as a weakness in the government's case." *Id.* at 123. He explained that they spoke with Brooks frequently during the trial and "[s]o it's hours of talking about how the case went

[6] Kepler Funk and Keith Szachacz represented Brooks in the direct appeal of his first trial and then represented Brooks in the retrial. *See Brooks v. State*, 787 So. 2d 765, 768 (Fla. 2001).

and it's really kind of a balancing test of are we going to benefit more than we will be hurt putting on a case or not" and that it's a "very complex decision." *Id.* at 124–25. Funk said the decision not to put on evidence was not solely to preserve the right to the final closing argument. *Id.* at 127. He also believed the state's case supported the reasonable inference that if any evidence, such as the items in Brooks's backpack seized by law enforcement or evidence found in Carlson's vehicle, tied Brooks to the murder, the very competent prosecutor and state experts would have produced it for the jury. *Id.* at 129. In addition to no forensic evidence tying Brooks to the crime, counsel said the defense theory relied on the fact that there was no eyewitness, no confession by Brooks or his codefendant, and no firm evidence of time of death. *Id.* at 146, 155. Funk also noted that the testimony of Mark Gilliam, an alleged coconspirator, that he, Brooks, and Davis planned the murders was severely impeached because Gilliam had recanted his testimony after the first trial and then retracted his recantation after being charged with perjury. *Id.* at 148, 165; *see also* ECF No. 69-8 at 343–78. When asked about the Caucasian hair found in Rachel Carlson's hand, Funk testified that "[m]y memory is that there was no - - I don't know if there was testing. . . . But I also remember that it was matching in color and length of the victim's is my memory." *Id.* at 130. Funk testified that if he had any evidence that would have exonerated Brooks, he would have presented it in a defense case and given up the right to the final closing argument. *Id.* at 129.

Defense co-counsel Keith Szachacz testified at the postconviction evidentiary hearing that the defense could have presented witnesses to show that none of Brooks's personal items bore any trace evidence connecting him to the crimes. He agreed during cross-examination that it was not necessary to do so because the lack of incriminating forensic evidence was obvious from the State's case. ECF No. 69-26 at 288–89. As to the failure to present evidence of the Caucasian hair found in Carlson's hand, Szachacz agreed, when asked, if he recalled testimony of the FDLE analyst in the first trial that the hair appeared to be similar to the color of Carlson's hair. [7] *Id.* at 289–90. Szachacz also agreed he could have attempted to have it tested, but did not recall if the hair was suitable for DNA testing at that time. *Id.* at 290. He explained that, in regard to the Caucasian hair as with every piece of evidence, "we, being Mr. Funk and I and being in consultation with Mr. Brooks, considered all alternatives and in the end made the decision, after you rested your case, that the best way to go forward was not to call any witnesses and not and not to introduce any other evidence." *Id.* at 290–91. He also agreed that even if the defense presented

[7] At the first trial, the defense called Robert Hursey, forensic hair examiner for the Tallahassee Regional Crime Lab, who testified that of all the hairs submitted for examination, none matched Brooks' hair sample and no hairs matching Carlson were found on any of Brooks' personal items. ECF No. 78-13 at 172, 177. Brooks argues that the Florida Supreme Court incorrectly relied on Szachacz' recollection that Hursey testified at the first trial that the Caucasian hair found in Carlson's hand was similar to Carlson's hair in its decision affirming denial of postconviction relief. *See Brooks*, 175 So. 3d at n.6. Brooks is correct that Hursey did not testify in the first trial that the hair was consistent with Carlson's. On cross-examination, Hursey testified that he did not note the color or characteristics of the Caucasian hair found in Carlson's hand. ECF No. 78-14 at 9.

evidence that the hair did not belong to Carlson, "it still would have just been an unknown Caucasian hair in the car of someone who had Caucasian friends and black friends." *Id.* at 291. Brooks did not present any evidence at the evidentiary hearing that the Caucasian hair found in Carlson's hand would have been exculpatory.

Petitioner has not demonstrated that the adjudication of this sub-claim by the Florida Supreme Court was contrary to or an unreasonable application of United States Supreme Court precedent or based on an unreasonable determination of fact in light of the evidence. Although the state court mentioned in a footnote that Szachacz recalled testimony from the first trial that the hair matched Carlson, which is not borne out by the record, *see* note 7 *supra*, co-counsel Funk related his own recollection that the hair in Carlson's hand appeared similar to Carlson's hair.

The state court concluded that counsel had a reasonable strategy to preserve the first and last closing argument and that Brooks expressly agreed with the decision not to present a defense case. It was obvious from the State's failure to present any inculpatory forensic evidence that no forensic evidence found in the vehicle or on Carlson tied Brooks to the crimes. The state's expert witness at trial affirmatively testified that blood collected from the crime did not tie Brooks to the crimes. The expert also testified over objection by the prosecutor that he did attempt DNA testing on three rooted hairs, not otherwise identified, that were provided to him, but could not obtain any results. *See* ECF No. 69-9 at 266, 275.

Presentation of defense witnesses to echo the fact that no forensic evidence tied Brooks to the crimes was deemed unnecessary by counsel, especially where the benefit of doing so would not outweigh the benefit of retaining first and last closing arguments. Testimonial proof of lack of forensic evidence tying Brooks to the murders was not substantially more "exculpatory" than the obvious fact that the State presented no such incriminating forensic evidence to begin with. The state court's conclusion that counsel was not ineffective is fully supported by the record.

In evaluating the performance prong of the *Strickland* there is a strong presumption in favor of competence. The inquiry is "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690. It was not unreasonable, or outside the wide range of professionally competent assistance, for counsel to make the defense case that this lack of evidence gave rise to reasonable doubt, and in doing so, preserve the right to make the final closing argument. *See, e.g.*, *Geralds v. Att'y Gen., Fla.*, 855 F. App'x 576, 588 n.11 (11th Cir. 2021) (unpublished) (finding that strategic decision to forfeit benefits of putting on evidence of lab reports in order to take advantage of the procedure known as the "sandwich," which allowed closing argument before and after the state, was one competent attorneys could have reasonably chosen); *Van Poyck v. State,* 694 So. 2d

686, 697 (Fla. 1997) (losing the opportunity to give two closing arguments was a reasonable tactical reason for limiting the presentation of evidence).

Finally, it is noteworthy, and the state court correctly found, that Brooks affirmatively agreed with the strategy to not present evidence or testify. At trial, defense counsel advised the court in chambers that the defense intended to rest without presentation of any evidence. ECF No. 69-10 at 135. After advising Brooks of his right to testify and present evidence, the trial judge asked Brooks if he concurred in this decision not to do so. He answered, "Yes." ECF No. 69-10 at 141. His agreement with this strategy has not been shown to have been based on deficient advice of counsel. Further, defendant's consent to counsel's strategy makes proof of his claim of ineffective assistance that much more difficult. *See, e.g.*, *Moore v. Balkcom*, 716 F.2d 1511, 1526 (11th Cir. 1983) ("Questions of trial strategy or tactics, particularly when consented to by the defendant, do not constitute a basis for federal habeas relief in the absence of exceptional circumstances."); *Gamble v. State,* 877 So. 2d 706, 714 (Fla. 2004) ("[I]f the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel.").

As the state court concluded, Brooks has not demonstrated counsel's representation on this issue was deficient. *Brooks*, 175 So. 3d at 222. Although the state supreme court did not address lack of prejudice, the state postconviction court concluded that Brooks failed to demonstrate a reasonable probability—one

sufficient to undermine confidence in the outcome—that the result of the trial would have been different had defense counsel presented witnesses to attest to the lack of incriminating forensic evidence. This adjudication was not objectively unreasonable. Further, nothing Brooks has provided here meets the prejudice prong of *Strickland*. Habeas relief on this subclaim is denied.

B. Another suspect

Brooks next contends that trial counsel provided ineffective assistance by failing to present evidence relating to Gerrold Gundy, a person who was initially a suspect in the crimes. He argues that defense counsel could have and should have presented evidence that a confidential informant reported that Gundy was seen riding in a car earlier that day with the same white female driver of the car found at the crime scene; that a K-9 dog tracked footprints near the scene to Gundy's residence; and that a cigarette was found near Gundy's residence that was the same brand found in the victim's car, and that it was not collected or tested. ECF No. 58 at 68.

1. State Court Proceedings

This subclaim was raised in the State postconviction proceeding and an evidentiary hearing was provided. The state court found, based on the testimony at the evidentiary hearing and the evidence at trial, that counsel did not provide deficient performance. The court concluded that the decision not to present additional evidence regarding Gundy as a suspect was reasonable trial strategy and

the decision was expressly agreed to by Brooks. ECF No. 69-35 at 10. On direct appeal, the Florida Supreme Court affirmed, stating:

> Accordingly, we conclude that Brooks' trial counsel made a reasonable, strategic decision to not lose credibility with the jury and forego the ability to present the last closing statement to present evidence that initially appeared to connect Gundy to the murders, but ultimately would have been substantially impeached by the State.

Brooks, 175 So. 3d at 222–23.

2. Clearly Established Supreme Court Law

The Florida Supreme Court correctly identified *Strickland* as the clearly established Supreme Court law governing this claim. *Brooks*, 175 So. 3d at 218–19.

3. Federal Review of Claim

At the postconviction evidentiary hearing, trial counsel Funk testified that the defense had no evidence to show that Gerald Gundy was responsible for the murders and that the State had the ability to rebut any evidence suggesting Gundy was the perpetrator. He recalled that Gundy had a Caucasian girlfriend who drove a red vehicle and carried her child in a car seat in the back, details that also matched Carlson. ECF No. 69-26 at 171–72. As to the K-9 tracking to Gundy's residence, counsel knew that the tracking had not begun near Carlson's car, but started from some distance away. ECF No. 69-26 at 173. Funk said counsel made a tactical decision that it was not worthwhile to present evidence attempting to suggest Gundy

was the perpetrator if it meant losing the final closing argument. ECF No. 69-26 at 175.

Co-counsel Szachacz testified that he was aware that a confidential informant told police that Gundy was Carlson's friend or boyfriend. He recalled that Gundy's actual girlfriend was another Caucasian female who drove a red car with a child seat in the back. ECF No. 69-26 at 283–84. He was also aware that Gundy smoked the same brand of Newport cigarette found near the victim's car at the scene, but DNA testing of the cigarette did not match a comparison sample obtained from Gundy. ECF No. 69-26 at 285. The trial record confirms this recollection, as the State's serology expert testified at trial that the Newport cigarette found near Carlson's car was tested and the DNA did not match Walker, Brooks, or Gundy. ECF No. 69-9 at 270. Szachacz said he knew that the State had the ability to explain away all the evidence relating to Gundy and that Gundy had already been mentioned as another possible suspect during the State's case. He testified that Brooks agreed with the decision not to present further evidence about Gerrold Gundy. ECF No. 69-26 at 284–85.

The postconviction court concluded that it was not unreasonable to avoid the danger of presenting evidence that could be rebutted, which would cause loss of credibility with the jury. The court also noted that during one of the evidentiary hearings, Gerrold Gundy testified that he did not know Rachel Carlson and that he

had a Caucasian girlfriend with light colored hair who drove a red car and had a young child. ECF No. 69-35 at 16. In affirming denial of this subclaim, the State Supreme Court concluded that trial counsel made a reasonable, strategic decision not to lose credibility with the jury by presenting evidence that initially appeared to connect Gundy to the murder but which could be substantially impeached. *Brooks*, 175 So. 3d at 222–23. The court also noted that presentation of evidence to prove Gundy was a viable suspect for the crimes would have attacked the credibility of the state's experts, which was contrary to the defense theory of reasonable doubt based on the fact that qualified experts found no forensic evidence proving Brooks was the murderer. *Id.* at 222. Even if counsel had been deficient in failing to present evidence that Gundy was initially a suspect in the crimes, Brooks has failed to demonstrate a reasonable probability that the result of the trial would have been a different verdict had that evidence been presented and subsequently impeached by the prosecutor. Both prongs of *Strickland* must be met to demonstrate ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687.

In light of the trial record and the testimony at the evidentiary hearing, Brooks has not demonstrated that the state court's adjudication of this subclaim was objectively unreasonable. Counsel has not been shown to have performed deficiently and Brooks has not demonstrated that, but for counsels' decision not to put on

evidence suggesting Gundy as the perpetrator, there exists a reasonable probability of a different result at trial. Habeas relief on this subclaim is denied.

C. Timeline

In this subclaim, Brooks contends that his trial counsel should have presented evidence showing that Brooks could not have committed the crimes based on his locations on the evening of the crime. ECF No. 58 at 71. He notes that the State's witnesses claimed to have seen Carlson's car at the crime scene around 8:30 p.m., and that two men, one with a limp, were seen walking on a street nearby. He contends that counsel could have presented Tim Clark and Laconya Orr to contradict this timeline.

1. State Court Proceedings

In his amended postconviction motion in state court, Brooks contended that trial counsel rendered ineffective assistance by failing to present Laconya Orr to testify that between 8:45 and 9 p.m. on the night of the murders, Walker Davis and a skinny black male came to her house looking for her husband, who was not home, and that the men left on foot. Brooks cited a police report as the basis for this proposed testimony. He also contended in his postconviction motion that Tim Clark saw a black male and the victim Carlson outside the bank where he was working on the night of the murders, but did not identify photos of Davis or Brooks as that black male. ECF No. 69-21 at 20–22.

The postconviction court denied the claim, noting that counsel testified at the evidentiary hearing that they talked extensively about whether to present Ms. Orr but decided not to do so because the State had ample evidence that Brooks was in Crestview that night. ECF NO. 69-35 at 17. As to Tim Clark, the postconviction court cited defense counsel's testimony that Clark told him with certainty that he could identify Brooks as the man with Carlson on the night of the murders, and that the decision not to call Clark was reasonable trial strategy. The Florida Supreme Court affirmed, citing counsel's testimony at the evidentiary hearing that although Clark initially told police he could not identify the person with Carlson on the night of the murder, he later changed his position and stated "with certainty" it was Brooks with Carlson. Defense counsel testified there was no way they could call Clark in light of this statement connecting Brooks with Carlson. *Brooks*, 175 So. 3d at 224. As to presenting Laconya Orr as a witness, the Florida Supreme Court found no deficient performance in failing to present her testimony because counsel testified at the evidentiary hearing that Orr's husband gave a statement to police that placed Davis and Brooks at Orr's house on Eglin Airforce Base slightly after 8 p.m., leaving enough time to drive from there to Crestview, as confirmed by counsel driving that same route. *Id.*

2. Clearly Established Supreme Court Law

The Florida Supreme Court correctly identified *Strickland* as the clearly established Supreme Court law governing this claim. *Brooks*, 175 So. 3d at 218–19.

3. Federal Review of Claim

The state presented evidence that Brooks was in Crestview on the night of the murders. Melissa Thomas testified that Davis and Brooks came to her home, located a few blocks from the crime scene, around 9 p.m. on the night of the murders. She testified, "[t]hey sat down for a minute, and Lamar asked if he could use the bathroom, and he used the bathroom and asked could he smoke a cigarette, and I said yes. He smoked a cigarette and used the telephone." ECF No. 69-8 at 125. Brooks's DNA was on a cigarette found in Melissa Thomas's house. While there that night, Davis also made a call from her house to Rochelle Jones at 9:22 p.m., and she picked the men up in Crestview. Jones testified that she drove to Crestview and picked up Davis and Brooks near the credit union on Dugan Avenue. ECF No. 69-8 at 170. On the way back to Eglin, they were stopped by the police for speeding.

Defense counsel were asked at the evidentiary hearing about their decision not to call these witnesses. As to witness Orr, defense counsel Szachacz testified at the evidentiary hearing that although Ms. Orr told police the men came to her home between 8:45 and 9 p.m., her husband had made statements that it was closer to 8 p.m., and that his recollection was seen as more reliable than hers and made more

sense. Szachacz also testified that the drive from the Orr home to Crestview was essentially a twenty minute drive, as counsel made that trip themselves to determine it. He said counsel did not believe that Ms. Orr's testimony would be helpful in attempting to show Brooks could not have been in Crestview in time to commit the murders and be at Melissa Thomas's house at 9:22 p.m. ECF No. 69-26 at 276.

As to witness Clark, the Florida Supreme Court's conclusion that trial counsel made reasonable strategic decisions not to present his testimony was not objectively unreasonable. Defense counsel Szachacz testified at the hearing that counsel knew Clark told police that he saw Carlson in her car talking to a black male standing outside the car across the street from the bank where he was working between 9 and 10 p.m. on the night of the murders. Szachacz said Clark later narrowed the time to closer to 9 p.m., but could not say the man matched photos of Davis and Brooks. ECF No. 69-26 278–79, 282. That location was three or four blocks from the scene of the crime and about half mile from Melissa Thomas's house. Szachacz testified that Clark told him "with certainty," and that he was 95 percent sure, that the man with Carlson was Brooks. ECF No. 69-26 at 257. Counsel considered this testimony would be more harmful than helpful and "there was no way we can call this gentleman because he was going to hurt Mr. Brooks." *Id.* He testified that both counsel and Brooks discussed and weighed the decision whether it was worth calling this one witness when it would mean the prosecutor would have the last hours of

closing argument with the jury. Szachacz testified that Brooks agreed with the decision not to present Clark. ECF No. 69-26 at 280–81. He said it was clear to him that Tim Clark's testimony would not be useful to the defense. ECF No. 69-26 at 295.

In light of this evidence, the State court's determination that counsel were not deficient in deciding not to present Laconya Orr or Tim Clark to testify was not objectively unreasonable, contrary to the requirements of *Strickland*, or an unreasonable determination of the facts in light of the evidence. "[A] strategic decision not to call a witness whose testimony is not entirely problem-free" does not amount to a deprivation of the Sixth Amendment right to counsel. *Lukehart v. Sec'y, Fla. Dep't of Corr.*, 50 F.4th 32, 48 (11th Cir. 2022). Although the Florida Supreme Court did not expressly reach the prejudice prong in regard to this subclaim, even on de novo review, Brooks has presented nothing to demonstrate a reasonable probability, one sufficient to undermine confidence in the outcome, that but for counsels' decision not to present Orr or Clark, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Habeas relief is denied on this subclaim.

D. Stolen green Nissan

In this subclaim, Brooks contends that trial counsel were deficient in failing to present evidence showing that the Crestview police had an anonymous tip on

April 29, 1996, several days after the murders, that a green Nissan pickup truck "was recovered sometime between Sunday and today" that may have had blood spatter in the interior. ECF No. 58 at 75. The police report indicated that the truck was a suspect vehicle in the double murders.

1. **State Court Proceedings**

This claim was presented in Brooks's state postconviction motion and he was provided a hearing on the claim. The state postconviction court denied the claim, concluding that defense counsel's assessment was reasonable that evidence of the green truck was not useful in any way because it was not connected to the crimes. The court further found that Brooks did not demonstrate that any further investigation of the truck would have rendered this evidence admissible or probative relative to the murders. ECF No. 69-35 at 20. The Florida Supreme Court affirmed denial of relief, citing defense counsels' testimony that nothing connected the stolen Nissan truck to Brooks's case and that Brooks was consulted on the decision not to present evidence of the truck. *Brooks*, 175 So. 3d at 223. The state supreme court found that trial counsel was not deficient in deciding not to present the evidence after making a reasonable assessment of its evidentiary value, and that Brooks did not establish that failure to present the evidence undermined confidence in the outcome of the trial. *Id.*

2. **Clearly Established Supreme Court Law**

The Florida Supreme Court correctly identified *Strickland* as the clearly established Supreme Court law governing this claim. *Brooks*, 175 So. 3d at 218–19.

3. **Federal Review of Claim**

At the evidentiary hearing on this claim, defense counsel Funk testified that to his recollection, the truck was never linked to anything in the case. ECF No. 69-26 at 160. Szachacz testified that he was aware of the anonymous tip regarding the green Nissan truck. ECF No. 69-26 at 258. He said he could not see any way to connect the truck to the crime in any useful way for the defense. Szachacz testified that the decision not to present evidence about the green truck was agreed to by Brooks. ECF No. 69-26 at 285, 298. No evidence was presented at the evidentiary hearing to show that the green truck had any relation to the murders or that further investigation of the green truck by counsel would have uncovered exculpatory evidence.

In light of the evidence presented at the evidentiary hearing, and the evidence presented at trial, Brooks has not shown that the adjudication of this subclaim by the state court was objectively unreasonable or contrary to or an unreasonable application of the United States Supreme Court holdings in *Strickland*. Counsels' decision not to present evidence concerning the anonymous tip about the green truck—or evidence about the green truck itself—has not been shown to be deficient.

The green truck was never tied to the murders and nothing was presented to show that it could have been tied to the murders. Counsel cannot be deficient for deciding not to present evidence that is essentially worthless to the defense and has not been shown to be exculpatory in any way, especially where, as here, presenting such evidence would forfeit the valuable benefit of the last word with the jury. Counsels' decision has not been shown to be outside the "wide range of professionally competent assistance." *Strickland*, 466 U.S. at 689. Further, as the state supreme court concluded, Brooks has not demonstrated a reasonable probability, one sufficient to undermine confidence in the outcome of the trial, that but for counsels' failure to present evidence of the green truck, the jury would have reached a different verdict. Because neither prong of *Strickland* has been proven, habeas relief on this subclaim is denied.

E. Polygraph of Melissa Thomas

In his final Ground I subclaim, Brooks contends that trial counsel rendered ineffective assistance by failing to rehabilitate Melissa Thomas's testimony after she was impeached by the testimony of Agent Haley. ECF No. 58 at 98; ECF No. 73 at 14–17. He also contends that the Florida Supreme Court misapplied the law by not finding a *Giglio* violation where, he alleges, the prosecutor presented technically true but misleading testimony of Agent Haley concerning what Thomas told him. ECF No. 58 at 98–100. Additionally, Brooks suggests in an alternative argument

that the prosecution committed a *Brady* violation by failing to provide Melissa Thomas's polygraph examination report to the defense.[8] Brooks explains, "an additional issue arose during the postconviction evidentiary hearing concern[ing] D-Ex. 17, which contained documents relating to a polygraph examination of Melissa Thomas." ECF No. 58 at 75–76. Brooks states that he "presented an alternative argument that the State failed to disclose material, exculpatory evidence." ECF No. 58 at 26 n.15. To support his *Brady* claim, he cites testimony from the postconviction evidentiary hearing in which trial counsel Szachacz testified that he could not remember the polygraph report, but that he could not say for certain the polygraph report had not been provided. ECF No. 58 at 33–34.

1. State Court Proceedings

The state circuit court denied the *Giglio* claim that the prosecutor failed to correct false testimony of Agent Haley, finding that the testimony was not material under *Giglio*. The postconviction court also found Brooks's *Brady* claim was without merit where counsel did not recall the polygraph report, but the prosecutor testified that it was provided to the defense. As to Brooks's ineffectiveness of counsel claim, the postconviction court found that trial counsel was not deficient and no prejudice was established by counsel's failure to introduce either the polygraph

[8] *See* ECF No. 78-22 at 79 (Report of Examination of Melissa Thomas).

results or Thomas's statement in the polygraph examination that she did not notice whether Brooks changed clothes in her bathroom. ECF No. 69-35 at 21.

The Florida Supreme Court affirmed denial of relief on the ineffectiveness claim, concluding that the polygraph report would not have been admissible and that, even if counsel should have rehabilitated Thomas with the results of the polygraph examination, prejudice was not demonstrated because the testimony whether Brooks changed clothes was of no consequence and did not contribute to the conviction, as the court previously held on direct appeal.[9] *Brooks*, 175 So. 3d at 225 (citing *Brooks*, 918 So. 2d at 201). The court found that failure to present the evidence of Thomas's polygraph answer did not undermine confidence in the proceeding.

The state supreme court did not address the merits of Brooks's *Brady* claim, finding that the claim had been waived. The court found that Brooks "presented no argument on appeal to support the allegation that a *Brady* violation occurred" and that the brief primarily mentioned *Brady* in a footnote. *Brooks*, 175 So. 3d at 233. The court expressly recognized that Brooks was making a *Giglio* violation based on the alleged "misleading" testimony by Agent Haley. *Id.* at 225. The court concluded

[9] The Florida Supreme Court held on direct appeal that the trial court erred in allowing the testimony of Agent Haley to impeach Thomas's trial testimony because her testimony that she could not remember telling Agent Haley that Brooks changed clothes was not inconsistent with her prior statement to him. *Brooks*, 918 So. 2d at 200. The court found that the prosecutor compounded the error by impermissibly relying on the impeachment as substantive evidence that Brooks changed clothes in Thomas's apartment. *Id.* at 201. However, the court found the error harmless beyond a reasonable doubt. *Id.*

that no *Giglio* violation had been demonstrated. The court held that Agent Haley's testimony that Thomas told him in an interview that Brooks changed into shorts in her bathroom was not shown to be false because in the polygraph, Thomas replied in the negative when asked if she "noticed" whether Brooks changed clothes. The court explained, "Thomas never definitively stated that Brooks did not change his clothes in her apartment." *Brooks*, 175 So. 3d at 226. The court further concluded that even if Haley's testimony had been false, it was not material and the error was harmless beyond a reasonable doubt. *Id.*

2. Clearly Established Supreme Court Law

The Florida Supreme Court correctly identified *Strickland* as the clearly established Supreme Court law governing the portion of this subclaim that alleges ineffective assistance of counsel. *Brooks*, 175 So. 3d at 225. The state court also correctly identified *Giglio v. United States*, 405 U.S. 150 (1972), as the clearly established Supreme Court law governing that portion of the claim that the prosecutor presented false or misleading testimony of Agent Haley. The state circuit court addressed the *Brady* claim and correctly identified *Brady v. Maryland*, 373 U.S. 83 (1963), as the established Supreme Court law controlling the claim.

3. Federal Review of Claim

At trial, Melissa Thomas testified in pertinent part that Walker Davis and Brooks came to her house around 9 p.m. on the night of the murders. They both had

on black nylon pants and Brooks had a black backpack. Brooks used the bathroom. ECF No. 69-8 at 124–28. She testified that when she was interviewed by Agent Haley, and when he asked her if Brooks looked any different when he came out of the bathroom, she could not remember what she told him. When asked if she remembered telling Agent Haley that Brooks came out of the bathroom wearing shorts, Thomas answered, "No, I don't remember." ECF No. 69-8 at 132–33. On cross-examination, Thomas agreed that she was "not sure whether Mr. Brooks changed clothes" and did not remember it. ECF No. 69-8 at 137. Later in the trial, the prosecutor called Agent Haley who was allowed to testify for impeachment purposes, over objection, that when he interviewed Melissa Thomas several days after the murders, she told him that when Brooks arrived he was wearing black jogging pants and when he came out of the bathroom, he was wearing shorts and was carrying a backpack. ECF No. 69-10 at 40–41.

In closing argument, the prosecutor made the following arguments, as substantive evidence, that Brooks changed clothes in Thomas's bathroom:

> And what Glenese Rushing [a trial witness] also tells you that's extremely interesting was that one of the men was wearing shorts. She saw that. **One of them was wearing shorts, and that fits right with what Melissa Thomas told Dennis Haley the first time she was ever interviewed, that Lamar Brooks had changed into shorts**. They were standing there at the Animal Hospital while she [Rushing] was at the ATM and she saw Rochelle Jones drive up and pick them up and pull into the Credit Union parking lot . . . .
>
> . . . .

> [Melissa Thomas] told Dennis Haley, **"Lamar Brooks went in that bathroom with a backpack and he came out in shorts. He was in long dark pants before he went in and he came out in shorts**."
>
> . . . .
>
> Dennis Haley. He interviewed Melissa Thomas April 29th, Monday. That's the first time law enforcement had evidence that Davis and Brooks were in Crestview Wednesday night. Melissa, on April 29th said, **"Lamar Brooks had on black jogging pants when he went to that bathroom with a backpack. He came out in shorts with that backpack**." She said no, he didn't leave his black jogging pants in her bathroom. Do you think he flushed them? I'd say a reasonable inference is they left in that backpack.
>
> . . . .
>
> April 24th, 9:22 P.M., Walker Davis and Lamar Brooks are at Melissa Thomas's house, point three-eighths mile, less than four-tenths mile from the murders. Walker Davis calls Rochelle Jones. **Lamar Brooks changes clothes** and makes a phone call.

ECF No. 69-10 at 314–15, 320, 349–50, 357 (bracketed material and emphases added).

The Florida Supreme Court previously held on direct appeal that the trial court erred in allowing Agent Haley to testify for impeachment purposes that Melissa Thomas told him Brooks changed into shorts in her bathroom. The court explained, "[t]he trial court erred in permitting this impeachment of Thomas's testimony. Florida courts have held that a witness's inability to recall making a prior statement is not synonymous with providing trial testimony that is inconsistent with a prior statement." *Brooks*, 918 So. 2d at 200. The court noted that the State "compounded the error by impermissibly relying on the impeachment as substantive evidence in

closing arguments." *Id.* at 201. However, the court found the error harmless and concluded that it was of no consequence to the verdict whether Brooks changed clothes. *Id.*

Brooks argued unsuccessfully in the postconviction circuit court that counsel should have rehabilitated Thomas's trial testimony with evidence of her statement in the polygraph, determined to be truthful, that she did not notice if he changed clothes. ECF No. 69-35 at 21. In the postconviction appeal, the Florida Supreme Court found counsel was not deficient for failing to introduce the polygraph examination results because polygraph evidence is not admissible in Florida. *Brooks*, 175 So. 3d at 225. The court did not discuss whether counsel should have introduced just the prior statement made in the examination that Thomas did not recall noticing whether Brooks changed clothes. The court concluded that even if counsel should have attempted to rehabilitate Thomas with her polygraph, Brooks's claim failed the prejudice prong of *Strickland*. *Id.* The court cited its conclusion on direct appeal that it was of no consequence to the verdict whether Brooks changed clothes, but did not further explain its reasoning why the alleged error of counsel was of no consequence. *Id.* In finding the impeachment of Thomas to be harmless error in the direct appeal, the court relied on the fact that no witness testified that Brooks had blood on his clothes and that "sufficient evidence existed to establish a conspiracy between Gilliam, Brooks, and Davis." *Brooks*, 918 So. 3d at 201. The court did not address

the possible harm created by the prosecutor arguing the impeachment evidence as substantive evidence that Brooks changed clothes in Thomas's apartment, thus leading to the inference that his long pants had blood on them. Brooks now argues that the state court unreasonably determined that trial counsel did not render ineffective assistance by failing to rehabilitate Thomas's trial testimony.

In this case, Brooks has not demonstrated that the alleged error of counsel in failing to rehabilitate Thomas with her statement in the polygraph examination had an actual substantial and injurious effect or influence in determining the verdict. Even without the impeachment of Thomas, and the prosecutor's argument that suggested Brooks changed clothes, the jury had before it sufficient evidence of his guilt, including but not limited to evidence that he conspired with Davis and Gilliam to murder the victims, participated in several unsuccessful attempts to effect the murders, was with Davis in Crestview on the night of the murders, and was identified near the scene of the murders around the timeframe in which the murders were likely committed. Brooks is not entitled to habeas relief based on this subclaim of ineffective assistance of counsel.

As to the *Giglio* aspect of this subclaim—that the prosecutor presented and failed to correct testimony he knew or should have known was misleading by Agent Haley—the claim is without merit. Thomas testified at the retrial in 2002 that she did not recall telling Agent Haley that Brooks changed clothes in her bathroom and

did not recall if he did so. Agent Haley was allowed to testify over objection that she told him in an interview in April 1996, several days after the murders, that Brooks was wearing long pants when he arrived at her residence and was wearing shorts when he came out of the bathroom. Brooks argues that Agent Haley's testimony was misleading, and the state knew it, because she told the polygraph examiner in May 1996 that she did not notice if Brooks changed clothes and the examiner concluded she was telling the truth. These various statements are not clearly contradictory—at one point she recalled a change of clothes but at another point, she did not recall noticing and at trial six years later, she did not recall what she told Agent Haley. They do not establish that the State presented false or misleading testimony in violation of *Giglio*.

Brooks argues that the Florida Supreme Court misapplied *Giglio* by concluding only that the prosecutor did not elicit false testimony from Agent Haley, without reference to whether his testimony was misleading. ECF No. 58 at 98. However, the state court recognized in its decision that Brooks was claiming that the state presented misleading testimony, stating: "Brooks next contends that the prosecutor committed a *Giglio* violation by presenting Agent Haley's allegedly misleading testimony during trial."[10] *Brooks*, 175 So. 3d at 225. Further, the state

[10] The Eleventh Circuit has expressed disagreement that misleading, but literally correct, material testimony necessarily violates *Giglio*. *Geralds v. Att'y Gen., Fla.*, 855 F. App'x 576, 589 (11th Cir. 2021) (unpublished) (distinguishing *United States v. Bagley*, 473 U.S. 667 (1985), and

court made clear that even if the state had presented actually false testimony, the *Giglio* test was not met because the evidence was not material. *Brooks*, 175 So. 3d at 226.

Assuming that the prosecutor knew Thomas was considered truthful by the polygraph examiner in her denial of noticing if Brooks changed clothes, that does not render Agent Haley's testimony concerning what she told him on a different occasion false or misleading. Further, even if a *Giglio* violation has been shown, Brooks has not demonstrated actual prejudice—that the alleged constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict" as required by "*Brecht*."[11] *See, e.g., Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1110 (11th Cir. 2012) (apply *Brecht* standard to *Giglio* claim). Brooks is not entitled to habeas relief on this *Giglio* subclaim.

As to the *Brady* aspect of this subclaim—that the polygraph report was not disclosed to the defense—the state supreme court found Brooks waived this claim by making only a general and conclusory mention of *Brady* in a footnote. *Brooks*,

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Alcorta v. Texas, 355 U.S. 28 (1957)). In response to Geralds' argument that the Florida Supreme Court's *Giglio* analysis was based on an incorrect rule of law that the evidence needed to be "clearly false," the Eleventh Circuit found that the decision was not "contrary to" Supreme Court precedent. *Geralds*, 855 F. App'x at 590.

[11] That the uncorrected misleading testimony is "material" under *Giglio*, meaning that there is any reasonable likelihood that the false [or misleading] testimony could have affected the judgment of the jury, does not satisfy the requirement of *Brecht* that the constitutional error caused actual prejudice and had a substantial and injurious effect on the verdict.

175 So. 3d at 233 (citing *Heath v. State*, 3 So. 3d 1017, 1029 n.8 (Fla. 2009); *Doorbal v. State*, 983 So. 2d 464, 482–83 (Fla. 2009)). For this reason, the claim is unexhausted and barred from federal habeas review. Brooks did not "fairly present" his claim in each appropriate state court, alerting that court to the federal nature of the claim. *See Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Picard v. Connor*, 404 U.S. 270, 277–78 (1971). Because Brooks's *Brady* claim was not properly presented to the state court and can no longer be litigated under state procedural rules, it is considered unexhausted and procedurally barred from federal review.

Even if the claim had been exhausted in the state court, it is without merit. Brooks's counsel from the first trial, Barry Beroset, testified that he turned all his trial files over to Funk and Szachacz when the case was reversed. He remembered being familiar with the substance of the polygraph report although not the specific document. ECF No. 69-26 at 323–24, 341. Brooks's defense counsel Funk testified in the first evidentiary hearing in 2008 that he received discovery documents from the first trial from Beroset and would have reviewed everything he received. He did not recall the polygraph report of Melissa Thomas.[12] ECF No. 78-17 at 160–62, 172.

[12] Counsel stipulated in the 2010 evidentiary hearing that the court could consider the transcribed testimony of defense counsels Funk and Szachacz from the 2008 evidentiary hearing regarding whether they recalled seeing certain documents, including the Thomas polygraph report. ECF No. 68-26 at 110–11.

Defense counsel Szachacz testified in the first evidentiary hearing in 2008 that he did not recall seeing the polygraph report of Melissa Thomas. He believed that if he had the polygraph report, he would have asked her about it. ECF No. 78-18 at 170–72. Szachacz reiterated in the 2010 evidentiary hearing that he did not remember the Thomas polygraph report. ECF No. 69-26 at 249. However, he could not say "with certainty" that it was not provided in discovery and was not provided to him in the trial materials received from the former defense counsel. ECF No. 69-26 at 261–62.

The trial prosecutor Robert Elmore testified in the 2010 evidentiary hearing that he provided all the materials that came in regarding Brooks's case to Brooks's defense counsel of record at the time. He said he specifically disclosed the Thomas polygraph report and the name of the polygraph examiner in discovery in 1996. ECF No. 69-26 at 374–75. Prosecutor Elmore's legal assistant in 1996 testified at the evidentiary hearing that trial file notes indicate that the Thomas polygraph report was included with documents the prosecutor's office provided to Brooks's defense counsel. ECF No. 69-26 at 360.

The state postconviction court denied the *Brady* claim, finding credible the testimony of the prosecutor that the state provided the information to the defense. ECF No. 69-35 at 22. That factual finding is supported by the record and defense counsel conceded that he could not say the report was not disclosed. The state court's adjudication was not contrary to any federal law or an unreasonable determination

of the facts based on the evidence in the state court record. Brooks's *Brady* subclaim is without merit and habeas relief is denied on all Brooks's subclaims in Ground I.

Ground II: Ineffective assistance of trial counsel in failing to present available evidence promised to the jury in opening statement

Brooks contends that trial counsel rendered ineffective assistance by not presenting forensic and other evidence which they referred to in opening statements. In his opening statement, defense attorney Szachacz told the jury about a number of things the jury "would learn" during the course of the trial.

1. State Court Proceedings

Brooks raised this issue in his amended state motion for postconviction relief. After an evidentiary hearing, the postconviction court denied the claim, concluding that counsel's decision not to present any evidence was strategic in retaining the right to the first and final closing argument and was not deficient. The court also found that Brooks failed to show a reasonable probability that the result of the trial would have been different if counsel had presented all the evidence referred to in the opening statement. ECF No. 69-35 at 23–26.

On appeal from denial of postconviction relief, the Florida Supreme Court affirmed. *Brooks*, 175 So. 3d at 226–27. The court noted that it found in Brooks's first claim that trial counsel was not ineffective in not presenting witnesses to testify about forensic evidence and other evidence, and about Jerrold Gundy as another

suspect. *Id.* at 226. The court stated: "In the prior claim, we concluded that trial counsel made reasonable, strategic decisions not to present several pieces of evidence, and at the time Brooks also agreed not to present this evidence." *Id.* The court explained that counsel was not deficient for *failing* to present the evidence, leaving only the question of whether counsel was ineffective for not presenting the evidence after *telling the jury it would be presented*. The state supreme court then reiterated that opening statements are not evidence, but only serve to outline what counsel expects will be established by the evidence. The court re-emphasized that after hearing the State's case, and after counsel and Brooks weighed the benefits of presenting witnesses versus the detriment of losing the final closing argument, it was a reasonable defense strategy based on the procedural rules in effect at the time not to present a case-in-chief. *Id.* at 227. The state supreme court did not address the prejudice prong of *Strickland*.

2. Clearly Established Supreme Court Law

The Florida Supreme Court correctly identified *Strickland* as the clearly established Supreme Court law governing this claim. *Brooks*, 175 So. 3d at 218–19.

3. Federal Review of Claim

At the evidentiary hearing, defense counsel Funk testified that the defense was ready to put on a case if they concluded that was the best course for Mr. Brooks, but

the final decision was made only after the State rested and after what had preceded it was analyzed and discussed. ECF No. 69-12 at 119. He explained:

> I'm sure we took into consideration how the witnesses testified on direct. What Mr. Elmore got out of them, so to speak, on his direct. What we perceived that he missed or did not ask them. How they responded to our cross-examination questions. Taking into account the demeanor of the witness. All those factors and the jury instructions. . . . And these were stabbings. Horrifically bloody scenes. And with all of the FDLE folks doing their job, they could not link Lamar to those homicides and so, of course, we saw that and perceived that as a weakness in the government's case. So when the government rests we evaluate, along with everything else. Okay, how do you think we did in terms of poking holes in the government's case? Is there any doubt raised? Is there - - knowing that Judge Tolton is going to read that lack of evidence instruction, where are we? What do we think? That just posed with, Okay, if we put on a case is that going to take away from our theory? Is it going to add to our theory? If it adds a little, is anything going to be taken away by Mr. Elmore's cross-examination of those folks? . . . It's a very complex decision. That's really what it comes down to. Are we going to gain more by putting on a case or not? And we obviously, since we didn't call witnesses, decided we would lose more than we would gain in this case.

ECF No. 69-26 at 123–25. When asked about the significance of the proffers of testimony that he was not allowed to elicit on cross-examination and ultimately did not present in a defense case, Funk testified that the central consideration was not whether their objections would be reversible, but whether—given the questions asked and answers received—does the gain of presenting the witnesses outweigh the detriment. A consideration in that analysis was how the jury would likely react to cross-examination of those witnesses by the prosecutor. Funk noted that the

prosecutor would have been able to rebut much of what they could have presented in a case-in-chief. ECF No. 69-26 at 126–27.

Defense counsel Szachacz testified at the evidentiary hearing that when he gave the opening statement, and referred to different things the jury would learn, he was anticipating the jury would learn them through direct and cross-examination and not necessarily through a defense case-in-chief. ECF No. 69-26 at 253. He knew at the time that a final decision on presenting a case-in-chief would not be made prior to trial. ECF No. 69-26 at 254. He said, "[b]ut of course when I gave my opening I had a good faith basis to believe that everything I talked about the jury would hear" in one way or another. ECF No. 69-26 at 255.

Review of the opening statement reveals that defense counsel never *promised* to present any evidence or testimony, but only told the jury what he thought they *would learn* during the trial. *See* ECF No. 69-7 at 44–53. During trial, the jury did learn that no forensic evidence connected Brooks to the murders—because no such evidence was presented by the State. The jury heard from Melissa Thomas that she saw no blood on Brooks or Davis and saw none on the couch where they sat. The jury heard testimony that a partially smoked cigarette found near Carlson's car was tested for DNA and was not positive for Brooks, Davis, or Gundy. ECF No. 69-9 at 270. From this, the jury could reasonably conclude that Jerrold Gundy was initially a suspect to the extent that his DNA was tested in relation to the murders. The jury

didn't hear that an unidentified informant told an investigator that she "believed" she saw Gundy in Carlson's car earlier in the day—evidence that the prosecution could have rebutted with evidence that Gundy also had a white girlfriend who drove a red car.[13] Defense counsel Szachacz testified at the evidentiary hearing that counsel was aware of the confidential informant's hearsay statement concerning Gundy prior to trial and were aware that Gundy's actual girlfriend was white and drove a red car with a child seat in the back. ECF No. 69-26 at 283–84. He also testified that Brooks agreed with the decision not to present further evidence about Gerrold Gundy. ECF No. 69-26 at 285, 294. Szachacz testified that with regard to every piece of evidence and every witness, "we, we being Mr. Funk and I and being in consultation with Mr. Brooks, considered all alternatives and in the end made the decision, after you [the prosecutor] rested your case, that the best way to go forward was not to call any witnesses and not to introduce any other evidence." ECF No. 69-26 at 290–91. He testified that Brooks agreed with the decision not to present, in a case-in-chief, any of the evidence about which Brooks complained in his postconviction motion. ECF No. 69-26 at 294. And, none of the evidence that Brooks asserts here should have been presented in a case-in-chief was clearly exculpatory.

[13] At the March 1, 2012, continuation of the evidentiary hearing in state court, Gerrold Gundy testified that he did not know Rachel Carlson. ECF No. 69-34 at 256, 260, 271. He said he did know Shana Tatum, a white female with light colored hair who drove a red or maroon car and had a child who rode in a car seat in the back. Tatum's husband worked on the military base.

Counsels' decision is evaluated with the presumption that it constituted sound trial strategy and is not assessed through the distorting lens of hindsight. *Strickland*, 466 U.S. at 689. The Eleventh Circuit has stated: "Considering the benefit of having the first and last word before the jury, balanced against the limited exculpatory value of the evidence that [petitioner] cites in this claim, we cannot say that counsel's performance, including in investigation and preparation for trial, amounted to incompetence under prevailing professional norms." *Geralds v. Att'y Gen., Fla.*, 855 F. App'x 576, 594 (11th Cir. 2021) (unpublished) (quotations omitted). In the present case, counsel testified he had a good faith belief that the jurors would learn about the evidence he discussed in opening statement one way or another, including through cross-examination. That is, until he was prohibited by the prosecutor's strategy and objections during cross-examination from eliciting the evidence in that manner. At the conclusion of the State's case, counsel and Brooks had to evaluate and weigh the benefit of presenting evidence that they knew, in some instances, the prosecution could rebut against the detriment of losing the final closing argument.

In *Berry v. Ferrell*, 201 F. App'x 746 (11th Cir. 2006) (unpublished), the habeas petitioner alleged ineffective assistance of counsel where defense counsel told the jury in opening statement that they would hear from a potential alibi witness, but later decided not to call that witness. The state court concluded that defense counsel's decision not to call the witness was a reasonable strategic decision and the

federal district court concluded the state court's decision was not contrary to or an unreasonable application of federal law. *Id.* at 747. The Eleventh Circuit agreed that the state court's determination that counsel was not ineffective for failing to call the witness identified by counsel in the opening statement was not contrary to or an unreasonable application of *Strickland*. "[T]he evidence does not clearly and convincingly show the attorneys did not subsequently determine that it would be more beneficial to Berry's defense not to call [the potential witness] in light of the evidence presented during trial. As such, the court reasonably applied *Strickland*'s strong presumption of effective performance and concluded that Berry failed to establish his ineffective assistance claim." *Id.* at 748; *see also Jones v. Dugger*, 928 F.2d 1020, 1026 n.8 (11th Cir. 1991) (holding that counsel not deficient for not calling witness after concluding the witness was unreliable, despite telling the jury in opening statement that the witness would be called).

The State supreme court did not expressly reach the issue of prejudice under *Strickland* in reviewing Brooks's claim that trial counsel was ineffective for having mentioned certain evidence in opening statement that, for strategic reasons, was not presented in a defense case-in-chief. The state postconviction circuit court did, however, conclude that Brooks failed to show a reasonable probability that presentation of the evidence at issue in a defense case-in-chief would have produced a different result at trial. ECF No. 69-35 at 26.

Even if the prejudice prong is reviewed de novo, Brooks has not demonstrated a reasonable probability—one sufficient to undermine confidence in the result—that the result of the trial would have been different if such evidence had been presented in a defense case-in-chief. The jury knew there was no forensic evidence presented to tie Brooks to the murders and this point was hammered hard during defense counsel's closing arguments. However, the jury heard testimony of Mark Gilliam that Davis offered Brooks a substantial sum of money to murder Carlson, who was after Davis for money, and that in the plot Gilliam would act as getaway driver. Gilliam also testified that he, Davis, and Brooks made two unsuccessful attempts to set up the murder before Gilliam left town. This was corroborated in part by a state trooper who stopped Carlson's car, in which a black male was a passenger, for speeding during the first attempt when Gilliam and Brooks were following in Gilliam's car. Testimony established that Brooks was in Crestview in the vicinity of the murders around the time of the murders. Eyewitnesses placed him in Crestview that night and DNA placed him in Melissa Thomas's residence, at a time consistent with the murders, where a call was made to Rochelle Jones to pick them up nearby. Evidence was presented that Jones did so. The fact that Brooks and Davis lied to police, first saying they were never in Crestview that night, did not add any credibility to the defense theory that Brooks did not murder Carlson and her child. *See Brooks*, 175 So. 3d at 211–14 (discussion of the evidence).

Additional evidence highlighting that no blood was found on Brooks's clothing and personal items later seized from him or on the couch cuttings from Melissa Thomas' couch, or that police may have considered another suspect who hearsay placed in a car which the informant thought was Carlson's, would not have diminished the evidence of the plot and the efforts to murder Carlson and her child. Even if counsel had presented a defense case and lost the right to both the first and last closing argument, there is no reasonable probability that the result of the trial would have been different.

Brooks has not demonstrated that the adjudication of the state court finding counsel not ineffective in deciding to forego a case-in-chief and retain the final closing argument was objectively unreasonable, contrary to or an unreasonable application of Supreme Court precedent, or an unreasonable determination of the facts in light of the evidence. Habeas relief on this claim is denied.

Ground III: Ineffective assistance of trial counsel by failing to investigate and present available exculpatory evidence

Brooks contends that trial counsel rendered ineffective assistance by failing to investigate and present exculpatory evidence. He cites counsel's failure to present: (1) testimony of Antonio Orr and Laconya Orr, cross-examination of Irving Westbrook, and presentation of the statement of Shana Tatum, all on matters bearing on the timeline for the murders; (2) evidence of Rachel Carlson's encounter with a

threatening person some days before the murders; (3) cross-examination of Mark Gilliam concerning whether his prosecution by the Army was delayed in exchange for his testimony; (4) cross-examination of insurance agent Mantheny on details of Davis obtaining the life insurance policy on the infant victim; and (5) testimony of Shameka McQueen at the evidentiary hearing on newly discovered evidence concerning when Gerrold Gundy knew Ira Ferguson.

1. State Court Proceedings

Exhaustion

Respondent contends this claim is unexhausted and thus procedurally barred. Brooks concedes that this claim was not presented in state court postconviction proceedings, but requests that this Court allow his unexhausted claim pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). He also argues in his second amended petition that the evidence he cites should be presented in an evidentiary hearing in this court and then considered, along with the evidence that was presented in the state postconviction proceedings and at trial, to determine the merits of his claims. ECF No. 58 at 124.

In his reply, Brooks recognizes the United States Supreme Court's decision in *Shinn v. Ramirez*, 142 S. Ct. 1718, 1734 (2022), decided after the filing of his second amended petition and after the Respondent's answer. In *Shinn*, the Supreme Court held that 28 U.S.C. § 2254(e)(2) precludes a district court from "considering

evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." *Id.* at 1734. Under *Shinn*, Brooks has not established the right to present, in a hearing in this court, evidence not presented in state court for consideration on the merits of this or any other of his pending claims. Despite this fact, Brooks contends that the evidence should be presented in an evidentiary hearing and considered "due to his actual innocence." ECF No. 73 at 21. He does not explain whether he is referring to his pending freestanding claim of actual innocence in Ground VIII, *infra*, or whether he is referring to proving actual innocence in relation to a claim of fundamental miscarriage of justice, a narrow exception acting as a gateway to review when a petitioner cannot demonstrate cause to excuse a procedural default. In the first instance, as discussed *infra*, there is no clear federal right to a freestanding claim of actual innocence in federal habeas. *See McQuiggin v. Perkins*, 569 U.S 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.").

As to the second instance, where "actual innocence" is cognizable as a gateway to review when the petitioner cannot show cause for the procedural default, the Supreme Court has explained that the petitioner must make a "credible showing" of actual innocence. *Id.* To make a credible showing of actual innocence, a petitioner must present new reliable evidence that was not presented at trial, and "must show that it is more likely than not that no reasonable juror would have convicted him in

the light of the new evidence." *Id.* at 398. And, in deciding if actual innocence is proven for its use as a gateway, the court "must consider all the evidence, old and new, incriminating and exculpatory." *House v. Bell*, 547 U.S. 518, 537–38 (2006) (quotation omitted). Proving actual innocence in this context is difficult—such a case is "exceptional" and the evidence must be "compelling." *Id.* at 522. Such a case is also "extremely rare" and the actual innocence exception should "only be applied in the extraordinary case." *Schlup*, 513 U.S. at 321. "Actual innocence" means factual innocence, "not mere legal insufficiency." *See Bousley v. United States*, 523 U.S. 614, 623 (1998). The evidence Brooks seeks to submit does not show actual, factual innocence, but merely presents possible inconsistencies in or fuller explanation of evidence presented at trial.

Respondent is correct that this claim is unexhausted and therefore procedurally defaulted. Brooks has not provided any basis, nor has he attempted to do so, on which to find cause for the failure to exhaust this claim under *Martinez v. Ryan*, 566 U.S. 1 (2012). The Supreme Court in *Martinez* held that that claims of ineffective assistance of trial counsel that were not exhausted in state court may be heard in federal habeas if the claims are substantial and if the petitioner demonstrates cause and prejudice. *Id.* at 9. The Supreme Court has now instructed:

> Often, a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to introduce new evidence to support it. Under the Antiterrorism and Effective Death

> Penalty Act of 1996 (AEDPA), the standard to expand the state-court record is a stringent one. If a prisoner has "failed to develop the factual basis of a claim in State court proceedings," a federal court "shall not hold an evidentiary hearing on the claim" unless the prisoner satisfies one of two narrow exceptions, see 28 U.S.C. § 2254(e)(2)(A), and demonstrates that the new evidence will establish his innocence "by clear and convincing evidence," § 2254(e)(2)(B). In all but these extraordinary cases, AEDPA "bars evidentiary hearings in federal habeas proceedings initiated by state prisoners." *McQuiggin v. Perkins*, 569 U.S. 383, 395, 133 S. Ct. 1924, 185 L.Ed.2d 1019 (2013).

Shinn, 142 S. Ct. at 1728. The Supreme Court made clear that ineffective assistance of collateral counsel in failing to develop the record in postconviction does not satisfy the "cause" requirement of *Martinez*. As harsh as this sounds, the Supreme Court made clear that collateral counsel's negligence is ascribed to the defendant. *Id.* at 1735. Thus, in AEDPA's terms, a prisoner fails "to develop the factual basis of a claim" even when his state post-conviction attorney was negligent. Failure of postconviction counsel to develop the record does not open the door to an evidentiary hearing in federal court to present that evidence for consideration on the merits. This bar applies to evidence presented in a "*Martinez* hearing" as well. So even if Brooks were to submit this evidence under *Martinez* in some effort to prove cause and prejudice for the procedural default, *Shinn* would not allow that evidence to be used to determine the merits of the ineffective assistance of counsel claim.

If Brooks is seeking to excuse the procedural default based on "actual innocence" as a gateway to review, language in *Shinn* suggests that evidence

submitted to establish "actual innocence" for gateway purposes may not be used to consider the unexhausted claim on the merits. The Court in *Shinn* stated in regard to new evidence presented in a *Martinez* hearing, "when a federal habeas court convenes an evidentiary hearing *for any purpose*, or otherwise admits or reviews new evidence *for any purpose*, it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in § 2254(e)(2) are satisfied." *Shinn*, 142 S. Ct. at 1738 (emphasis added). Nothing has been presented demonstrating that the provisions of § 2254(e)(2) have been met to allow for an evidentiary hearing or consideration of new evidence cited by Brooks that was not presented in state court.[14]

Nothing has been presented to support a finding of "cause" for the failure to exhaust this claim in state court or that the claim is "substantial" and has "merit" as required by *Martinez*. *Martinez*, 566 U.S. at 14. In addition, as discussed *infra*, the claims are not substantial or meritorious and do not show Brooks's actual innocence to allow review under the "actual innocence" gateway. The claim is unexhausted and procedurally defaulted, and Brooks cannot return to state court in order to exhaust

[14] 28 U.S.C. § 2254(e)(2) provides that if the petitioner has failed to develop the factual basis of a claim in state court, the federal court shall not hold an evidentiary hearing on the claim unless the petitioner shows that the claim relies on a new, retroactive rule of constitutional law or relies on a factual predicate that could not have been discovered by due diligence *and* the facts underlying the claim would establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found petitioner guilty.

this claim. For the reasons set forth above, Brooks is not entitled to an evidentiary hearing, nor is he entitled to habeas relief on this claim and it is denied.

2. Clearly Established Supreme Court Law

The state courts did not have an opportunity to consider this ineffective assistance of counsel claim or the specific evidence he cites in this ground for relief. Generally, as the state court recognized, *Strickland* is the clearly established Supreme Court law governing ineffective assistance of counsel claims. *See Brooks*, 175 So. 3d at 218–19; *see also* Final Order Denying Defendant's Amended Motion for Postconviction Relief, ECF No. 69-35 at 9–10.

3. Federal Review of Claim

Even if this claim were not procedurally barred, and even if the evidence proposed by Brooks could be considered in reviewing the merits of his ineffective assistance of counsel claim, the evidence would not demonstrate that, but for counsel's failure to investigate and present the evidence, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

Brooks argues that counsel should have presented Laconya Orr to testify that Davis and another smaller man came to her house on Eglin Air Force Base on the night of the murders asking to see her husband Antonio, who was not home. She told police that the men arrived around 8:30 to 8:45 p.m., and that her husband had left at approximately 8:30 p.m. Brooks contends that this evidence would have shown

that Brooks and Davis could not have gotten to Crestview in time to kill the victims and be at Melissa Thomas's house at 9:22, when they placed phone calls from there. ECF No. 58 at 16–17. Brooks contends that trial counsel should have spoken to Ms. Orr to determine how she fixed the time of Davis and Brooks's arrival at her home and that the failure prejudiced Brooks. This claim ignores the fact that there was no exact time determined for the deaths. Defense counsel Szachacz testified at the evidentiary hearing that he was aware of Ms. Orr's statements about the time of the visit by Brooks and Davis, but he also recalled her husband, Antonio Orr, reporting them at the house closer to 8 p.m. Counsel testified that the exact time of death was unknown, which became a double-edge sword for counsel in preparing their strategy. He said "we talked about it extensively" but "time was not going to win the day for the defense." ECF No. 69-26 at 155–56. Defense counsel Szachacz and Funk were aware that it was essentially a 20-minute drive from Eglin, where Orr lived, to Crestview because they had made that same drive. The drive time indicated that Brooks and Davis could have been at the Orr's house around 8 p.m., driven to Crestview where the murders occurred, and be at Thomas's house by 9:22 p.m. ECF No. 69-26 at 276. Szachacz testified that he recalled that Antonio Orr's statements were more reliable and made more sense than Ms. Orr's concerning when Brooks and Davis would have been at their home. Even if Ms. Orr had testified at the retrial, her husband's testimony could have been presented to rebut the timeline her

testimony established. Brooks has not demonstrated a reasonable probability, one that undermines confidence in the outcome, that but for counsels' failure to present testimony of Laconya Orr, the result of the proceeding would have been different.

Brooks contends that counsel should have more fully cross-examined witness Irving Westbrook, who testified that he was "hanging out" in an area near some clubs and a bar on the night of the murders. He testified that he saw the victim's car parked at the location of the crime earlier in the night, at "probably about 8:00 or 8:30, somewhere around about that time." ECF No. 69-7 at 80–81. He was not wearing a watch. ECF No. 69-7 at 94. He later agreed, after his recollection was refreshed from his statement to officers, that he first saw the car about 8:30 p.m. ECF No. 69-7 at 108.

Westbrook testified he met his cousin Kea Bess on the street and was walking with her when he saw two men coming up the street. He said one man had a limp and neither man had on a shirt. ECF No. 69-7 at 89. Bess later testified at trial that she had met Walker Davis before and he had a cast on his leg. She said that on the night of the murders, she met her cousin Irving Westbrook on the street and also saw Davis, who was wearing a cast, and another man walking south on Booker Street. One of the men was carrying a bag. ECF No. 69-8 at 110.

Westbrook further testified that he visited a friend at his residence and several hours later, they left on foot. He did not know the exact time, but it was getting late

when they went back to the area where he had seen the victim's car. It was still there, with its lights still on and engine running. ECF No. 69-7 at 98. He and his friend Charles walked by the car and noticed the baby in the car seat in the back and a woman slumped over in the front. He tapped on the window but no one moved. ECF No. 69-7 at 99–100. He and his friend left to find a telephone to call 911.

Brooks contends defense counsel should have cross-examined Westbrook to bring out testimony similar to what he testified at Brooks's resentencing some years later that the man with the limp had "twists" his hair. Brooks argues that counsel could have shown that neither Brooks nor Davis wore their hair in twists at the time of the crimes.[15] Even if this cross-examination had occurred, Kea Bess testified that she knew Davis and that the man she saw on the street with the cast on his leg was Davis. Brooks has not demonstrated a reasonable probability that, but for counsels' failure to elicit testimony from Westbrook that one of the men had twists in his hair, the result of the proceeding would have been different.

Next, Brooks suggests, as he did in Ground One, that defense counsel should have presented evidence that Gerrold Gundy was an alternative suspect based on "reports that Rachel Carlson was seen with Gerrold Gundy at approximately 5:30 p.m. on April 24th." ECF No. 58 at 119. One stumbling block to making Gundy an

[15] At the resentencing hearing, Westbrook said the man with the limp had "twists or rubber bands or something" in his hair. ECF No. 78-51 at 13.

alternative suspect was the fact that he also had a white girlfriend who drove a red or maroon car with a child seat in the back. Brooks contends that counsel should and could have presented evidence that Gundy's girlfriend, Shana Tatum told police she was not in Crestview, or with Gerrold Gundy, on April 24, 1996, the day of the murders. Even if Tatum was not with Gundy on the day of the murders, that is not proof that Gundy was with Rachel Carlson, whom he denied knowing. At the evidentiary hearing Gundy denied knowing Rachel Carlson and denied being with her on the day of the murders. This Tatum evidence does not demonstrate that but for counsels' alleged error, there is a reasonable probability that the jury would have acquitted Brooks of these murders.

Brooks further contends that defense counsel should have presented evidence that Rachel Carlson told some friends that a few days before the crimes she had a "run-in" with a man in a truck who gave her a threatening look. ECF No. 58 at 119. The notes Brooks refers to state that Carlson told a colleague that when she was driving with Davis as a passenger, a truck pulled up next to her and the man looked at her like he wanted to kill her, but saw Davis and drove away. ECF No. 78-25 at 25. Brooks relates that trial counsel in the first trial tried to admit Carlson's hearsay statements about the encounter, but the trial court ruled them inadmissible hearsay. *See* ECF No. 78-25 at 47–58. He now argues that the statements would have been admissible, although he fails to support that contention with applicable authority. He

cites *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). ECF No. 58 at 120. In *Chambers*, the Supreme Court held that rules of evidence should not be "mechanistically" applied if doing so prohibits a defendant's constitutional right to present "critical evidence" and a complete defense. *Id.* at 302–03. In *Chambers*, at issue was a declarant's out-of-court confession which the Court found admissible because it (1) was spontaneously made shortly after the crime; (2) was corroborated by other evidence; (3) was self-incriminatory and against self-interest; and (4) the hearsay declarant was in court and could be cross-examined. *Id.* at 300–01. Chambers cautioned:

> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

Id. at 302–03. In the present case, it is not certain that Carlson's hearsay statements about a man who gave Carlson a threatening look—not really evidence of a "run-in"—would have been admitted under the *Chambers*' criteria, even if defense counsel offered them in the retrial.

Brooks has not demonstrated a reasonable probability, as defined by *Strickland*, that but for defense counsel's failure to offer this hearsay evidence at the retrial, the result of the proceeding would have been different. Habeas relief is denied on this aspect of his claim.

The next unexhausted sub-claim that Brooks presents concerns counsel's failure to impeach the critical testimony of Mark Gilliam with information concerning the prosecutor's communications with the Army, of which Gilliam was a member, suggesting a delay in Gilliam's prosecution or discharge until after Brooks's trials. ECF No. 58 at 122. In the communications cited by Brooks, the state prosecutor indicated that it was his understanding the Army was considering prosecuting Gilliam for conspiracy to commit murder and it was requested that such be delayed until after the trials to avoid alienating Gilliam or affecting his ability to appear for trial. The response from the Army stated that it did not intend to prosecute Gilliam before the trials of Davis and Brooks and would make a determination whether to move forward with charges against Gilliam after the trials. The Army response also asked that copies of the trial transcripts and evidence be provided. ECF No. 58 at 121. These communications, and the fact that the Army already planned to wait until after the completion of the trials to possibly prosecute, was not clearly impeaching as to Gilliam's testimony of the conspiracy. They indicate no quid pro quo, and one is not apparent, where it is clear the Army intended to prosecute Gilliam

if the trial documents revealed grounds to do so. If anything, the Army's response would have given Gilliam a reason to deny the conspiracy, not inculpate himself along with Brooks and Davis. Brooks has not demonstrated a reasonable probability that but for defense counsel's failure to attempt to impeach Gilliam with this information, the result of the proceeding would have been different. Habeas relief is denied on this aspect of his subclaim.

In his next unexhausted claim. Brooks contends that defense counsel should have investigated and had insurance agent Mantheny fully explain the circumstances surrounding Davis's purchase of a life insurance policy on the infant victim. ECF No. 58 at 123–24. He contends that if the jury heard that Davis wanted to insure his wife, himself, his children, as well as Carlson's daughter, whom he referred to as his goddaughter, the policy would not have appeared as "sinister." Brooks contends that Mantheny could have explained that Davis missed several appointments and did not seem anxious to obtain the policies. Brooks argues that if all this information had been elicited at trial, the result of the proceeding would likely have been different.

The trial court admitted evidence of this life insurance policy as relevant to the possible source of funds which Davis had promised Brooks for his part in the conspiracy. The Florida Supreme Court agreed that under Florida law, it was not an abuse of discretion to admit evidence of the policy for the purpose of establishing the source of the funds. *Brooks*, 918 So. 2d at 188. Even if the jury heard that Davis

insured himself and his family, and heard the other details of his actions in purchasing the policy, and even if the prosecutor had not made comments suggesting the policy showed Davis's premeditation, this evidence does not demonstrate a reasonable probability sufficient to undermine confidence in the verdict that the jury would have concluded Brooks did not conspire and did not carry out the murders. Habeas relief on this aspect of Ground III is denied.

Finally, Brooks contends that *postconviction counsel* should have presented the testimony of Shameka McQueen at the evidentiary hearing held in 2010 to prove that Ira Ferguson—the subject of the newly discovered evidence claim—knew Gerrold Gundy as early as 1999. He does not contend that *trial counsel* was deficient in regard to Shameka McQueen. He does not offer this evidence directly in support of the ineffectiveness of trial counsel, but appears to suggest that McQueen's testimony would have helped support a newly discovered evidence claim regarding Ira Ferguson. Ferguson came forward with an affidavit in 2010, long after the trial, after seeing Davis in prison. Ferguson testified at a final evidentiary hearing on the newly discovered evidence claim that he knew Gerrold Gundy in 1996 and saw him with Rachel Carlson at a club in Crestview just before 11 p.m. on the night of the murders. ECF No. 69-34 at 90–91. The state postconviction court found that Ferguson's testimony was "thoroughly impeached" at the evidentiary hearing. ECF No. 69-35 at 39. The Florida Supreme Court found that Ferguson's testimony was

not credible and was not corroborated. *Brooks*, 175 So. 3d at 232. Even if McQueen had testified at the evidentiary hearing that Ferguson knew Davis in 1999, three years after the murders, that would not have overcome the impeachment and lack of credibility of Ferguson. Brooks has not demonstrated that the testimony of McQueen would have created a reasonable probability of a different result at trial. Brooks is not entitled to habeas relief on this or any of the other subclaims in Ground III and habeas relief is denied on this ground.

Ground IV: Ineffective assistance of appellate counsel in failing to raise meritorious issues regarding the denial of confrontation of witnesses

Brooks contends in this claim that appellate counsel provided ineffective assistance on direct appeal by not arguing that Brooks was denied his constitutional right to confront witnesses, to-wit: Melissa Thomas, an FDLE crime scene technician, Agent Mike Bettis, Officer Steve Whatmough, FDLE Analyst Jack Remus, and Investigator Jerome Worley. ECF No. 58 at 127. He contends that the trial court constitutionally erred by precluding him from cross-examining these witnesses on matters outside the scope of their direct testimony.

1. State Court Proceedings

Brooks raised this claim in a petition for writ of habeas corpus filed in the Florida Supreme Court. ECF No. 69-39 at 2. The state court denied the petition, citing section 90.612(2), Florida Statutes, a provision of the Florida Evidence Code

which provides that cross-examination is limited to the subject matters discussed on direct examination. *Brooks*, 175 So. 3d at 236. That statute further provides that the trial court may, in its discretion, allow cross-examination on additional matters. The Florida Supreme Court held that appellate counsel's performance was not deficient in failing to argue the trial court abused its discretion in limiting cross-examination to matters within the scope of direct examination. *Id.* at 237. In denying the claim, the state court also cited Brooks's failure to present any precedent demonstrating that the ruling of the trial court violated his constitutional right to cross-examination. Finally, the court concluded that Brooks failed to demonstrate that appellate counsel's alleged error compromised the appellate process to such a degree that the confidence in the correctness of the result is undermined. *Id.*

2. Clearly Established Supreme Court Law

To prevail on a claim of ineffective assistance of appellate counsel, the petitioner must satisfy both prongs of the *Strickland* test. *See, e.g.*, *Smith v. Robbins*, 528 U.S. 259, 289 (2000); *Philmore v. McNeil*, 575 F.3d 1251, 1264 (11th Cir. 2009). Under *Strickland*, prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* The Florida Supreme Court correctly recognized that the Supreme Court law governing this claim required the

court to determine (1) whether the alleged omission is of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and (2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Brooks*, 175 So. 3d at 234. Although the court did not expressly cite *Strickland* in stating the standard, the court did cite its decision in *Lynch v. State*, 2 So. 3d 47 (Fla. 2008), which explained that the standard cited there—the same standard cited in the *Brooks* decision—was "[c]onsistent with the *Strickland* standard." *Id.* at 84–85. Thus, the Florida Supreme Court correctly recognized the *Strickland* standard as the clearly established Supreme Court law governing this claim.

3. Federal Review of Claim

Appellate counsel need not raise every nonfrivolous claim in a merits brief but may winnow out the weaker arguments. *Jones v. Barnes*, 463 U.S. 745, 754 (1983). Federal courts recognize that state courts are the final arbiters of evidentiary law and federal courts must respect that law absent a constitutional violation. *Breedlove v. Moore,* 279 F.3d 952, 963 (11th Cir. 2002). Brooks has not demonstrated that the state court's reliance on the provision of the Florida Evidence Code governing cross-examination in evaluating his ineffective assistance of appellate counsel claim was an objectively unreasonable application of *Strickland*.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. Barring a Confrontation Clause violation as identified in *Crawford v. Washington*, 541 U.S. 36 (2004), the principle protection derived from this right is the opportunity for effective cross-examination of the prosecution's witnesses—"not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). The right to cross-examination is intended to test the reliability of the witness's testimony. *Crawford,* 541 U.S. at 61. Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits. *See Al-Amin v. Warden Georgia Dep't of Corr*., 932 F.3d 1291, 1302 (11th Cir. 2019) (quoting *Van Arsdall*, 475 U.S. at 679).

In determining if the state court unreasonably applied the *Strickland* standard to a claim of ineffective assistance of appellate counsel, the inquiry requires the court to consider the merits of the omitted claim because Petitioner must show that there is a reasonable probability of success on appeal. *See Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991). Under section 90.612(2), Florida Statutes, cross-examination of a witness is limited to the subject matter of the direct examination and to matters affecting the credibility of the witness, although the court may, in its discretion,

permit inquiry into other matters. Limitation of cross examination is subject to an abuse of discretion standard, *Gosciminski v. State*, 132 So. 3d 678, 706 (Fla. 2013), and subject to the requirements of the Sixth Amendment. A court abuses its discretion "when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Huff v. State,* 569 So.2d 1247, 1249 (Fla. 1990); *Parker v. State*, 89 So. 3d 844, 870 (Fla. 2011).

The purpose of cross-examination is "typically to impeach or discredit the witness." *United States v. Kaley*, 760 F. App'x 667, 679 (11th Cir. 2019) (unpublished) (citing *United States v. Lankford*, 955 F.2d 1545, 1548 (1992)). Brooks complains that he was not allowed to cross-examine these witnesses on matters outside the scope of direct-examination in order to elicit evidence he says supported the theory of his defense, but has not shown that he was limited in cross-examining the witnesses on any matters testified to on direct-examination or on any matters impeaching or discrediting them.

Even assuming appellate counsel should have raised the claim on direct appeal challenging the trial court's application of section 90.612(2), Brooks must still demonstrate a reasonable probability—one sufficient to undermine confidence in the result—that had the claim been raised, the result of the appeal would have been different. *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000). In order to have prevailed

in this claim on direct appeal, appellate counsel would have had to convince the court that the trial judge abused his discretion in limiting cross-examination to the matters elicited on direct examination. In deciding Brooks's claim of ineffective assistance of appellate counsel, the Florida Supreme Court held that the trial court was not required to allow defense counsel to cross-examine the witnesses outside the scope of direct examination. *Brooks*, 175 So. 3d at 236. Based on this ruling, there does not appear to be a reasonable probability that the Confrontation Clause claim would have received a favorable result if it had been presented on direct appeal. *See Herring v. Sec'y, Fla. Dep't of Corr.*, 397 F.3d 1338, 1354–55 (11th Cir. 2005) ("The Florida Supreme Court has already told us how the issues would have been resolved under Florida state law had [petitioner's counsel] done what [petitioner] argues he should have done."). Nor is it likely that if the claim had been raised on direct appeal, the state court would have found a violation of the Confrontation Clause. *See, e.g.*, *United States v. Leavitt*, 878 F.2d 1329, 1339 (11th Cir. 1989) ("[A] limitation on cross-examination does not violate the sixth amendment unless the excluded testimony would have affected the jury's impression of the witness' credibility." (citing *Van Arsdall,* 475 U.S. at 681)).

Confrontation Clause violations are subject to harmless error review. *Van Arsdall*, 475 U.S. at 684; *Rodgers v. State*, 948 So. 2d 655, 665 (Fla. 2006). Even if appellate counsel had raised the issue of limitation of cross-examination on direct

appeal, and even if the state court had found a Confrontation Clause violation, the court would likely have found the error harmless beyond a reasonable doubt. Certainly, when brought as a claim of ineffective assistance of appellate counsel, the state court found the alleged error did not undermine confidence in the verdict. It is unlikely the court would have found in the direct appeal that limitation of cross-examination to matters testified to on direct-examination contributed to the guilty verdict.

Brooks contends his defense was harmed when he was prohibited from asking Melissa Thomas if law enforcement took cuttings from her couch to be tested for blood. He was also precluded from asking a FDLE crime scene technician what he did at Thomas's house regarding the investigation. He also sought to cross-examine Mike Bettis, the agent who seized Brooks's backpack containing a number of personal items, including a pair of nylon pants, from Brooks in Philadelphia. Brooks argues that the cross-examination of these witnesses would have proved that no blood was found on Melissa Thomas's couch after Brooks sat on it or on the nylon pants he may have worn on the night of the murders and which the prosecutor suggested in closing argument would have been in the backpack. ECF No. 58 at 133–34. Even without this cross-examination, the jury was keenly aware that the State presented no evidence of blood on Thomas's couch or on any clothing relevant to the crime.

Brooks contends that his defense case was harmed by the inability to cross-examine Officer Whatmough regarding Gerrold Gundy as an alternate suspect, but does not specify what evidence would have been elicited. At the trial, Officer Whatmough testified about taking Walker Davis to the hospital to have his leg cast removed and identifying the note that he saw fall from his cast during that procedure. He also described the writing on the notes. ECF No. 69-8 at 196–204. On cross-examination, defense counsel asked Officer Whatmough whether he knew the name Gerrold Gundy. ECF No. 69-8 at 207. Brooks notes that the prosecutor objected to the question as being outside the scope of direct, but the judge allowed Officer Whatmough to answer that he had heard the name in his investigation. ECF No. 69-8 at 206–07. Brooks does not indicate what further cross-examination of Officer Whatmough was denied and should have been appealed.

Brooks also argues that appellate counsel should have appealed the denial of cross-examination of Investigator Jerome Worley, who testified on direct-examination about the location where the murders occurred, areas relevant to the investigation of the deaths, and persons he had interviewed. ECF No. 69-10 at 103–04. Defense counsel did not attempt to cross-examine Investigator Worley, but based on earlier rulings that he could not inquire outside the scope of direct-examination, proffered Investigator Worley's testimony. On proffer, counsel elicited testimony that a confidential informant told him she believed she saw Gerrold Gundy in the

victim's car earlier in the day of the murder. ECF No. 69-10 at 127. Officer Worley testified that he attempted to speak with Gerrold Gundy at his grandmother's residence where he lived, which was about one-half mile from the crime scene. While there, an investigator with him noticed a partially smoked Marlboro Light cigarette and a boot print by the driveway. ECF No. 69-10 at 123. Investigator Worley was not asked on proffer to relate any conversation that he may have had with Gundy and only stated that he did not get to search the grandmother's home.

Investigator Worley also testified on proffer that he noticed a partially smoked cigarette near the door of Carlson's car. ECF No. 69-10 at 122.[16] Officer Worley was also asked on proffer if a tracking dog was at the scene of the murders, to which he answered yes, but no further elaboration was requested or given. ECF No. 69-10 at 131–32. Even if appellate counsel had presented the denial of Investigator Worley's cross-examination as an issue on direct appeal, and even if the state court had found error in its exclusion, it is unlikely that the Florida Supreme Court would have found the error contributed to Brooks's conviction when considered in light of the entire record.

[16] It should be noted that FDLE analyst Remus testified on direct-examination that a Newport cigarette found by Carlson's car was tested and the DNA did not match Walker, Brooks, or Gundy. Another cigarette, a Marlboro brand, also found near Carlson's car was tested by Remus and did not yield to a DNA analysis. Apparently, neither of these cigarettes was the cigarette referred to as being seen near the driveway to Gundy's grandmother's residence. ECF No. 69-9 at 270.

Lastly, Brooks contends appellate counsel should have appealed the denial of certain cross-examination of FDLE Analyst Jack Remus. Defense counsel was allowed to elicit testimony that Remus did attempt to type DNA from hairs he had been provided but was unsuccessful. He was not allowed to discuss a "laundry list" of items submitted from Mr. Brooks, which he addressed on proffer as clothing, boots, wallet, backpack phones, and many other personal items and found no indication of blood. ECF No. 69-9 at 283. Again, even without this cross-examination, the jury was keenly aware that the state had no forensic evidence tying Brooks to the murders.

None of the proposed cross-examination of which Brooks complains, and argues counsel should have complained of on appeal, related to the impeachment or credibility of the witnesses. The Florida Supreme Court concluded that appellate counsel was not deficient for failing to raise the claim on direct appeal concerning the trial court's enforcement of the state evidentiary provision. The court also found that counsel's failure to do so did not undermine confidence in the appellate process. *Brooks*, 175 So. 3d at 237. Federal habeas courts do not sit to review state evidentiary rulings unless the alleged error is of such a magnitude as to render the defendant's trial fundamentally unfair. *See Estelle v. McGuire,* 502 U.S. 62, 67, 71 (1991); *Knight v. Singletary,* 50 F.3d 1539, 1546 (11th Cir. 1995). Brooks has not demonstrated that denial of his claim that appellate counsel was ineffective—a

denial based in part on adherence to the state evidence code—rendered his trial fundamentally unfair. Nor has he shown that the adjudication by the state court in denying his ineffective assistance of counsel claim was objectively unreasonable or contrary to or an unreasonable application of any clearly established federal law as determined by the United states Supreme Court. Habeas relief is denied on this claim.

Ground V: Trial court error in admitting testimony of life insurance salesman that violated Petitioner's right to confrontation under the Sixth Amendment

Brooks contends that his Sixth Amendment right to confront witnesses was violated when the trial court admitted testimony of Steve Mantheny, an insurance agent. Mantheny testified about an insurance policy on the life of Alexis Stuart, the infant victim in the case, that was issued to Walker Davis in the amount of $100,000.

1. State Court Proceedings

Exhaustion

Respondent contends that Brooks failed to exhaust a Confrontation Clause claim in state court and, because of that, the claim is procedurally barred. ECF No. 69 at 71–73. Prior to the taking of any testimony, Brooks counsel moved to exclude testimony by Mantheny of any statements made to him by Walker Davis. ECF No. 69-6 at 306. Counsel also argued that the policy itself should not be admitted because it would be irrelevant to Brooks's guilt and would be used by the prosecutor to

improperly ascribe Davis's motive to Brooks. ECF No. 69-6 at 310–16. The trial judge agreed that statements made to Mantheny by Davis would be excluded but that evidence of the insurance policy could come in as relevant to the source of the money Walker offered Brooks during the conspiracy if the state proved a conspiracy. ECF No. 69-6 at 334. Later in the trial, before Mantheny testified, defense counsel also objected that Mantheny's testimony would be irrelevant and improper if no evidence is presented that Brooks knew about the policy. ECF No. 69-8 at 94. This objection was overruled.

On direct appeal, Brooks argued that Mantheny's testimony was admitted in violation of the Florida Evidence Code, section 90.803(18)(e), Florida Statutes, which provides that statements of a coconspirator are admissible if they are made during the course, and in furtherance, of the conspiracy. He also stated on appeal that the insurance policy evidence was admitted in violation of the Sixth Amendment's Confrontation Clause. ECF No. 69-14 at 3, 31, 34. While he cited the Sixth Amendment, Brooks made scant reference to the constitutional claim in his argument, stating only that before trial, he alerted the trial court to the "confrontation problems" inherent in letting the State prove Brooks's intent by showing Davis's intent and in trying to transfer Davis's consciousness of guilt to Brooks. ECF No. 69-14 at 32. However, the reference defense counsel made at trial to a "confrontation problem" which was cited in Brooks's initial brief was made not in regard to

Mantheny's testimony or the insurance policy, but to Davis's lies, along with Brooks's lies, to police about not being in Crestview on the night of the murders. *See* ECF No. 69-6 at 278–85.

The Florida Supreme Court resolved the Mantheny claim solely as one of relevance and admissibility of evidence under Florida law: "We hold that the trial court did not abuse its discretion in admitting evidence concerning the existence of a $100,000 life insurance policy for the purpose of establishing the source of the funds promised to Brooks for his role in killing Rachel Carlson and Alexis Stuart." *Brooks*, 918 So. 2d at 188. The court also made clear that the policy itself was not inadmissible.[17] *Id.* at 192 n.8.

Brooks did not provide each state court with the opportunity to rule on his constitutional Sixth Amendment claim as required. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995). He did not "fairly present" his claim in each appropriate state court, alerting that court to the federal nature of the claim. *Id.* at 365–66. For this reason, this claim is unexhausted and procedurally barred.

[17] This is in accord with both Florida law and federal law concluding that signed instruments and contracts are "verbal acts" and not hearsay. *See, e.g.*, *Deutsche Bank Nat. Trust Co. v. Alaqua Property*, 190 So. 3d 662, 664–65 (Fla. 5th DCA 2016) (citing, *inter alia*, *Kepner–Tregoe, Inc. v. Leadership Software, Inc.,* 12 F.3d 527, 540 (5th Cir. 1994) ("Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are nonhearsay.")))

A federal court may entertain the merits of an unexhausted claim only if the prisoner establishes one of two exceptions. The first is the "cause and actual prejudice" exception. *Engle v. Isaac*, 456 U.S. 107, 129 (1982). The second is the "actually innocent" exception, also known as the "fundamental miscarriage of justice" exception, applicable in extraordinary circumstances. *Murray v. Carrier,* 477 U.S. 478, 495–97 (1986). Brooks has not provided a basis on which to find either exception has been met.

2. Clearly Established Supreme Court Law

The state courts did not rule on a Sixth Amendment Confrontation Clause claim. To prove a Sixth Amendment Confrontation Clause claim, the petitioner must identify testimonial evidence that he was unable to cross examine. *Crawford v. Washington*, 541 U.S. 36, 56 (2004). Confrontation Clause violations are subject to harmless error review. *Van Arsdall*, 475 U.S. at 684. The *Brecht* standard governs harmless error analysis in habeas corpus involving Confrontation Clause violations. *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (explaining that constitutional violations classified as trial errors are subject to harmless error analysis); *see also Grossman v. McDonough*, 466 F.3d 1325, 1339 (11th Cir. 2006). Under the *Brecht* standard, the alleged violation must have "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. The standard set forth in *Brecht* applies "whether or not the state appellate court recognized the

error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*." *Fry v. Pliler*, 551 U.S. 112, 121 (2007). Where the state court did rule on the merits of the claim, the requirements of the AEDPA must also be satisfied before relief may be granted. *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022).

3. Federal Review of Claim

Even if the claim was not procedurally barred, the claim is without merit. Steve Mantheny testified that Walker Davis met with him to discuss a life insurance policy in December 1995 and filed an application and was issued the policy in February 1996. ECF No. 69-8 at 99–100. The policy was issued in the amount of $100,000 with Davis as the primary beneficiary. The application and the policy were admitted under the business records exception in the Florida Evidence Code. The Florida Supreme Court found that the evidence was properly admitted as relevant to establishing the source of the funds promised to Brooks for his role in the killings. *Brooks*, 918 So. 2d at 188. The court found that the State established the existence of a conspiracy through the testimony of Mark Gilliam, described as "direct evidence of the plot to murder and the nexus to a large sum of money." *Id.* The Florida Supreme Court found that the trial court "reasonably concluded that the insurance policy was relevant to establish the source of the money Davis promised to pay Brooks for his part in the crimes." *Id.* at 189. The court concluded that the nexus

between the insurance policy and the crime charged was established by the substantial sum promised to Brooks coupled with evidence of Davis' modest financial means. *Id.* at 190. The court also ruled that under Florida law, the motive of one coconspirator "can illuminate the motive of others" and that the $100,000 life insurance policy provided Davis a motive to plot to kill the victims and provided a source of the payment to Brooks to commit the crimes. *Id.* at 191.

These rulings by the Florida Supreme Court on the issues of admissibility and relevance of Davis's insurance policy—rulings based on Florida law—are matters of state law which are not generally cognizable in a federal habeas claim. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). It is not the province of the federal court to review the state trial court's evidentiary rulings under state law, even if Petitioner couches his claim as a denial of federal due process. *See Branan*, 861 F.2d at 1508 ("This limitation on federal habeas review is of equal force when a petition, which actually involves state law issues, is 'couched in terms of equal protection and due process.' " (citation omitted)). A federal court's inquiry into state evidentiary rulings is severely restricted and is limited to violations of a federally guaranteed right, such as the denial of fundamental fairness. *Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1295 (11th Cir. 2014) (citing *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984)). To prevail on a claim that a trial court's evidentiary ruling violated the Due Process Clause, the evidence must be "so extremely unfair that its admission violates

fundamental conceptions of justice." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). The category of infractions that violate fundamental fairness is very narrow, *Estelle*, 502 U.S. at 73, and any such evidentiary error is subject to the harmless error analysis and will not be the basis of federal habeas relief unless the error "had substantial and injurious effect or influence in determining the jury's verdict." *Sims v. Singletary*, 155 F.3d 1297, 1312 (11th Cir. 1998) (quoting *Brecht*, 507 U.S. at 623 (citation omitted)).

To the extent that Brooks is making a Confrontation Clause claim, he has not identified what out-of-court testimonial evidence was admitted for which he had no opportunity to cross-examine. He provides no United States Supreme Court precedent holding that an insurance policy, or similar contract, admitted under the business records exception, violates the Confrontation Clause. He contends in his petition that he had a right to confront his "accusers" and "witnesses against him" and argues that he was unable to cross-examine Davis about the policy. However, the insurance policy was not an out-of-court testimonial statement by Davis. The policy was not a codefendant's confession. It was not created under circumstances leading an objective witness to reasonably believe that statements would be used at a later trial. The policy does not fall within the "core class of testimonial statements" covered by the Confrontation Clause. "Testimonial" statements are typically "solemn declaration[s] or affirmation[s] made for the purpose of establishing or

proving some fact," and may include "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 U.S. at 51–52. The Supreme Court stated in *Crawford,* "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." *Id.* at 56. Business records have been found to be testimonial, and subject to the Confrontation Clause, where they were prepared for use in court and not simply kept in the ordinary course of business. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009) (holding laboratory analysts' certificates of analysis, although akin to business records, were affidavits within the core class of testimonial statements covered by the Confrontation Clause). The insurance policy at issue here does not fall into this latter class of records. Brooks has not established that admission of the insurance policy obtained by Davis violated Brooks's federal constitutional right to confrontation.

To the extent that Brooks's claim is a *Bruton* claim, which Brooks denies,[18] the claim also lacks merit. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a non-testifying codefendant's confession or testimonial

[18] *See* Reply, ECF No. 73 at 28.

statements that implicate the defendant may not be admitted at trial against the defendant. The *Bruton* rule, like the Confrontation Clause itself, only applies to testimonial statements. *See United States v. Hano*, 922 F.3d 1272, 1286–87 (11th Cir. 2019) (citing *Whorton v. Bockting*, 549 U.S. 406, 419–20 (2007)).

Mantheny did not relate any testimonial statements by Davis. Nothing in his testimony indicated Davis had a plan to kill the child on which he obtained a life insurance policy or to involve Brooks in that plan. Nothing in the policy itself, or in Mantheny's testimony, constituted statements by a non-testifying codefendant incriminating Brooks. Therefore, no *Bruton* violation has been demonstrated. Further, even if Brooks had made and exhausted a *Bruton* claim, any *Bruton* error would be subject to harmless error analysis. *See, e.g.*, *Brown v. United States*, 411 U.S. 223, 231 (1973). Brooks cannot demonstrate that admission of the evidence of the insurance policy obtained by Walker Davis was erroneous under federal law or "had a substantial and injurious effect or influence in determining the jury's verdict." *See Brecht*, 507 U.S. at 623. The *Brecht* standard, applicable on collateral review, is a more stringent harmless error standard than the standard applied on direct appeal. *Al-Amin v. Warden, Ga. Dep't of Corr.*, 932 F.3d 1291, 1298 (11th Cir. 2019) "To show prejudice under *Brecht*, there must be more than a reasonable possibility that the error contributed to the conviction or sentence." *Id.* at 1299 (11th Cir. 2019) (quoting *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012)

(quotation and citation omitted)). To prevail, a petitioner must show "actual prejudice" from the constitutional error. *Al-Amin*, 932 F.3d at 1299 (citing *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1110 (11th Cir. 2012)).

Brooks Confrontation Clause claim relating to the insurance policy was not presented to each state court and is procedurally barred. Even if it were not barred, Brooks has not demonstrated that the trial court's ruling was contrary to any clearly established federal law as determined by the United States Supreme Court or an unreasonable determination of the facts in light of the evidence. The claim is therefore denied.

Ground VI: Trial court error in permitting improper testimony and evidence in violation of Petitioner's Sixth Amendment right to confrontation and his constitutional right to a fair trial which the Florida Supreme Court unreasonably determined to be harmless

Brooks contends that the trial court violated his Sixth Amendment right to confrontation by allowing testimony of Billie Madero, an employee of the Child Support Division of the Department of Revenue, that she received a call from a person identifying herself as Rachel Carlson seeking an appointment to set up child support payments from Walker Davis. Brooks also contends that evidence about two notes found in Davis's leg cast violated Brooks's constitutional right to confrontation. He argues that the State supreme court found the trial court erred in

admission of all this evidence, but that the court unreasonably found the errors to be harmless. ECF No. 58 at 144–52.

1. State Court Proceedings

Brooks objected at trial to the testimony of Madero regarding a call she received from Rachel Carlson asking for an appointment to apply for child support from Walker Davis. Counsel argued that it was inadmissible hearsay and irrelevant to Brooks. ECF No. 69-7 at 344–45. Defense counsel argued, "[i]t's relevance, it's that it's Rachel Carlson's state of mind, it's the objection that the only intent to offer this is to show motive of Walker Davis." ECF No. 69-7 at 346. Counsel later objected that the evidence was "a statement of Rachel Carlson . . . . regarding her state of mind and her belief that this baby belongs to Walker Davis." ECF No. 69-8 at 3. Finally, counsel stated, "I just need to add confrontation clause issues as a - - part of the objection." ECF No. 69-8 at 3.

As to the notes found in Davis's cast, counsel moved prior to trial to suppress evidence of the notes as irrelevant, lacking proof of authorship, and, if they were Walker's statements, inadmissible as statements of a codefendant not made during the conspiracy. ECF No. 69-6 at 322–27. During trial, counsel again objected to the admission of the contents of the notes on the ground that it would constitute a Confrontation Clause violation and, later, on the ground of relevance. ECF Nos. 69-8 at 188; 69-9 at 239. His objections were overruled.

Brooks appealed both these issues to the Florida Supreme Court on direct appeal. As to the Madero claim, Brooks cited the "Sixth Amendment Right to Confrontation" in his issue statement of Issue II. However, he made no substantive Confrontation Clause argument and cited no authorities to support a claim that the Madero testimony violated his federal constitutional right to confrontation. Instead, he argued lack of relevance to Brooks and lack of foundation to prove that Carlson made the statements attributed to her. ECF No. 69-14 at 39–43. Regarding the notes found in Davis's cast, Brooks argued on appeal the lack of relevance to Brooks and the inability to cross-examine Davis about the notes, resulting in a violation of right to confront witnesses. ECF No. 69-14 at 43–46.

The Florida Supreme Court found the trial court abused its discretion in admitting the Madero testimony because it was inadmissible hearsay under Florida law, finding her testimony to be hearsay within hearsay. *Brooks*, 918 So. 2d at 193. The court went on to conclude that the error was harmless beyond a reasonable doubt: "[T]he State has established beyond a reasonable doubt that the admission of the limited record information did not contribute to the verdict in the instant case." *Id.* at 194. The court cited what it viewed as the "overwhelming amount of properly admitted evidence" upon which the jury could have legitimately relied in finding Brooks guilty. *Id.* The court emphasized the testimony of Mark Gilliam regarding the plot to kill Carlson and the two partial failed attempts to do so in which he,

Brooks, and Davis were involved prior to Gilliam leaving town. The court also cited the evidence of several different individuals that Brooks was present in Crestview in the vicinity of the crime scene in close proximity to the time of the murders. *Id.* at 195–96. In addition, the court cited proof of a motive of pecuniary gain for Brooks for commission of the murders. The court stated, "In light of the totality of the evidence, there is no reasonable possibility that the admission of the limited child support record information could have contributed to the jury verdict." *Id.* at 195.

As to the two notes in Davis's leg cast—described as written in two different handwriting styles—one note discussed an airline flight time and cost that generally coincided with Brooks's travel back to Philadelphia. *Id.* at 199. The Florida Supreme Court noted, "[t]hrough the testimony of Thomas Hardin, a fellow airman and friend of Davis, the jury learned that Brooks had to receive a $244 wire transfer of the funds he needed to purchase an airline ticket to return from Florida to Philadelphia." *Brooks,* 918 So. 2d at 189. The second note said "Mark would have cracked up" and "Events, Home to walk Heavy [Davis's dog] and then to home." *Id.* This second note, in part, coincided with Brooks's account that he gave police of his and Davis's actions on the night of the murder. The Florida Supreme Court stated: "The trial court admitted the notes as additional evidence to show an association between Brooks and Davis . . . . Brooks contends that the trial court abused its discretion in admitting the notes because there is no evidence connecting him to the notes. We

agree." *Id.* The court cited the fact that the State offered no evidence of the authors of the notes, when the notes were written, or when the notes were placed in Davis's cast. *Id.* at 200. The court indicated in its cumulative error analysis that error in admitting the notes was harmless. *Id.* at 202. The court did not address a Confrontation Clause claim in relation to the two notes although Brooks raised one in his appeal. ECF No. 69-14 at 43–46.

2. Clearly Established Supreme Court Law

The state court did not rule on Brooks's Sixth Amendment Confrontation Clause claim pertaining to the notes in Davis's cast. The Supreme Court has held that out-of-court statements constitute a violation of the right to confrontation if they are testimonial and the defendant was unable to cross examine the declarant. *See Crawford*, 541 U.S. at 56. Confrontation Clause violations are subject to harmless error review. *Van Arsdall*, 475 U.S. at 684. The *Brecht* standard governs harmless error analysis in habeas corpus claims involving Confrontation Clause violations. *Brecht*, 507 U.S. at 629 (explaining that constitutional violations classified as trial errors are subject to harmless error analysis); *see also Grossman v. McDonough*, 466 F.3d 1325, 1339 (11th Cir. 2006). Under the *Brecht* standard, the alleged violation must have "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. *Brecht* applies "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the

'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*." *Fry v. Pliler*, 551 U.S. 112, 121 (2007).

3. Federal Review of Claim

A. Evidence regarding child support

Exhaustion of Madero Claim

Respondent is correct that Brooks did not fairly present his constitutional Confrontation Clause claim relating to the testimony of Madero about Carlson's intended application for child support in each state court. ECF No. 69 at 92. The issue was raised in trial court primarily as an error of Florida evidentiary law with only two unelaborated references to "confrontation clause" issues. ECF No. 69-8 at 3, 5. Brooks mentioned in his issue statement on appeal the violation of his Sixth Amendment right of confrontation, but made no specific or substantive federal constitutional argument in the brief to support that alleged violation. ECF No. 69-14 at 40.

Because Brooks did no more than "scatter some makeshift needles in the haystack of the state court record" as to his Confrontation Clause claim, he did not clearly or fairly present his constitutional claim regarding the Madero testimony in each state court. *McNair v. Campbell*, 416 F.3d 1291, 1303 (11th Cir. 2005) (citation omitted) (holding that federal habeas petitioner failed to "fairly present" his federal confrontation-clause claim to the state court on direct appeal where petitioner's brief

claimed trial error in violation of state law, relied almost exclusively on state law, and made only passing references to violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments). Accordingly, Brooks's Confrontation Clause claim regarding the Madero testimony is similarly unexhausted and, because he cannot now return to state court to properly exhaust that claim, it is procedurally barred. *See Rodriguez v. State*, 919 So. 2d 1252, 1262 n.7 (Fla. 2005) (holding that issues were procedurally barred because they should have been, but were not, raised on direct appeal). Even if Petitioner's Madero habeas claim was not procedurally barred, Brooks's claim of a constitutional violation by the evidentiary error in admission of hearsay, for the reasons discussed below, will be denied. *See* 28 U.S.C. § 2254(b)(2) (stating that a § 2254 petition "may be denied on the merits, notwithstanding the failure of the [petitioner] to exhaust the remedies available in the courts of the State").

Analysis

At trial, Madero testified that in the course of her business, she made notes of telephone calls seeking appointments to apply for child support. Madero was allowed to testify over objection that her job at the state Department of Revenue was to set up appointments for persons who called or came in. ECF No. 69-8 at 6. She testified that in 1996, she received a telephone call from a person identifying herself as Rachel Carlson. Madero made notes during the call indicating the purported

"absent parent" was Walker Davis and the "custodial parent" was Rachel Carlson. The purpose of the appointment sought in the call was to apply for child support. ECF No. 69-8 at 10–11. Madero explained, "[w]e just made a little piece of paper so we could send out the appointments from the paper." The paper with the notes was "just for us to make the appointment." ECF No. 69-8 at 6. The note was admitted into evidence. Madero did not indicate that the information on the note, or the information conveyed in the telephone call, was intended to be used to establish the relationship between Walker, Carlson, and the child or to be used in any formalized manner.

The state court did not rule on a claim of violation of the Confrontation Clause, but found Madero's hearsay testimony was inadmissible under the Florida evidence code, and that the error was harmless.[19] *Brooks*, 918 So. 2d at 193–97. Carlson's statements seeking an appointment to apply for child support, albeit hearsay under state law, were not shown to be testimonial for purposes of the Confrontation Clause. They were not shown to have been created under circumstances leading an objective witness to reasonably believe that statements would be used at a later trial or in any formalized manner—Madero made clear the

[19] Generally speaking, a federal habeas court will not review a trial court's actions concerning the admissibility of evidence unless the error is of such magnitude as to deny fundamental fairness constituting a due process violation. *See, e.g., Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir. 1983) (citing *Lisenba v. California*, 314 U.S. 219, 228 (1941)).

statements were noted only to facilitate the subsequent making of an appointment for the caller. The statements Carlson made in seeking an appointment regarding an application for child support do not fall within the "core class of testimonial statements" covered by the Confrontation Clause, which are typically "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact," and may include "material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." *Crawford*, 541 U.S. at 51–52; *see also United States v. Clotaire*, 963 F.3d 1288, 1295 (11th Cir. 2020). For these reasons, Brooks has not established that the Madero testimony, although inadmissible hearsay under Florida law, constituted a Confrontation Clause violation under the federal constitution.

To obtain federal habeas relief, the Supreme Court has mandated that the petitioner must meet two tests: the test set forth in the AEDPA and the test for harmlessness under *Brecht,* 507 U.S. at 638, which is applicable in federal habeas review. *See Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2021). Brooks has not established that the trial court's erroneous admission of Madero's hearsay rendered his trial fundamentally unfair, a due process violation, or that it was a violation of the Sixth Amendment right to confrontation. He has not demonstrated, as he also

argues, that the state court's harmlessness determination was unreasonable under the *Chapman* harmless error standard applicable on direct appeal.[20]

Brooks has not demonstrated that the state court's adjudication is in any way contrary to or an unreasonable determination of federal law as determined by the United States Supreme Court, or an unreasonable determination of fact based on the record, as required under the AEDPA. Further, Brooks has not demonstrated that the evidentiary error identified by the state court had a substantial and injurious effect on the jury's verdict as required by *Brecht*. Even if the admission of Madero's testimony had violated the Confrontation Clause,[21] habeas relief cannot be granted because it did not also have a substantial and injurious effect on the jury's verdict as required by *Brecht*. As the state court found in its harmlessness analysis, the state presented a substantial amount of direct and circumstantial evidence of Brooks's

[20] The state court properly identified the controlling standard. *See Brooks*, 918 So. 2d at 194 (citing *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) (citing *Chapman v. California*, 386 U.S. 18, 23 (1967)), as the harmless error test to apply. The Supreme Court has explained, "*Chapman* merely announced the default burden of proof for evaluating constitutional errors on direct appeal: The prosecution must prove harmlessness beyond a reasonable doubt. 'And this Court has repeatedly explained that, when it comes to AEDPA, "the more general the [federal] rule[,] . . . the more leeway [state] courts have in reaching outcomes in case-by-case determinations' before their decisions can be fairly labeled unreasonable." *Brown v. Davenport*, 142 S. Ct. 1510, 1530 (2022) (citation omitted).

[21] Confrontation Clause violations are subject to harmless error analysis. *See, e.g.*, *Van Arsdall*, 475 U.S. at 684. In *Brecht*, the Court made clear that "granting habeas relief merely because there is a 'reasonable possibility' that the trial error contributed to the verdict . . . is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged.' " *Brecht*, 507 U.S. at 637 (internal citations omitted).

guilt. *See Brecht,* 507 U.S. at 638. It cannot be said that admission of the limited evidence that Carlson sought an appointment to apply for child support for a child she said was Davis's had a substantial and injurious effect on the verdict in light of the evidence including, but not limited to, the conspiracy to murder Carlson, the several attempts to carry out the conspiracy to murder, Brooks financial motive to commit murder, and—in spite of Brooks's initial lies—evidence of his presence in the vicinity of the murder around the time of the murder. For all these reasons, Brooks's habeas claim is denied.

B. Notes from Davis's cast

The Florida Supreme Court found that the notes were improperly admitted because no evidence connected Brooks to the notes. The State offered no evidence of the authors of the notes, when the notes were written, or when the notes were placed in Davis's cast. *Brooks*, 918 So. 2d at 200. The state court found that error in admitting the notes was harmless. *Id.* at 202. The United States Supreme Court has explained, "we have long recognized that 'a "mere error of state law" is not a denial of due process.' " *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011) (quoting *Engle v. Isaac*, 456 U.S. 107, 121, n.21 (1982)). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," and "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at

67–68. Error in admissibility of evidence under Florida law is a state law issue not subject to federal review unless the defendant can demonstrate that its admission constituted a violation of due process and rendered the trial fundamentally unfair. *See, e.g.*, *Smith v. Wainwright*, 741 F.2d 1248, 1258 (11th Cir. 1984); *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir. 1983). Brooks has not made such a showing.

The Florida Supreme Court did not rule on Brooks's claim that the notes violated his Sixth Amendment right to confrontation, but it is questionable whether the content of the notes was testimonial, as the United States Supreme Court has explained is necessary for hearsay evidence to be a violation of the Confrontation Clause. Although one note appears to have been written to plan for or commemorate what Davis and Brooks told police about the night of the murders, and the other coincides with evidence of Brooks's return to Philadelphia, they were not shown to have been created with the intent that they be presented to prove any matter in a formalized setting. *See Crawford*, 541 U.S. at 51–52. However, even if the notes could be considered testimonial under *Crawford*, introduction of the notes did not have a substantial and injurious effect on the jury's verdict as required by *Brecht*. Brooks is not entitled to habeas relief on Ground VI and the claim is denied.

Ground VII: Trial court error in denying defense objections to closing argument resulting in violation of Petitioner's right to a fair trial

Brooks contends here that the trial court erred in denying several defense objections to the prosecutor's closing arguments, resulting in a trial that was unconstitutionally unfair. He contends the prosecutor improperly, and unfairly, argued that Brooks should have presented certain defenses, that he should have told police about the insurance policy, that Brooks was responsible for the actions and statements of Davis outside the conspiracy, that other possible defense theories should be rejected, and suggesting that Brooks was unsuccessfully attempting to present an "alibi" defense.

1. State Court Proceedings

On direct appeal, Brooks raised these claims of error in his initial brief. ECF No. 69-14 at 59–70. The Florida Supreme Court found no error in any of the claims, stating:

> After a close review of the record, we conclude that Brooks mischaracterizes the proceedings and that no improper burden-shifting occurred. To the contrary, the comments challenged by Brooks constitute permissible comment on the evidence presented, *see Morrison v. State,* 818 So.2d 432, 445–46 (Fla. 2002), and defenses raised. *See Lynn v. State,* 395 So.2d 621, 623 (Fla. 1st DCA 1981). Similarly, to the extent the prosecutor's closing arguments created a misimpression regarding the law of principals, it was properly clarified by the trial court's instruction on that point. *See Bush v. State,* 809 So.2d 107, 117 (Fla. 4th DCA 2002). Finally, we determine that the State did not improperly construct an alibi defense for the purpose of challenging

> it. The State did not make reference to the failure of Brooks to call an alibi witness or make insinuations designed to undermine the viability of any alibi defense that the State itself introduced.

Brooks, 918 So. 2d at 207–08. The state court concluded that Brooks failed to demonstrate that the prosecutor's comments deprived him of a fair trial, were so fundamentally tainted as to require a new trial, or were so inflammatory that they might have influenced the jury to reach a more severe verdict than it would have otherwise. *Id.* at 207.

2. Clearly Established Supreme Court Law

Although it did not cite United States Supreme Court authority, the state court correctly cited the general standard by which improper prosecutorial comments are measured. The Supreme Court explained in *Darden v. Wainwright*, 477 U.S. 168 (1986), that "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* at 181 (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)).

3. Federal Review of Claim

The first instance of prosecutorial comment cited by Brooks occurred when the prosecutor commented during closing argument: "[m]aybe it will be suggested that Lamar Brooks, there's no evidence that he knew about the insurance. Well he sure didn't tell the police he did." ECF No. 69-11 at 15. Defense counsel objected to improper burden shifting and moved unsuccessfully for a mistrial. The state court

found that this comment was not burden shifting, but was permissible comment on the evidence. *Brooks*, 918 So. 2d at 207. Even if the comment could be interpreted to suggest burden shifting or comment on Brooks's silence, Brooks has not demonstrated that the comment so infected the trial with unfairness as to deny him due process. Improper comments on silence and improper burden shifting are both trial errors that are subject to a harmlessness analysis. *See, e.g.*, *Brecht*, 507 U.S. at 622; *Hedgepeth v. Pulido*, 555 U.S. 57, 61 (2008). Brooks has not met the test set out in *Brecht* that the alleged error had a "substantial and injurious effect or influence" on the verdict. *Brecht*, 507 U.S. at 637.

Brooks next contends that the prosecutor improperly argued that Brooks was liable for whatever Walker Davis did outside of the conspiracy. The prosecutor argued as follows: "[r]emember this. Every time you see his name in the instructions, every time you see his name under the law of principals, that doesn't just mean Lamar Z. Brooks. That means Lamar Z. Brooks, or his principal, because he is responsible for all the acts of Walker Davis, Jr." ECF No. 69-10 at 271–72. Defense counsel objected and moved for a mistrial. The judge denied the motion, noting that defense counsel can, on rebuttal, clear up any such implication, and that "it's all going to be coming down from me, and the Court's going to tell them that too, that it's my instructions on the law, not what you all say is the law." ECF No. 69-10 at 273. Brooks also contends that the prosecutor improperly referred to statements

made by Walker Davis to Rochelle Jones[22] in the early morning the day after the murders in an effort to impute those statements to Brooks. The state court found that the judge's instructions properly clarified the law of principals and no reversible error occurred. *Brooks*, 191 So. 2d at 207. Brooks has not demonstrated that the prosecutor's comments, in light of the judge's proper instruction on the law of principals, infected the trial to such extent as to deny Brooks due process or have a substantial injurious effect on the verdict.

Brooks next contends that the prosecutor improperly proposed "strawmen" defense theories simply in order to shoot them down. Brooks cites the prosecutor's comments that "maybe it's a defense theory" that the police dog alerted on the footprints; that the conspiracy was really all a joke; that the waterbed setup time precluded the murder; or that because no blood was seen on Brooks, he is not guilty. ECF Nos. 69-10 at 368–71; 69-11 at 1. Defense counsel objected and moved for mistrial, which was denied. The state court rejected the argument that the prosecutor improperly proposed strawman defenses in order to knock them down and that no

[22] Walker Davis called Rochelle Jones from Melissa Thomas's residence on the night of the murders and she came and picked up Davis and Brooks after they left there. Jones testified that she received a call from Davis early the next morning, but she was not asked what they spoke about. ECF No. 69-8 at 174. She said Brooks called her later that day and said the police were saying Davis murdered someone and that he had helped. ECF No. 69-8 at 175. Jones admitted that she initially lied when she told investigators that she did not know of Davis's whereabouts on the night of the murder, but later told the investigator that she picked them up in Crestview that night. ECF No. 69-8 at 179, 182.

improper burden shifting occurred. Further, the prosecutor, in large part, was properly commenting on the defense theories and on the evidence, including that Gilliam first described the conversation about murdering the woman who wanted money from Davis as a joke. ECF No. 69-8 at 232–33. Defense counsel argued in closing, before the prosecutors argued, that a witness established that Brooks and Davis were putting together a waterbed the night of the murders, as Brooks first told investigators. He argued that Melissa Thomas did not see blood on Brooks or on the couch where they sat. He said regarding the blood, "[i]t wasn't there because he didn't do it." ECF No. 69-10 at 250. He argued Rochelle Jones did not see any blood. He argued that the trooper who pulled Jones over when driving Brooks and Davis after the murders saw no blood on Brooks. Defense counsel argued in closing that Jan Johnson mentioned "[t]he search dog alerted to the prints." ECF No. 69-10 at 254. In discussing these defenses in closing argument, the prosecutor was not inventing "strawmen" in order to knock them down. He was making permissible comment on the evidence and on the defenses argued by Brooks.

Brooks also contends that the prosecutor's argument mentioned "alibi" when no alibi defense was formally offered at trial. In closing, the prosecutor argued that when Brooks used the phone at Thomas's residence, maybe he "wanted to set up an alibi with that phone call, just like he and Davis set up the alibis the next morning." ECF No. 69-11 at 4. Brooks also argued that the prosecutor intended to use a visual

aid of the timeline of events that characterized Brooks's statements to investigators about being at Davis's residence and walking the dog named Heavy as the "Heavy alibi." The trial judge overruled defense counsel's objections, finding that the prosecutor was using the term "alibi" generically. ECF No. 69-10 at 284–85. Although the word "alibi" was written on the demonstrative aid, when the prosecutor discussed the timeline in closing, he argued that when Brooks was interviewed, he "told the Heavy lie." ECF No. 69-10 at 302.

Brooks contends that any mention of "alibi" was improper because it was the State, not Brooks, who raised the issue that he was somewhere else on the night of the murders. The Florida Supreme Court rejected the claim of error, noting that the prosecutor did not construct an alibi defense in order to challenge it, and did not make any reference to Brooks's failure to call an alibi witness. *Brooks*, 918 So. 2d at 207–08. This adjudication, that the comments did not deprive Brooks of a fair trial, was not objectively unreasonable. The evidence before the jury included the fact that Brooks did attempt to set up an "alibi" in the generic sense by initially telling investigators that he was not in Crestview that night, but was at Eglin helping Davis set up a waterbed and walking the dog. The prosecutor's comments on the evidence, including that Brooks made a phone call from Thomas's residence, even if they were improper, has not been shown to have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477

U.S. at 181 (internal quotation and citation omitted). For all the foregoing reasons, this claim for habeas relief is denied.

Ground VIII: **Actual Innocence**

In his last claim, Brooks makes a freestanding claim of actual innocence. ECF No. 58 at 161. He cites as proof of "actual innocence" the lack of forensic evidence, the timeline, and the evidence indicating the existence of another viable suspect. Brooks relies on evidence presented at the postconviction evidentiary hearing and the newly discovered evidence relating to Ira Ferguson, and evidence he proposes for the first time in his petition.

1. State Court Proceedings

The Florida Supreme Court held on direct appeal that there existed an "overwhelming amount of properly admitted evidence upon which the jury could have legitimately relied in finding Brooks guilty." *Brooks*, 918 So. 2d at 194. The court also found that apart from the errors in admission of evidence identified in the second direct appeal, "the jury would have still heard extensive and substantial evidence in support of Brooks' guilt." *Id.* at 202.

2. Clearly Established Supreme Court Law

The United States Supreme Court has held that a plea of actual innocence can be made in an attempt to overcome the AEDPA one-year statute of limitations for filing a petition for writ of habeas, but the Court has not resolved whether a prisoner

may be entitled to habeas relief based solely on a freestanding claim of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (citing *Herrera v. Collins*, 506 U.S. 390, 404–05 (1993)). In *Herrera*, the Supreme Court stated that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. "Whether the constitutional guarantee of due process supports independent claims of actual innocence without any other constitutional violation remains open to debate. *Tabb v. Christianson*, 855 F.3d 757, 764 (7th Cir. 2017) (citing *District Attorney's Office v. Osborne*, 557 U.S. 52, 71 (2009) ("Whether such a federal right exists is an open question.") and *House v. Bell*, 547 U.S. 518, 554–55 (2006) (same)).

3. Federal Review of Claim

Petitioner recognizes that the United States Supreme Court has not held a freestanding claim of actual innocence to be cognizable in federal habeas proceedings. ECF No. 58 at 160. The Eleventh Circuit has reiterated that its binding precedent forecloses habeas relief on a freestanding claim of actual innocence not accompanied by an independent constitutional violation. *Collins v. Sec'y, Dep't of Corr.*, 809 F. App'x 694, 696 (11th Cir. 2020) (unpublished); *see also Raulerson v. Warden*, 928 F.3d 987, 1004 (11th Cir. 2019); *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) (stating "our precedent forbids granting habeas

relief based upon a claim of actual innocence, anyway, at least in non-capital cases"); *Brownlee v. Haley*, 306 F.3d 1043, 1065 (11th Cir. 2002) (stating it is not the federal court's role "to make an independent determination of a petitioner's guilt or innocence based on evidence that has emerged since the trial," emphasizing that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution) (citation omitted)). For these reasons, Brooks's freestanding claim of actual innocence must be denied.

Even if Brooks's freestanding claim of actual innocence were cognizable in this habeas proceeding, the evidence he points to as establishing his actual innocence fails in that regard. To establish an actual innocence claim, where cognizable as a gateway claim, the petitioner must present "new reliable evidence—whether it would be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," and the court "must consider all the evidence, old and new, incriminating and exculpatory," without regard to admissibility at trial. *House*, 547 U.S. at 537–38 (internal quotations omitted). Petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327). Brooks argues that this Court should consider all the new evidence, which he describes as all the evidence he presented in the postconviction evidentiary hearing, the "newly discovered evidence" of Ira

Ferguson that he submitted in the final postconviction hearing, and the new evidence he proposes in Ground III, *supra*, that was not presented in state court. None of this evidence establishes Petitioner's factual, actual innocence but, at most, suggests conflicts in or insufficiency of the evidence. *See Bousley v. United States*, 523 U.S. 614, 623 (1998).

It cannot be said "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" if presented with all the evidence that Brooks has cited in his petition along with all the evidence presented or proffered at trial. Assuming for the sake of argument that Petitioner's claim of actual innocence was cognizable, the threshold for proving his actual innocence is "extraordinarily high" and the demonstration of actual innocence must be "truly persuasive." *Herrera*, 506 U.S. at 417. Brooks has not met that threshold and his "actual innocence" claim is denied.

IV. EVIDENTIARY HEARING

Petitioner requests a plenary evidentiary hearing on certain of the claims presented in his petition. ECF No. 58 at 17. He contends that postconviction counsel failed to adequately develop the record with evidence relating to his claim that trial counsel was ineffective, and seeks a hearing to present that evidence in this court. ECF No. 58 at 16-17. He asks that *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino*

v. Thaler, 569 U.S. 413 (2013),[23] be extended to allow an evidentiary hearing to present to the federal court exculpatory evidence that was "previously available yet unpresented" in state court. An evidentiary hearing for federal habeas claims may be allowed only under very limited circumstances as follows:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(2002); *see also Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1334–37 (11th Cir. 2004) (capital petitioner met none of the requirements contained in 28 U.S.C. § 2254(e)(2), thus district court abused discretion in granting evidentiary hearing). Petitioner has not demonstrated entitlement to a hearing under the requirements of § 2254(e)(2).

[23] *Martinez* and *Trevino* provided only a "narrow exception" to excuse the procedural default by postconviction counsel of a substantial federal claim of ineffective assistance of trial counsel in state court under limited circumstances in order to allow that claim to be presented in a federal habeas proceeding. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1737 (2022).

Further, the United States Supreme Court has reiterated that a federal habeas court's review of an exhausted claim is highly circumscribed and, "[i]n particular, the federal court may review the claim based solely on the state-court record." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732 (2022) (citing *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011)). A federal court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on ineffective assistance of state postconviction counsel in failing to sufficiently develop the basis of a claim unless the requirements of § 2254(e)(2) are met. *Shinn*, 142 S. Ct. at 1734.

Most importantly to Brooks's request to extend *Martinez* and *Trevino* to allow an evidentiary hearing, the Court in *Shinn* refused to extend the exception created in *Martinez* to state postconviction counsel's failure to properly develop the basis of an exhausted claim; and, even where postconviction counsel was negligent, the prisoner must satisfy the requirements of § 2254(e)(2) before a hearing may be held. *Shinn*, 142 S. Ct. at 1737. The Court also made clear that in resolving the merits of an unexhausted habeas claim that is allowed under *Martinez*, the federal habeas court may not consider the evidence adduced in federal court to prove the *Martinez* exception unless the requirements of § 2254(e)(2) are met. *Shinn*, 142 S. Ct. at 1738.

Because Petitioner has not met the requirements for an evidentiary hearing, and because the record is adequate for resolution of his claims, his request for an evidentiary hearing is denied.

V. CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." If a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." 28 U.S.C. § 2254 Rule 11(a). A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. 28 U.S.C. § 2254 Rule 11(b).

"Section 2253(c) permits the issuance of a COA only where a petitioner has made a 'substantial showing of the denial of a constitutional right.' " *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting § 2253(c)(2)). *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (explaining how to satisfy this showing); 28 U.S.C. § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' " *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (citing *Miller-El*, 537 U.S. at 327). Brooks has not made such a showing in this case and a COA will be denied.

VI. LEAVE TO APPEAL IN FORMA PAUPERIS

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). "Good faith means than an issue exists on appeal that is not frivolous when judged under an objective standard." *Burgess v. United States*, No. 4:11-cv-76, 2011 WL 1740504, *1 (S.D. Ga. May 5, 2011) (citations omitted). "A claim is frivolous if it is without arguable merit either in law or fact." *Id*. (citation and internal quotation marks omitted). Here, this Court certifies that any appeal from Brooks would not be in good faith. While some of the claims Brooks raises may be nonfrivolous if there were not multiple grounds for denial, the various bases for their denial deprive them of arguable merit. For example, Brooks's claims that his trial counsel were ineffective because they failed to present exculpatory evidence may be nonfrivolous on their merits, but his failure to exhaust this claim combined with his inability to present new evidence under *Shinn* deprive Brooks of a good-faith basis to appeal. Accordingly, this Court denies Brooks leave to appeal in forma pauperis.

VII. CONCLUSION

For the foregoing reasons, the second amended petition for writ of habeas corpus, ECF No. 58, is **DENIED**. A Certificate of Appealability is **DENIED** and

leave to appeal in forma pauperis is **DENIED**. The Clerk shall close the file.

SO ORDERED on December 14, 2022.

s/Mark E. Walker
Chief United States District Judge

APPENDIX A4

District Court Order Denying Motion to Alter or Amend and/or for Reconsideration of Denial of a COA (February 7, 2023)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LAMAR Z. BROOKS,

***Petitioner*,**

v. **Case No.: 3:15cv264-MW/ZCB**

RICKY D. DIXON, Secretary,
Florida Department of Corrections,
and ASHLEY MOODY,
Attorney General.

***Respondents*.**

_____/

ORDER ON MOTION TO ALTER OR AMEND

This Court has considered, without hearing, Petitioner's motion under Fed. R. Civ. P. 59(e) to alter or amend (ECF No. 83) the denial of his petition filed under 28 U.S.C. § 2254 (ECF No. 79). Brooks also requests the court to reconsider the denial of a certificate of appealability ("COA") and the denial of his request for in forma pauperis ("IFP") status. ECF Nos. 79 and 82. Respondent filed a response to the motion, ECF No. 85, which has been considered. For the reasons set forth below, the motion is **DENIED**.

The decision to alter or amend a judgment is committed to the sound discretion of the district court. *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006); *Jackson v. Crosby*, 437 F.3d 1290, 1295 (11th Cir. 2006); *Mincey v. Head*, 206 F.3d

1106, 1137 (11th Cir. 2000); *Lockard v. Equifax, Inc.*, 163 F.3d 1259, 1267 (11th Cir. 1998). When reviewing for an abuse of discretion, the appellate court will generally affirm unless the district court applied an incorrect legal standard, made findings of fact that were clearly erroneous, or committed a clear error of judgment. *See Mincey*, 206 F.3d at 1137. "The petitioner's burden of showing an abuse of discretion is a 'difficult' one." *Id.* (citation omitted).

"A Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument, or present evidence that could have been raised prior to the entry of judgment." *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)); *see also Miller v. Comm'r, Alabama Dep't of Corr.*, 826 F. App'x 743, 748 (11th Cir. 2020) (unpublished). Nor can a Rule 59(e) motion "be used simply as a tool to reopen litigation where a party has failed to take advantage of earlier opportunities to make its case." *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 744 (11th Cir. 2014).

The standard which must be met for granting of a motion to alter or amend is a high one: "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur*, 500 F.3d at 1343 (alteration in original) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). Manifest error of law has been described as "wholesale disregard, misapplication, or failure

to recognize controlling precedent." *Oto Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (citation omitted). In order to prevail on his motion, Brooks must demonstrate that this Court made a manifest error of law or fact in denying his § 2254 petition and in denying a certificate of appealability.

Brooks's motion to alter or amend reargues the majority of his § 2254 petition and does not identify any newly discovered evidence or manifest error of law or fact. Because Brooks "did nothing more than seek to relitigate the issues decided against him," denial of such a motion does not constitute an abuse of discretion. *See Jeffus v. Sec'y, Fla. Dep't of Corr.*, 759 F. App'x 773, 777 (11th Cir. 2018). The order denying Brooks's § 2254 petition provided lengthy analysis of each of his claims and that analysis will not be repeated here. For the reasons stated, the Rule 59(e) motion to alter or amend, ECF No. 83, will be **DENIED**.

Denial of a Certificate of Appealability

Brooks also asks the court to reconsider and alter or amend its denial of a COA to appeal the denial of habeas relief. The denial of a COA was based on the conclusion that Brooks failed to make a substantial showing of a denial of a constitutional right as required by *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or a showing that jurists of reason could find the issues adequate to deserve encouragement to proceed further, as explained in *Buck v. Davis*, 580 U.S. 100, 115 (2017). ECF No. 79 at 116. Brooks argues that, for the same reasons argued on the

merits of each of his claims, jurists of reason could disagree with the court's resolution of Grounds I, II, III, V, VI, and VIII of his petition. He contends, as to Ground III, that jurists of reason could disagree with the court's reliance on *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), to bar consideration of evidence not admitted in state court or presented for the first time in the petition. He argues, as to Ground VIII, that jurists of reason could find it debatable whether a petitioner in a non-capital case has standing to raise a freestanding actual innocence claim. I disagree.

In order to obtain a COA, a habeas petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (quotations omitted). Brooks has met neither of these requirements and no amount of re-argument of his claims will change that result. Brooks's motion to reconsider and alter or amend the denial of a COA will be **DENIED**.

Denial of IFP Status

Under 28 U.S.C. 1915(a)(3), an appeal may not be taken in forma pauperis if the trial court certified that it is not taken in good faith—that is, where an issue exists on appeal that is not frivolous when judged under an objective standard. Brooks was

denied IFP status in the order on his § 2254 petition because, as the undersigned concluded, any appeal would not be in good faith. ECF No. 79 at 117.

Brooks now argues that this Court "conceded that 'some of the claims Brooks raised may be nonfrivolous,' " thus requiring a grant of IFP status. ECF No. 83. The Court's order denying IFP status stated in part, "For example, Brooks's claims that his trial counsel were ineffective because they failed to present exculpatory evidence may be nonfrivolous on their merits, but his failure to exhaust this claim combined with his inability to present new evidence under *Shinn* deprive Brooks of a good-faith basis to appeal." ECF No. 79 at 117. This statement related to Brooks's Ground III, which he agreed was not exhausted in state court postconviction proceedings, and which he sought to support with evidence not presented in state court. The undersigned can see how this statement could be misconstrued as a concession that the claim had arguable merit. That is not the case. To the extent Brooks seeks clarification of the statement, that request is granted. The statement was intended to indicate that, even assuming arguendo that a claim might not be frivolous but is subject to denial on more than one ground, an appeal from denial of that claim would not be in good faith. The statement was intended to simply provide an example of a claim that was due to be denied for several reasons, including failure to exhaust, and which was denied for one or more of the stated reasons. Further, as for the claim at issue in this case, the Court found that even if the claim had been exhausted and even

if the evidence not presented in state court were considered, the claim lacked merit under *Strickland v Washington*, 466 U.S. 668 (1984). *See* ECF No. 79 at 64. Under these circumstances, any appeal from denial of that claim would not be in good faith and the denial of IFP status will not be altered or amended.

After a comprehensive review of all the claims in the § 2254 petition and the authorities cited, the undersigned concluded there was no substantial showing of the denial of a constitutional right. This Court also concluded that any appeal of the claims brought by Brooks would not be "in good faith," which, objectively, means there is no substantial question for review and that an appeal will be futile. *See, e.g.*, *Parsell v. United States*, 218 F.2d 232, 235 (5th Cir. 1955).[1]

An appeal is frivolous, and not taken in good faith, when the issues are without arguable merit and therefore futile. *Pace v. Evans*, 709 F.2d 1428, 1429 (11th Cir. 1983) (citations omitted). The Eleventh Circuit has described an issue as frivolous, for purposes of a motion for IFP, where the legal theories are without arguable merit in law or fact—in contrast to an issue that has arguable merit and is capable of being convincingly argued. *See Ghee v. Retailers Nat'l Bank*, 271 F. App'x 858, 859–60 (11th Cir. 2008) (unpublished). "[A]rguable means capable of being convincingly argued." *Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991) (internal quotations

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

omitted). Brooks's request for IFP status was considered in the order denying habeas relief under the forgoing objective standards and it was determined that an IFP status for appeal was not appropriate. Thus, the order certified under 28 U.S.C. § 1915(a) that the appeal would not be taken in good faith and IFP status was denied. Brooks's request under Rule 59(e) to alter or amend that ruling denying IFP status will be **DENIED**.

CONCLUSION

Brooks's motion under Rule 59(e) to alter or amend the order denying habeas relief under § 2254 (ECF No.83) is **DENIED**. A certificate of appealability of the Rule 59(e) motion is **DENIED** and leave to proceed in forma pauperis is **DENIED**.

SO ORDERED on February 7, 2023.

s/Mark E. Walker
Chief United States District Judge

APPENDIX A5

Florida Supreme Court Postconviction Opinion (May 7, 2015)

175 So.3d 204
Supreme Court of Florida.

Lamar Z. BROOKS, Appellant,
v.
STATE of Florida, Appellee.
Lamar Z. Brooks, Petitioner,
v.
Julie L. Jones, etc., Respondent.

Nos. SC12–629, SC13–706.
|
May 7, 2015.
|
Rehearing Denied Sept. 17, 2015.

Synopsis

Background: Petitioner, whose conviction for murder in the first degree and sentence of death were initially reversed and remanded, 787 So.2d 765, and whose conviction and death sentence following second jury trial were affirmed, 918 So.2d 181, petitioned for post conviction relief. Following evidentiary hearing, the Circuit Court, Okaloosa County, Kelvin Clyde Wells, J., denied petition. Petitioner appealed and applied to Supreme Court for a writ of habeas corpus.

Holdings: The Supreme Court held that:

[1] trial counsel did not provide ineffective assistance of counsel by failing to present their own forensic expert testimony;

[2] trial counsel was not ineffective in failing to present evidence discussed during opening statement;

[3] trial counsel did not perform deficiently when they failed to present mitigation evidence during the penalty phase;

[4] postconviction court's determinations regarding newly discovered evidence were supported by competent substantial evidence;

[5] appellate counsel's decision not to present a *Stumpf* due process claim was not ineffective assistance of counsel; and

[6] prosecutor's use of a stabbing gesture in the air and raising his voice while counting the number of stab wounds inflicted on the victims during a reenactment of the murders was not improper.

Denial of petition affirmed, and writ denied.

West Headnotes (44)

[1] Criminal Law Effective assistance

Ineffective assistance of counsel claims are reviewed under a mixed standard of review because the performance and prejudice prongs of *Strickland* test for ineffective assistance of counsel present mixed questions of law and fact. U.S.C.A. Const.Amend. 6.

[2] Criminal Law Post-conviction relief

Postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses; as a result, a reviewing court defers to the postconviction court's factual findings, so long as those findings are supported by competent, substantial evidence.

1 Case that cites this headnote

[3] Criminal Law Review De Novo

Supreme Court reviews the postconviction court's legal conclusions de novo.

[4] Criminal Law Effective assistance

Because *Strickland* test for ineffective assistance of counsel requires that a defendant establish both deficiency and prejudice, an appellate court evaluating a claim of ineffectiveness is not required to issue a specific ruling on one component of the test when it is evident that the other component is not satisfied. U.S.C.A. Const.Amend. 6.

[5] **Criminal Law** Prejudice in general

Prejudice as a result of ineffective assistance of counsel is not established based solely on the subjective assessments of a party or his or her counsel regarding the importance of evidence; rather, prejudice is established only when the defendant can establish a reasonable probability, which is a probability sufficient to undermine confidence in the outcome of that proceeding, that but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

[6] **Criminal Law** Experts; opinion testimony

Trial counsel did not provide ineffective assistance of counsel by failing to present their own forensic expert testimony in capital murder trial, where counsel made a reasonable, strategic decision to retain the tactical advantage of presenting the final closing statement and to pursue the theory of reasonable doubt by arguing, through inference rather than witness testimony, that no forensic evidence linked defendant to the murders, and counsel was able to argue in final closing statement that the state's forensic experts did not connect defendant to the crime through DNA, hair fibers, saliva, skin cells, shoeprints, or handwriting. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

[7] **Criminal Law** Introduction of and Objections to Evidence at Trial

Trial counsel made a reasonable, strategic decision to not lose credibility with the jury and forego the ability to present the last closing statement to present evidence that initially appeared to connect a third party to the murders, but ultimately would have been substantially impeached by the State, and, thus, did not provide ineffective assistance of counsel by failing to present it in capital murder trial. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

[8] **Criminal Law** Introduction of and Objections to Evidence at Trial

Trial counsel made a reasonable assessment in capital murder trial of the evidentiary value of a stolen vehicle, which matched the description of a vehicle suspected to be associated with the murders that a confidential informant reported was recovered and purportedly had blood spatter inside the cabin and on the hood, and, thus, counsel did not provide ineffective assistance of counsel by choosing not to present it, where nothing connected the vehicle to any aspect of defendant's case and could not have been used to support defendant's defense. U.S.C.A. Const.Amend. 6.

[9] **Criminal Law** Presentation of witnesses

Trial counsel was not ineffective failing to present witnesses whose testimony would have contradicted the state's timeline in capital murder trial, where counsel concluded that one witness's testimony would have hurt defendant's case because it would have placed defendant with victim near the time of the murders, and the other witness's testimony would likely have been substantially impeached. U.S.C.A. Const.Amend. 6.

[10] **Criminal Law** Introduction of and Objections to Evidence at Trial

Trial counsel was not ineffective in capital murder trial in failing to present evidence from polygraph examination of witness; polygraph evidence was generally inadmissible. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** Introduction of and Objections to Evidence at Trial

Defendant was not prejudiced as required for relief on the basis of ineffective assistance of counsel by trial counsel's failure to present evidence regarding result of polygraph examination of witness, where the evidence was of a truthful answer to the question

regarding whether defendant changed clothes in witness's bathroom, and this evidence was of no consequence and did not contribute to the conviction. U.S.C.A. Const.Amend. 6.

[12] **Criminal Law** What constitutes perjured testimony

Prosecutor did not present, or fail to correct, false testimony, as required for a *Giglio* violation, on the basis of officer's testimony in capital murder trial that witness told officers that defendant changed into shorts in her bathroom, although witness testified that she did not remember telling officers that defendant changed clothes, where witness did not definitively state that defendant did not change clothes in her apartment.

[13] **Criminal Law** Use of False or Perjured Testimony

A *Giglio* violation is demonstrated when: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material.

[14] **Criminal Law** Argument and Conduct of Defense Counsel

Trial counsel was not ineffective in failing to present evidence discussed during opening statement in capital murder trial, where attorneys spent hours planning, rehearsing, and modifying their opening statement to incorporate what they believed the evidence would show, but the prosecutor strategically limited the direct examination of specific witnesses to prevent them from cross-examining state's witnesses on certain subjects so that prosecutor successfully objected to that questioning as outside the scope of direct examination, and counsel discussed whether the benefits of presenting witnesses outweighed the procedural benefits afforded, and ultimately concluded that none of the evidence discussed outweighed the value of retaining the opportunity to present the first and last closing statements. U.S.C.A. Const.Amend. 6.

[15] **Criminal Law** Scope and Effect of Opening Statement

Opening statements are not substantive evidence, but rather serve to outline what an attorney expects will be established by the evidence presented during trial.

3 Cases that cite this headnote

[16] **Criminal Law** Adequacy of investigation of mitigating circumstances

Criminal Law Presentation of evidence in sentencing phase

To demonstrate that counsel was ineffective for failure to investigate or present mitigating evidence in the penalty phase of capital murder trial, a defendant must establish that the deficient performance of counsel deprived the defendant of a reliable penalty phase proceeding. U.S.C.A. Const.Amend. 6.

[17] **Criminal Law** Adequacy of investigation of mitigating circumstances

Counsel in penalty phase of capital murder trial has an obligation to conduct a thorough investigation of the defendant's background. U.S.C.A. Const.Amend. 6.

[18] **Criminal Law** Adequacy of investigation of mitigating circumstances

Counsel in penalty phase of capital murder trial must not ignore pertinent avenues for investigation of which he or she should have been aware. U.S.C.A. Const.Amend. 6.

[19] **Criminal Law** Adequacy of investigation of mitigating circumstances

Counsel in penalty phase of capital murder trial has a duty to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary. U.S.C.A. Const.Amend. 6.

[20] **Criminal Law** Death Penalty

In the context of penalty phase errors of counsel, the prejudice prong of *Strickland* test for ineffective assistance of counsel is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings. U.S.C.A. Const.Amend. 6.

[21] **Criminal Law** Death Penalty

For relief on the basis of ineffective assistance of counsel in the penalty phase of capital murder trial, a defendant must show that, but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[22] **Criminal Law** Sentencing in General

To assess the probability that, but for counsel's deficiency, there is a reasonable probability that defendant would have received a different sentence, a reviewing court considers the totality of the available mitigation evidence, both that adduced at trial, and the evidence adduced in the evidentiary hearing, and reweighs it against the evidence in aggravation. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

[23] **Sentencing and Punishment** Reception of evidence

Defendant may waive the presentation of mitigation evidence in penalty phase of capital murder trial only when the waiver is made knowingly, voluntarily, and intelligently.

[24] **Criminal Law** Adequacy of investigation of mitigating circumstances

Sentencing and Punishment Reception of evidence

A defendant's decision to waive the presentation of mitigation evidence in the penalty phase of capital murder trial must not be made blindly; rather, counsel must first investigate all avenues of potential mitigation and advise the defendant so that he or she reasonably understands what is being waived and its ramifications, and is able to make an informed and intelligent decision.

[25] **Criminal Law** Death Penalty

Criminal Law Presentation of evidence in sentencing phase

Trial counsel did not perform deficiently when they failed to present mitigation evidence during the penalty phase of capital murder trial or to contest the imposition of the death penalty; trial counsel conducted a reasonable investigation into potential mitigation and explained the benefits of presenting mitigation to defendant, who exercised his right to make a knowing, voluntary, and intelligent waiver of the presentation of mitigation, and counsel could not be deemed deficient for honoring defendant's decision not to contest the death penalty. U.S.C.A. Const.Amend. 6.

[26] **Criminal Law** Defense counsel

Petitioner for postconviction relief was not prejudiced in penalty phase of capital murder trial by trial counsel's failure to present mitigation evidence, although petitioner suffered from alcohol abuse after his discharge from the military, where he failed during hearing on petition for postconviction relief to present any evidence linking his alcohol abuse to his life and conduct, and failed to present mitigation evidence that undermined confidence in his sentence, as evidence presented in aggravation was significant and included that murder was committed in a cold, calculated, and premeditated manner, for pecuniary gain, and

murder occurred while defendant was engaged in commission of aggravated child abuse. U.S.C.A. Const.Amend. 6.

[27] **Criminal Law** Newly discovered evidence

Postconviction court's determinations that newly discovered evidence that a witness saw victim with a third party on the night of the murders approximately ten minutes before defendant and co-defendant were detained by law enforcement several miles from the crime scene was not credible, it would have been of little or no value to the defense, and would probably not have produced an acquittal on retrial were supported by competent substantial evidence in postconviction proceeding relating to capital murder trial, where witness waited nearly 15 years before reporting this information to law enforcement, and his explanation for not disclosing this evidence sooner was that he was not a law enforcer.

[28] **Criminal Law** Newly Discovered Evidence

Criminal Law Newly discovered evidence

To obtain relief based on a claim of newly discovered evidence, a defendant must meet two requirements: first, the evidence must not have been known, and it must appear that the evidence could not have been known through the use of due diligence; second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial.

1 Case that cites this headnote

[29] **Criminal Law** Probable effect of new evidence, in general

Criminal Law Newly discovered evidence

Newly discovered evidence would probably produce an acquittal on retrial, as required for relief, if it weakens the case against a defendant so as to give rise to a reasonable doubt as to his or her culpability.

[30] **Criminal Law** Newly Discovered Evidence

In determining whether a new trial is warranted on the basis of newly discovered evidence, the reviewing court must consider all newly discovered evidence which would be admissible, and evaluate the weight of both the newly discovered evidence and the evidence which was introduced during trial; determination includes an evaluation of whether: (1) the evidence goes to the merits of the case or constitutes impeachment evidence; (2) the evidence is cumulative to other evidence presented; (3) there are any inconsistencies in the newly discovered evidence; and (4) the evidence is material and relevant.

1 Case that cites this headnote

[31] **Criminal Law** Post-conviction relief

When a postconviction court rules on a newly discovered evidence claim after an evidentiary hearing, a reviewing court will affirm those determinations that involve findings of fact, the credibility of witnesses, and the weight of the evidence, provided that they are supported by competent, substantial evidence.

2 Cases that cite this headnote

[32] **Criminal Law** Review De Novo

In considering a claim of newly discovered evidence, an appellate court reviews the postconviction court's application of the law to the facts de novo.

1 Case that cites this headnote

[33] **Criminal Law** Points and authorities

Petitioner waived on appeal his claim of a *Brady* violation, where his discussion of Brady on appeal was presented primarily in a footnote.

[34] **Habeas Corpus** Particular Issues and Problems

Habeas Corpus Post-trial proceedings; sentencing, appeal, etc

Claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus.

[35] **Habeas Corpus** Post-trial proceedings; sentencing, appeal, etc

To determine whether a claim alleging ineffective assistance of appellate counsel warrants habeas relief, a reviewing court evaluates whether: (1) alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and (2) deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. U.S.C.A. Const.Amend. 6.

[36] **Habeas Corpus** Counsel

In raising a claim of ineffective assistance of appellate counsel, the defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

[37] **Criminal Law** Raising issues on appeal; briefs

Appellate counsel's decision on appeal from conviction of murder in the first degree and sentence of death not to present a *Stumpf* due process claim on the basis that prosecutor presented inconsistent theories did not constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, as required for relief on the basis of ineffective assistance of counsel, where prosecutor did not take inconsistent positions during defendant's and co-defendant's trials, as it was the State's position that co-defendant was the mastermind who requested that defendant assist him with his plan to murder. U.S.C.A. Const.Amends. 6, 14.

[38] **Habeas Corpus** Matters determined on appeal

Defendant's claim that appellate counsel did not adequately contest the proportionality of the death sentences on direct appeal was procedurally barred in habeas corpus proceeding, where the issue was raised on direct appeal, and the Supreme Court considered and rejected the arguments in a lengthy analysis. U.S.C.A. Const.Amend. 6.

1 Case that cites this headnote

[39] **Criminal Law** Raising issues on appeal; briefs

Appellate counsel was not ineffective in failing to present a claim that the trial court erred in preventing trial counsel from cross-examining several witnesses called by the State to elicit testimony regarding evidence that defense had planned to introduce through cross-examination, where trial court properly exercised its statutorily conferred discretion to expand cross-examination beyond the subject matters discussed during direct examination, and the testimony defendant sought to introduce was outside the scope of direct examination. U.S.C.A. Const.Amend. 6; West's F.S.A. § 90.612(2).

[40] **Criminal Law** Comments on evidence or witnesses

Any ambiguity in the prosecutor's comments during voir dire regarding the State's burden of proof was clarified satisfactorily in capital murder trial when the trial court instructed the jury that the prosecutor's comments were not evidence and later read to the jury the standard instruction for reasonable doubt.

[41] **Criminal Law** In particular prosecutions

Criminal Law Homicide and assault with intent to kill

Prosecutor's statement contending that there was no evidence connecting the third party, who defendant attempted to blame for the murders, to the murders was a reasonable comment based on the evidence presented during trial, and in no way bolstered the State's case or shifted the burden to defendant to prove that he was innocent in capital murder trial, where comments only conveyed that the prosecutor believed no evidence was presented during trial to link third party to the murders.

[42] **Criminal Law** Comments on Evidence or Witnesses

Criminal Law Inferences from and Effect of Evidence

Criminal Law Comments by prosecution on failure of accused to present evidence

State may not comment on a defendant's failure to present a defense because doing so could lead the jury to erroneously conclude that the defendant has the burden of doing so; however, a prosecuting attorney may comment on the jury's duty to analyze and evaluate the evidence presented during trial and may provide his or her opinion relative to what reasonable conclusions may be drawn from the evidence.

[43] **Criminal Law** Demonstrative conduct by counsel

Prosecutor's use of a stabbing gesture in the air and raising his voice while counting the number of stab wounds inflicted on the victims during a reenactment of the murders was not improper in penalty phase of capital murder trial; it was within a trial court's discretion to allow the prosecutor to explain during closing statements what he reasonably believed would assist the jury in understanding the evidence that was presented during trial.

1 Case that cites this headnote

[44] **Criminal Law** For prosecution

It is within a trial court's discretion to allow the prosecutor to explain during closing statements what he reasonably believed would assist the jury in understanding the evidence that was presented during trial.

Attorneys and Law Firms

***210** Linda McDermott of McClain & McDermott, P.A., Estero, FL, for Appellant/Petitioner.

Pamela Jo Bondi, Attorney General, and Charmaine Millsaps, Assistant Attorney General, Tallahassee, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Lamar Brooks appeals an order of the circuit court that denied his initial motion to vacate his convictions of first-degree murder and sentences of death filed pursuant to Florida Rule of Criminal Procedure 3.851. He also petitions this Court for a writ of habeas corpus. We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const. As explained below, we affirm the postconviction court's denial of relief on all claims and deny Brooks' petition for a writ of habeas corpus.

FACTS AND BACKGROUND

Lamar Brooks was convicted and sentenced to death for the first-degree murders of Rachel Carlson and her three-month-old daughter, Alexis Stuart. *Brooks v. State,* 918 So.2d 181, 186–87 (Fla.2005) (*Brooks II*). However, this Court reversed Brooks' convictions and sentences on direct appeal, concluding that the trial court erroneously admitted extensive ***211** inadmissible hearsay testimony that prejudicially impacted Brooks' trial. *Brooks v. State,* 787 So.2d 765, 781–82 (Fla.2001) (*Brooks I*). Upon retrial, Brooks was again convicted of the murders of Carlson and Stuart. *Brooks II,* 918 So.2d at 187. A jury recommended a sentence of death by a vote of nine to three for the murder of Carlson and eleven to one for the murder of Stuart, and the trial court again sentenced Brooks to death for both murders. *Id.* This Court affirmed Brooks' convictions and sentences on direct appeal.

Id. at 211. The portions of the opinion relevant to the facts of the murders are as follows:

> In the late night hours of April 24, 1996, Rachel Carlson and her three-month-old daughter, Alexis Stuart, were found stabbed to death in Carlson's running vehicle in Crestview, Florida. Carlson's paramour, Walker Davis, and Brooks were charged with the murders. Davis was married and had two children, and his wife was pregnant with their third child. However, the victim believed Davis was also the father of her child and demanded support from him. [n.1] Davis became concerned about this pressure. He was convicted of the murders and sentenced to life imprisonment. However, he did not testify at Brooks' trial.
>
> > [N.1.] DNA tests performed after the murders revealed that Davis was not the father [of Stuart].
>
> Brooks lived in Pennsylvania but had traveled to Florida from Atlanta with his cousin Davis and several friends on Sunday, April 21, 1996. Brooks stayed with Davis at Eglin Air Force Base for a few days before returning to Pennsylvania. In interviews with the police, he informed them that on the following Wednesday evening, the night of the murders, he helped Davis set up a waterbed, watched some movies, and walked Davis's dog. Contrary to Brooks' statements, several witnesses placed him and Davis in Crestview on the night of the murders, although no physical or direct evidence linked him to the crimes.
>
> ....
>
> [D]uring this trial, Mark Gilliam related detailed, substantiated information regarding the two failed attempts he, Brooks, and Davis had made on Carlson's life. Gilliam testified that on Monday, April 22, 1996, Davis phoned Carlson from the hospital asking her to meet him at his home where Gilliam and Brooks were secretly waiting in Gilliam's car. According to Gilliam, he and Brooks followed the vehicle occupied by Davis and Carlson in the direction of the predesignated place in Crestview where, according to plan, Brooks was to shoot Carlson. Gilliam established that Brooks had a pistol-grip shotgun and latex gloves with him in the car. Gilliam's version of events was partially corroborated by the testimony of a law enforcement officer who performed a consensual search of Davis's home after the murders and discovered a short-handled shotgun. In addition, the crime scene analyst testified that the smudged hand impressions found at the crime scene were consistent with the perpetrator wearing latex gloves.
>
> Gilliam further testified that during the course of the duo following Carlson's car on the night of the first failed murder attempt, Carlson was stopped by a law enforcement officer for speeding. Gilliam explained that he drove by Carlson's stopped car, made two u-turns, and pulled up a short distance behind her. This testimony was partially corroborated by that of Florida State Trooper Michael Hulion, who reported that he stopped Carlson for speeding on Monday, April 22, and noted the presence of ***212** a baby in the back seat as well as a black male in the passenger seat. Gilliam further described that as this was occurring a second police officer drove to a position behind his vehicle, approached his car, and began questioning the two men as to why they had positioned their vehicle behind Carlson's stopped vehicle. Testimony at trial confirmed that a sheriff's deputy had in fact run a check on Gilliam's license plates that evening in the vicinity of Crestview.
>
> Gilliam also described in detail the second attempt to effectuate the murder, which occurred on the following day, Tuesday, April 23, and followed largely the same sequence of events with Carlson picking Davis up at a local shopping center and Gilliam and Brooks following behind. According to Gilliam, the second attempt ended in failure because Gilliam became separated from Carlson's car at a stop light. Gilliam stated that he and Brooks proceeded to the predesignated location in Crestview and waited for the plan to unfold, but Davis and Carlson did not appear. Gilliam's testimony was supported by the testimony of the officers who questioned Gilliam after the murders and related that he placed "Xs" on a map of Crestview that corresponded to the area in which the victims' bodies were found. Finally, Gilliam stated that he backed out of the murder plan and left Eglin the morning of April 24 to return to his base at Fort Benning, Georgia.
>
> ....
>
> Record evidence also firmly establishes Brooks' presence in Crestview in the vicinity of the crime scene in close proximity to the time of the murders. Witnesses Irving Westbrook and Charles Tucker testified that they saw two men walking in the vicinity of the murder scene, away from where Carlson's car was later found, around the time of the murder. According to Irving Westbrook, one of the men had a limp. Their testimony was corroborated by witness Kea Bess who had previously been introduced to Davis by a mutual friend on the Sunday prior to the murders. Bess testified that she saw Davis, whom she recognized because

of the cast on his leg, and another man walking rapidly in the opposite direction from the crime scene. According to Bess, one of the men was carrying a bag.

Witness [Melissa] Thomas testified that Davis and Brooks visited her Crestview apartment, located only a few blocks from the scene of the crime, on the night of the murders shortly after 9 p.m. She stated that both men were wearing black nylon pants and that Brooks carried a black backpack. Thomas testified that Brooks used the bathroom, Davis asked for a towel, and both men used the telephone. [n.10] The presence of Brooks and Davis in Thomas's apartment that evening was also corroborated by the testimony of Nikki Henry, a friend of Thomas, who arrived just as the two men were walking away from the location.

[N.10] The presence of Brooks in the apartment was corroborated by the DNA found on a cigarette butt recovered from Thomas's ashtray which matched Brooks' DNA.

The presence of Brooks and Davis in Crestview on the night of the murders was further established and verified by the testimony of Rochelle Jones. Jones stated that she received a call from Davis on the night of the murders requesting that she come to a particular location to provide transportation for the duo. Davis gave Jones directions to drive to a street in Crestview between a credit union and an animal hospital. Jones's testimony was corroborated by ***213** telephone records, and the testimony of a police officer who stopped Jones for speeding as she drove back to Eglin Air Force base, who noted the presence of two black males in her vehicle and requested that Davis assume operation of the vehicle because Jones was operating the vehicle with a suspended license. The testimony of Jones was further corroborated by that of Glenese Rushing, who was using the automatic teller machine at the Crestview credit union on the night of the murders and reported seeing two people across the street at the animal hospital entering a car that subsequently made a u-turn in the credit union parking lot. The testimony of Jones also establishes that whatever transportation Brooks and Davis may have used to travel to Crestview that evening was apparently unavailable for the return trip.

Record evidence also demonstrates the guilty knowledge of Brooks regarding the murders. In contrast to the multitude of witnesses who placed Brooks in Crestview near the crime scene on the night of the murders, Brooks consistently denied being in the community during his police interviews. According to Air Force Office of Special Investigations Agent Karen Garcia, Brooks claimed that he and his cousin remained in Davis's apartment near Eglin Air Force base assembling a waterbed on the night of the murders, leaving only briefly to walk Davis's dog. At one point during his interview with Agent Garcia, Brooks stated, “Walker is on his own. If he did something, he's on his own.” The investigator from the office of the State Attorney, Michael Hollinhead, also interviewed Brooks shortly after the murders. Hollinhead testified that when he attempted to develop information from Brooks regarding the person named “Mark” (subsequently identified as Gilliam), who had accompanied Brooks to Davis's home on April 21, Brooks became “evasive.”

The identity of Brooks as the individual who killed Carlson and Stuart is also supported by substantial evidence. Forensic evidence established that both Carlson and Stuart were killed by a person seated in the rear driver's-seat of the vehicle, [n.13] and that no one occupied the front passenger's seat at the time of Carlson's stabbing. Other evidence demonstrated that Brooks was the individual seated in the back seat of Carlson's vehicle. Importantly, Davis was in a leg cast at the time of the murder. That fact renders it highly unlikely that Davis would have been able to sit in the back seat of a car in a position that would have left him able to muster the leverage utilized to mount this attack from behind. Moreover, a shoe print was found on Carlson's shoulder. A forensic expert opined that the print was consistent with the killer extricating himself from the vehicle by climbing over the victim's body, which was found in the front seat, or opening the driver's-side front door and kicking Carlson over. Either feat would have been almost impossible for a man in a leg cast. Moreover, Davis sat in the front passenger seat during the prior failed murder attempts as established by the trooper who stopped Carlson for speeding and testified to seeing a baby in the back seat and a black man in the right front seat.

[N.13] This evidence included nondescript contact blood stains found on the exterior of the vehicle on the driver's-side front and rear doors; contact blood stains on the interior rear driver's-side door that were consistent with someone with blood on their hands attempting to exit the vehicle; ***214** contact stains on the driver's headrest consistent with placement of a bloody hand; and medium-velocity blood spatter and arterial spurting on the front passenger's door panel. Based on this evidence, the crime scene analyst concluded that Carlson was behind the steering wheel when the attack began, that the

> attack continued as she moved to the front passenger's side of the vehicle, and that her attacker was seated in the driver's-side back seat. Another forensic expert concurred with this conclusion.

Brooks II, 918 So.2d at 186–87, 194–97 (quoting *Brooks I,* 787 So.2d at 768–69) (some footnotes omitted).

As a basis for imposing sentences of death for the murders of Carlson and Stuart, the trial court found that four statutory aggravating circumstances had been proven beyond a reasonable doubt for each murder: (1) Brooks was previously convicted of another capital felony (the contemporaneous murder of the other victim); (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); (3) the murder was committed for pecuniary gain; and (4) the murder occurred while the defendant was engaged in the commission of aggravated child abuse. *Id.* at 187. [1] The trial court additionally found as an aggravating factor that Carlson's murder was especially heinous, atrocious, or cruel (HAC). *Id.*

Although Brooks waived his right to present mitigating evidence, counsel described for the trial court the mitigating evidence they would have presented. *Id.* Based on this information, the trial court found the following statutory mitigating circumstances: (1) Brooks lacked a significant criminal history (little weight); and (2) Brooks was twenty-three years old at the time of the murders (little weight). *Id.* at 187 n. 2. The trial court additionally found the following nonstatutory mitigating circumstances: (1) Brooks' codefendant, Walker Davis, Jr., was sentenced to life imprisonment (little weight); (2) Brooks has strong family ties and participated in community affairs (very little weight); (3) Brooks is his family's only living son (some weight); (4) Brooks' military service (little weight); (5) Brooks demonstrated good character and an ability to establish loving relationships (little weight); (6) Brooks is the father of a six-year-old child (some weight); (7) Brooks exhibited good courtroom behavior and demeanor (some weight); (8) Brooks regularly attended church and had Christian training (little weight); (9) Brooks' employment history (little weight); (10) the sufficiency of life in prison without the possibility of parole as punishment (little weight); and (11) the sufficiency of life in prison without parole to protect society (some weight). *Id.*

On direct appeal, Brooks presented fourteen claims. *Id.* at 187–211. Specifically, Brooks contended that the trial court erred when it: (1) admitted a life insurance policy; (2) permitted testimony regarding child support records; (3) admitted notes seized from Davis' leg cast; (4) permitted the State to impeach Melissa Thomas regarding whether, on the night of the murders, Brooks changed clothes in her apartment; (5) permitted Mark Gilliam to testify regarding Brooks' desire to shoot the police officer who approached Gilliam's vehicle during the first failed attempt ***215** to murder the victims; (6) denied several objections to comments made by the prosecutor during closing statements; (7) refused to instruct the jury on section 90.803(18)(e), Florida Statutes (1996); [2] (8) denied Brooks' motion for mistrial; (9) denied Brooks' motion to change venue; (10) found that Brooks committed the murder during the course of an act of aggravated child abuse and relied upon this fact to justify the imposition of the death sentence; (11) found the pecuniary gain and CCP aggravating circumstances applied to the murder of Stuart; (12) found that the sentences of death were proportionate; (13) refused to require the jury to return a special verdict that specified which aggravating circumstances were found and the accompanying vote; and (14) assigned the jury's recommendation great weight. *Id.* at 187–211.

This Court determined that five errors of law occurred during the course of Brooks' retrial, including: (1) the erroneous admission of testimony concerning the child support records; (2) the erroneous admission of the notes recovered from Davis's leg cast; (3) the improper impeachment of Thomas; (4) the trial court's failure to read the jury instruction for section 90.803(18)(e) as requested by defense counsel; and (5) the erroneous reliance by the trial court on the aggravating factor that the murders were committed during the course of an act of aggravated child abuse. *Id.* at 202. [3] However, we concluded that there was no reasonable probability that any of these errors, either individually or cumulatively, contributed to Brooks' convictions, and affirmed Brooks' convictions and sentences. *Id.* at 197, 199–202, 211. The United States Supreme Court denied certiorari review on May 22, 2006. *Brooks v. Florida,* 547 U.S. 1151, 126 S.Ct. 2294, 164 L.Ed.2d 820 (2006).

Postconviction Proceedings

On May 18, 2007, Brooks filed an initial seven-claim motion to vacate judgment of convictions and sentences.

Brooks later amended his motion to add two additional claims. The claims presented were: (1) counsel performed ineffectively when they failed to present and/or the State failed to disclose, critical exculpatory evidence during ***216** the guilt phase; (2) counsel performed ineffectively when they failed to present available evidence to the jury, despite promising to do so during opening statements; (3) counsel performed ineffectively when they failed to investigate and present available mitigation; (4) counsel performed ineffectively when they failed to provide Brooks with adequate mental health assistance during trial; (5) Florida's rules prohibiting postconviction counsel from interviewing jurors unconstitutionally inhibit Brooks from determining if constitutional errors occurred; (6) the lethal injection procedures violate the Eighth Amendment; (7) Brooks' convictions and sentences of death constitute cruel and unusual punishment; (8) the State would violate the Eighth Amendment ban against cruel and unusual punishment by executing Brooks, a brain-damaged, mentally impaired individual; and (9) Brooks is exempt from execution under the Eighth Amendment because he suffers from severe brain damage and other mental limitations.

The postconviction court granted an evidentiary hearing on claims 1, 2, 3, 4, and 9, and summarily denied claims 5, 6, 7, and 8. The evidentiary hearing was held over the course of four days between January and May 2008. However, in January 2009, the postconviction court judge died unexpectedly before a final order on Brooks' postconviction claims was issued. The case was reassigned to a successor judge, and a new evidentiary hearing was held on the same claims.

During the second evidentiary hearing, Brooks presented five witnesses. Two of the witnesses, Wilden Davis, Brooks' cousin, and Joanne Washington, Brooks' childhood friend, testified that Brooks was an intelligent, witty, and happy child. However, both Davis and Washington testified that after Brooks joined the military and returned from overseas, he became reclusive, withdrawn, irritable, and occasionally verbally and physically aggressive. Brooks started drinking heavily and occasionally smoked marijuana.

Dr. Hyman Eisenstein, a clinical psychologist with a specialty in neuropsychology, testified that Brooks exhibited brain dysregulation, and diagnosed Brooks with chronic post-traumatic stress disorder (PTSD) and alcohol abuse. Dr. Eisenstein testified that at the time of the murders, Brooks was additionally suffering from an extreme mental or emotional disturbance, was abusing alcohol, and could not conform his conduct to the requirements of law. However, Dr. Eisenstein's testimony was significantly impeached during cross-examination. Dr. Eisenstein admitted that Brooks was generally uncooperative, did not give his best effort during the initial evaluation, and refused to see him for a second evaluation. Thus, Dr. Eisenstein admitted that his diagnosis of PTSD and his conclusion that Brooks was suffering from an extreme emotional disturbance were only "tentative" because Brooks was uncooperative during the evaluation process. Dr. Eisenstein additionally admitted that his belief that Brooks was drinking on the night of the murders was merely an assumption based on prior conduct.

Finally, Brooks presented Kepler Funk and Keith Szachacz, the attorneys who represented Brooks during his initial direct appeal and, after his convictions were reversed, during the retrial. Both Funk and Szachacz testified in detail regarding their relationship with Brooks, their approach to Brooks' retrial, and the strategic decisions they made both before and during Brooks' retrial.

The State presented three witnesses. Barry Beroset, Brooks' counsel during the first trial, testified regarding his trial strategy, the extent of his mitigation investigation, and whether he pursued mental ***217** health mitigation. Debbie Carter, a legal assistant with the State Attorney's Office, and Robert Elmore, the Assistant State Attorney who prosecuted Brooks and his codefendant, testified regarding the State's discovery procedures and whether certain documents were disclosed to the defense during pretrial discovery.

On March 9, 2011, after the evidentiary hearing was completed, but before a final order was issued, Brooks filed a successive postconviction motion in which he alleged that newly discovered evidence established he did not murder Carlson or Stuart. A third evidentiary hearing was held on this claim, during which Brooks presented four witnesses. [4]

During the evidentiary hearing, Ira Ferguson, who was incarcerated and serving sentences for convictions of second-degree murder, grand theft auto, and robbery with a deadly weapon, testified that he met Walker Davis in prison. Ferguson informed Davis that he had visited in Crestview and knew several people who lived there. Ferguson later testified that he knew Gerrold Gundy, and that Carlson was Gundy's girlfriend. Ferguson testified that on the night of the murders, he arrived at a club between 10:30 and 11 p.m. Outside the club in the parking lot, Ferguson saw Gundy, Carlson, and

a baby inside Carlson's vehicle. Ferguson testified that he approached them, asked for a cigarette, and departed from the area. When he returned, Ferguson noticed that the vehicle had been moved onto a side street. Shortly thereafter, Ferguson heard a door slam and saw Gundy and Carlson arguing. Ferguson left the scene and drove to a friend's house. The next day, Ferguson learned of Carlson's and Stuart's deaths, but he did not contact the authorities.

Funk testified that he never encountered Ferguson during the course of his investigation of the murders. He further testified that he investigated Gundy as a possible suspect, but ultimately decided, with Brooks' consent, that the best course of action was to not attempt to connect Gundy to the murders. In addition, he testified that he and Szachacz conducted an extensive investigation and concluded that there was no "indication in any way, shape [,] or form ... that Ms. Carlson was alive at 10:45. I think that it was contradicted by the evidence, frankly."

Daniel Ashton, a private investigator, testified that he became involved with Brooks' case in 2006. The first time he learned of Ferguson was in July 2010, when he received a phone call from Davis' mother. He testified that while he was investigating the murders, he never encountered any evidence that: (1) placed Ferguson in Crestview at the time of the murders; or (2) corroborated Ferguson's testimony that he saw Gundy with Carlson at a nearby club at 10:45 p.m. on the night of the murders. Ashton additionally testified during cross-examination that no evidence found during the investigation supported Ferguson's testimony that Gundy fought with someone outside of the club on the night of the murders or that Gundy knew Carlson. Ashton was also unable to locate Michelle Roberts, the friend whose house Ferguson allegedly went to on the night of the murders.

Elizabeth Hutchinson testified that she met Ferguson through mutual friends who travelled from Miami to visit her in Crestview in 1996. Hutchinson testified that she also knew Gundy and she had never seen Ferguson and Gundy together.

***218** The State presented several witnesses in rebuttal. Glenn Swiatek, who briefly represented Walker Davis on appeal, testified that he introduced himself to Ferguson shortly before Ferguson was deposed. During that conversation, Ferguson asked Swiatek to provide him information as to the date on which the murders occurred. Immediately after Swiatek provided the information, he observed Ferguson write the date at the top of an affidavit. Swiatek testified that Ferguson told him that he asked Swiatek for this date information only to determine whether Swiatek was an undercover agent.

Gerrold Gundy testified that he had never met Carlson, but that around the time of the murders he had a girlfriend named Shawna Tatum, who, like Carlson, was a white female with blonde hair. Also like Carlson, Tatum had a young child and drove a small red vehicle. Gundy recalled an incident in 1999 in Crestview where he and three men who were related to Ferguson were arrested on drug charges. Gundy testified that he did not know these men and was later released when the police determined that he had no connection to the crime. When Gundy was shown two pictures of Ferguson, he stated it was possible that he had seen Ferguson before, but that he and Ferguson were not friends and he did not interact with Ferguson on the night of the murders.

Margaret Summers, a sergeant with the Florida Department of Corrections (DOC) who worked at the Wakulla Corrections Institution Annex from October 2008 to June 2011, testified that she studied the internal movement records of Davis and Ferguson while they were incarcerated in that facility. She testified that she never saw Ferguson and Davis together, nor did she locate a time when they were housed in the same dormitory. Although there was a two-month period when Davis and Ferguson could have interacted during recreational hours, she could recall only one occasion when Ferguson and Davis were in the same location at the same time. Sylvia Williams, a records custodian for the Florida Department of Law Enforcement (FDLE), testified that from April 2010 to November 2010 and from April 2003 to July 2003, Davis and Ferguson were housed in the same facility.

On March 12, 2012, the postconviction court issued an order denying all of Brooks' claims, including the newly discovered evidence claim presented in the successive motion. This appeal follows.

ANALYSIS

Strickland Standard of Review

Brooks' first two claims on appeal challenge the postconviction court's determination that counsel did not perform ineffectively during the guilt phase of his retrial. This Court recently described what a defendant must establish to succeed on a claim of ineffective assistance of trial counsel:

> [T]he test when assessing the actions of trial counsel is not how, in hindsight, present counsel would have proceeded. *See Cherry v. State,* 659 So.2d 1069, 1073 (Fla.1995). On the contrary, a claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. *Id.* When examining counsel's performance, an objective standard of reasonableness applies, *id.* at 688, 104 S.Ct. 2052 and great deference is given to counsel's performance. ***219** *Id.* at 689, 104 S.Ct. 2052. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." *See Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000). There is a strong presumption that trial counsel's performance was not ineffective. *See Strickland,* 466 U.S. at 669, 104 S.Ct. 2052.
>
> Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. [*Id.* at] 689, 104 S.Ct. 2052. A defendant must do more than speculate that an error affected the outcome. *Id.* at 693, 104 S.Ct. 2052. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052. Both deficient performance and prejudice must be shown. *Id.*

Bradley v. State, 33 So.3d 664, 671–72 (Fla.2010).

[1] [2] [3] [4] Ineffective assistance claims are reviewed under a mixed standard of review because the performance and prejudice prongs of *Strickland* present mixed questions of law and fact. *Id.* at 672. Postconviction courts hold a superior vantage point with respect to questions of fact, evidentiary weight, and observations of the demeanor and credibility of witnesses. *See Cox v. State,* 966 So.2d 337, 357–58 (Fla.2007). As a result, this Court defers to the postconviction court's factual findings so long as those findings are supported by competent, substantial evidence. *See Bradley,* 33 So.3d at 672. However, this Court reviews the postconviction court's legal conclusions de novo. *Id.* Finally, because *Strickland* requires that a defendant establish both deficiency and prejudice, an appellate court evaluating a claim of ineffectiveness is not required to issue a specific ruling on one component of the test when it is evident that the other component is not satisfied. *See Mungin v. State,* 932 So.2d 986, 996 (Fla.2006).

Failure to Present "Critical, Exculpatory" Evidence

In his first claim, Brooks contends that his trial attorneys performed ineffectively when they failed to present several pieces of "critical, exculpatory evidence" during the guilt phase of his retrial. The postconviction court denied this claim, concluding that Brooks had failed to establish either deficiency or prejudice. Before addressing these claims individually, we note that there is an abundance of evidence which demonstrates that Brooks clearly and unequivocally waived his right to present a defense case-in-chief during his retrial. For example, the court conducted the following colloquy with Brooks to address whether he agreed with the decision not to present a defense:

> COURT: Let me ask at this time. You've already stated on the record that it's the position of the defendant that he's not going to put on any witnesses at this time.
>
> COUNSEL: That's correct.
>
> COURT: And, Mr. Brooks, you realize you have a constitutional right to testify on your behalf, and as I understand it, you're waiving that opportunity at this point, is that correct?
>
> BROOKS: Yes.
>
> ***220** COURT: And you're also waiving the constitutional right that you'd have to present witnesses on your behalf, is that correct?
>
> BROOKS: Yes.
>
> COURT: So [counsel's] assertion that you're going to rest ... that's what you want to do, is that correct?
>
> BROOKS: Yes.

Further, Brooks' attorneys, Funk and Szachacz, testified extensively during the evidentiary hearing regarding their

trial strategy and their relationship with Brooks. Funk testified that during the retrial he and Szachacz met with Brooks daily to discuss the case. They asked for Brooks' input and involved him in every decision. After the State rested, Funk and Szachacz reviewed the record, examined the evidentiary value of presenting witness testimony, and considered the strategy of prior counsel, who had unsuccessfully presented a defense during the first trial. They then discussed the case with Brooks, and with his input, determined that the best course of action was to not present a defense. Counsel testified that while they would have liked to present the evidence discussed below, none of that evidence, independently or collectively, was strategically important enough to outweigh the benefits of retaining first and last closing statements, especially considering that Brooks had been charged with the emotionally charged crime of brutally murdering a three-month-old baby and her mother. [5]

[5] Additionally, Brooks contends that prejudice has been established because during trial, his attorneys proffered much of the evidence discussed below. Brooks asserts the proffers demonstrate that his attorneys *wanted* to present the proffered evidence and *felt* the information was critical to the defense. However, prejudice is not established based solely on the subjective assessments of a party or his or her counsel regarding the importance of evidence. Rather, prejudice is established only when the defendant can establish a reasonable probability, which is a probability sufficient to undermine confidence in the outcome of that proceeding, that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Bradley,* 33 So.3d at 671–72. Thus, simply because trial counsel *wished* to present certain evidence, does not establish that Brooks was prejudiced by counsel's failure to do so. Although the facts indicate that trial counsel made a reasonable, strategic decision not to present a defense case-in-chief, we address ***221** each of the individual pieces of evidence Brooks claims counsel failed to present.

Lack of Forensic Evidence Linking Brooks to the Murders

[6] Brooks contends that trial counsel performed deficiently when they failed to present witnesses to emphasize that no forensic evidence discovered either at the crime scene or found on Brooks' person linked him to the murders. Although Brooks does not dispute that counsel attempted to establish reasonable doubt, he contends that they performed deficiently when they neglected to utilize the lack of forensic evidence to further establish a reasonable doubt in the minds of the jury.

During the evidentiary hearing, Funk testified he and Szachacz believed the lack of forensic evidence that connected Brooks to the crime was a critical fact that significantly favored the defense. To maximize the value of this fact, Funk and Szachacz testified that their trial strategy was to bolster the credibility of the State forensic experts by portraying them as experts in their field. According to Funk, if the jury believed that the forensic experts were "the greatest thing since sliced bread [who] could find a needle in any haystack," he and Szachacz could establish reasonable doubt during closing statements by emphasizing that even the best forensic experts failed to uncover *any* evidence that linked Brooks to the crimes. Both Funk and Szachacz were aware that several pieces of evidence—including the hair discovered in the victim's hand, [6] vacuum sweepings taken from the victim's car, and Brooks' backpack—had been forensically analyzed and revealed no scientific connection between Brooks and the murders. However, Brooks' counsel testified that they ultimately made the strategic decision not to present forensic experts so that they could assert during the final closing statement:

> We've got the experts that can gather evidence. Why do you think they do it, for fun? It's for this purpose. This is what their job is, to gather evidence. Some examples of those in cases are DNA, DNA. Do you have it this case? None. Okay? That FDLE's got serologists, DNA folks, microanalysis, handwriting experts, voice stress experts, document examiners, pen pressure testing, paper testing, ink, fibers, ropes, shoeprints. They have people there, scientists, that test this stuff[,] ... like Jan Johnson who are solely trained ... to make sure I preserve [evidence] so it doesn't get contaminated, and properly collect it, package it, to get it to those people. Hair fibers. What do we have in this case? None. Saliva, none. Skin cells, none. Shoeprints, none. I'm talking about evidence in criminal trials where the Government is able to meet their burden. Confessions happen in criminal cases. In this case, none. Handwriting analysis? This case, none, none. Blood on people? This case, [Brooks], none.

This Court has, on several occasions under similar circumstances, concluded that the decision to preserve the first and last closing statements constitutes a sound trial strategy. *See* ***222** *Van Poyck v. State,* 694 So.2d 686, 697 (Fla.1997) (concluding that counsel made a tactical

decision to refrain from presenting a defense case-in-chief to preserve the first and last closing statements); *see also Evans v. State,* 995 So.2d 933, 945 n. 16 (Fla.2008). Thus, both the record and our prior precedent demonstrate that trial counsel made a reasonable, strategic decision to retain the tactical advantage of presenting the final closing statement and to pursue the theory of reasonable doubt by arguing, through inference rather than witness testimony, that no forensic evidence linked Brooks to the murders. *See Johnston v. State,* 63 So.3d 730, 737 (Fla.2011) (holding that strategic decisions do not constitute ineffective assistance if counsel considers and rejects alternative courses when the final strategy was reasonable under the norms of professional conduct). Therefore, because it is evident that Brooks has failed to establish deficiency, we need not address the prejudice prong of *Strickland* and conclude that counsel did not perform ineffectively. We affirm the postconviction court's denial of this subclaim. *See Mungin,* 932 So.2d at 996.

Gerrold Gundy

[7] Brooks next contends that trial counsel performed deficiently when they failed to present several pieces of evidence that purportedly connected Gundy to the murders. Specifically, Brooks contends that: (1) Gundy was allegedly seen riding with a white female driver in a car similar to the one driven by the victim; (2) a crime scene dog tracked footsteps from the scene of the crimes to the doorstep of Gundy's house; (3) a partially smoked Marlboro cigarette was found on the street near Gundy's home, and an open pack of the same brand of cigarettes was found inside the victim's car; and (4) a confidential informant told law enforcement that Gundy was Carlson's friend or boyfriend.

However, for each piece of evidence, Funk or Szachacz logically explained why the defense strategically decided not to present it during the retrial. For example, Funk noted that the crime scene dog that tracked footsteps to Gundy's doorstep *did not begin the search from the crime scene,* but rather began tracking from a dirt road about thirty yards away from the scene. Additionally, Brooks' counsel was aware that Gundy had a Caucasian girlfriend who, like Carlson, had an infant child and drove a small red vehicle. This fact explains why the witnesses could have mistakenly thought that Gundy's girlfriend was Carlson, and further supports the decision not to present this evidence during trial.

Based on this evidence, and other evidence that rebuts any potential connection between Gundy and the murders, Funk testified, "Did we think that [the State] had the ability to rebut any claim that Gundy was the one who committed these homicides? Yeah, we knew that. We knew we [were not] going to be able to prosecute Gerrold Gundy." Funk added that to attack the credibility of the forensic experts, including the crime scene dog, would have undermined the defense strategy to bolster the credibility of the State forensic experts and then rely on their credibility to stress the lack of forensic evidence connecting Brooks to the crime. Thus, after he and Szachacz discussed the issue thoroughly with Brooks, they "made the decision that it wasn't worth pursuing. The downside outweighed any potential upside."

Accordingly, we conclude that Brooks' trial counsel made a reasonable, strategic decision to not lose credibility with the jury and forego the ability to present the last closing statement to present evidence that initially appeared to connect Gundy to the murders, but ultimately would have ***223** been substantially impeached by the State. Counsel did not perform deficiently with respect to this claim, and we hold that the postconviction court properly rejected this challenge of ineffectiveness. *See McCoy v. State,* 113 So.3d 701, 716 (Fla.2013).

Green Nissan

[8] Before trial, a confidential informant reported that a stolen green Nissan was recovered that matched the description of a vehicle suspected to be associated with the murders. The vehicle purportedly had blood spatter inside the cabin and on the hood. Although Brooks contends that counsel performed deficiently when they failed to present this evidence, he presented no evidence during the postconviction proceedings to demonstrate that this Nissan had any connection to the murders. Brooks has also failed to demonstrate that any further investigation of the Nissan would have rendered this evidence probative or admissible.

During the evidentiary hearing, Funk testified that *nothing* connected the stolen Nissan to any aspect of Brooks' case. Szachacz similarly testified that the information regarding the Nissan was "worthless" and could not have been used to support Brooks' defense. Funk explained that they discussed this issue with Brooks and agreed not to present evidence of the Nissan to the jury. We conclude that counsel made a reasonable assessment of the evidentiary value of the

Nissan and tactically decided not to present it. Therefore, because Brooks has failed to establish either that his counsel performed deficiently by failing to present this evidence or that this failure undermined confidence in the outcome of his trial, we conclude that the postconviction court did not err when it denied this subclaim.

Timeline

[9] Brooks contends that trial counsel performed deficiently when they failed to present evidence from two witnesses, LaConya Orr and Tim Clark. According to Brooks, these witnesses would have presented evidence that would have contradicted the State's timeline. Specifically, Brooks contends Orr told police that between 8:45 and 9 p.m. on the night of the murders, Davis and a "skinny, shorter black male" came to her house looking for her husband. The men left on foot when Orr told them that her husband was not home. Similarly, Brooks contends Clark would have testified that, between 9 and 10 p.m. on the same night, Clark saw Carlson in her vehicle conversing with a black male. Clark was shown pictures of Davis and Brooks, but he could not identify either of the men as the individual he saw with Carlson. [7]

During the evidentiary hearing, Funk testified that he and Szachacz thoroughly researched whether testimony could be presented to rebut the State's timeline. They reenacted what Clark told police to determine whether it was possible to identify Carlson from the location where Clark had allegedly seen Carlson sitting in her vehicle. Further, Funk and Szachacz discovered that although Clark had initially stated that he could *not* identify the person with Carlson on the night of the murders, ***224** he later changed his position and stated "with certainty" that Brooks was the black male with Carlson. In light of Clark's statement, Szachacz testified that there was "no way we [could] call [Clark] because he was going to hurt [ ] Brooks." Funk shared the same sentiments, stating that they did not present Clark because he could not imagine anything connecting Brooks with Carlson "ever helping because [ ] Davis was the one that had the link to [ ] Carlson."

Similarly, Szachacz testified that Orr's husband had given a statement to law enforcement that placed Davis and Brooks at Orr's house slightly after 8 p.m. Szachacz and Funk knew that timeframe left more than enough time for Brooks and Davis to drive from Eglin Air Force Base to Crestview and commit the murders because they had driven the route themselves in preparation for trial. Further, Orr could not positively identify Brooks as the individual who approached her house with Davis. Based on the limitations of Orr's potential testimony, Funk testified, "I know we talked about [presenting Orr as a witness] extensively.... And the bottom line analysis was, from a strategic standpoint, it was best not to go there. I think the jury would see through that."

Based on these facts, we hold that the postconviction court did not err when it concluded that trial counsel did not perform deficiently by failing to present Orr and Clark as witnesses. Both attorneys thoroughly researched whether they could challenge the State's timeline and ultimately concluded that: (1) Clark's testimony would have placed Brooks with Carlson near the time of the murders; and (2) Orr's testimony would likely have been substantially impeached by the prosecution. Thus, because neither witness's testimony would have substantially aided the defense, we conclude that trial counsel made a reasonable, strategic decision not to present the witnesses. *See Reynolds v. State,* 99 So.3d 459, 498–99 (Fla.2012) (holding that counsel was not ineffective for failing to present unfavorable testimony). Therefore, because it is evident that Brooks has failed to establish deficiency, counsel cannot be deemed ineffective, and we affirm the denial of this subclaim. *See Mungin,* 932 So.2d at 996.

Polygraph Examination of Melissa Thomas

[10] During trial, Melissa Thomas testified that on the night of the murders, Davis and Brooks came to her Crestview apartment at approximately 9 p.m. wearing black nylon pants. *Brooks II,* 918 So.2d at 200. She testified that while inside her home, Brooks excused himself to use the bathroom. *Id.* Thomas then testified that she recalled being interviewed by police shortly after the murders. *Id.* When the prosecutor asked Thomas whether she recalled telling Agent Haley during the interview that Brooks exited the bathroom wearing shorts, Thomas answered, "No, I don't remember." *Id.*

The State subsequently presented Agent Haley, who testified that Thomas had previously told him Brooks changed into shorts while in the bathroom. *Id.* Counsel objected, asserting that the question constituted improper impeachment because Thomas' trial testimony did not materially differ from her statement to Haley. *Id.* The trial judge allowed the impeachment on the basis that her trial testimony and her previous statement to Agent Haley were "contradictory to a degree." *Id.*

On direct appeal, Brooks contended the trial court erred when it permitted the prosecutor to impeach Thomas with the statement she had provided to Agent Haley. *Id.* This Court agreed, and held that:

> the trial judge in the instant case allowed the impeachment of Thomas's testimony ***225** because he found her testimony inconsistent to a degree with her prior statement, not because he determined that she was fabricating her inability to recall the content of her police statement. Given the other detailed evidence provided by Haley and the fact that Brooks' retrial occurred six years after the murders were committed, there is no basis on which to conclude that Thomas fabricated her lack of recollection. For that reason, the trial court erred in permitting the impeachment of Thomas's trial testimony with her previous statement.

Id. However, we determined that the error was harmless:

> Permitting Agent Haley to testify to the prior statement of Thomas, in which she indicated that Brooks had changed into shorts in her bathroom, *did not contribute to his conviction.* Neither Thomas nor any of the witnesses who placed Brooks in Crestview on the night of the murders indicated that he or his clothes were covered in blood. The State did not recover or seek to introduce any blood-stained clothing. In the absence of any such evidence, testimony that Brooks changed clothes in Thomas's bathroom *is of no consequence.*

Id. (emphasis supplied).

During the postconviction proceedings, Brooks has alleged both *Strickland* and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), violations relating to Thomas' and Haley's testimony. He contends his trial counsel performed deficiently when they failed to present the results of Thomas' polygraph examination. During the examination, Thomas responded in the negative when asked whether she noticed if Brooks changed clothes in her apartment. This answer was deemed truthful by the polygraph administrator. Brooks alleges that counsel performed deficiently when they failed to present these results to rehabilitate Thomas' trial testimony.

[11] We conclude that this claim of ineffectiveness fails both prongs of *Strickland.* As the postconviction court noted, polygraph evidence is generally inadmissible, and trial counsel cannot be deemed deficient for failing to present inadmissible evidence. *See Gosciminski v. State,* 132 So.3d 678, 702 (Fla.2013) (noting that "[p]olygraph evidence has, as a matter of law, long been inadmissible as evidence in Florida"), *cert. denied,* ——U.S. ——, 135 S.Ct. 57, 190 L.Ed.2d 57 (2014); *Owen v. State,* 986 So.2d 534, 546 (Fla.2008). Further, even if we were to conclude that counsel performed deficiently when they failed to rehabilitate Thomas with the results of her polygraph examination, Brooks has failed to demonstrate prejudice because we specifically held on direct appeal that any testimony relating to whether Brooks changed clothes in Thomas' bathroom was "of no consequence" and "did not contribute to his conviction." *Brooks II,* 918 So.2d at 201. These conclusions demonstrate that counsel's failure to present this evidence does not undermine confidence in the outcome of Brooks' trial. Therefore, Brooks' claim of ineffectiveness was properly denied by the postconviction court.

[12] **[13]** Brooks next contends that the prosecutor committed a *Giglio* violation by presenting Agent Haley's allegedly misleading testimony during trial. Brooks claims that "despite knowing that Thomas was truthful in her response on the polygraph *that Mr. Brooks did not change clothes,* the prosecutor wanted the jury to believe otherwise." A *Giglio* violation is demonstrated when: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence ***226** was material. *Davis v. State,* 26 So.3d 519, 532 (Fla.2009). We conclude that Brooks has failed to establish any of the three *Giglio* prongs.

First, Brooks' claim that Thomas definitively stated during the polygraph that Brooks did not change clothes is false. Instead, during the polygraph examination, Thomas was asked if she *noticed* "if [Brooks] changed clothes," to which she responded "no." Thomas testified during trial that she did not remember telling Agent Haley that Brooks changed clothes. Thus, Thomas never definitively stated that Brooks *did not* change his clothes in her apartment. Accordingly, the State did not knowingly present false testimony when it elicited from Agent Haley that Thomas told him during an interview that Brooks *changed into shorts* in the bathroom of her apartment. Therefore, the first and second prongs of *Giglio* have not been met. Second, even if we were to conclude that the prosecutor knowingly presented false testimony, which we do not, Brooks has failed to demonstrate that any evidence concerning whether Brooks changed clothes in Thomas' apartment was material. In fact, we have previously determined that this evidence was "of no consequence" and not material. *Brooks II,* 918 So.2d at 201. Therefore, the third prong of the *Giglio* test has not been met, and we deny relief on this claim.

Conclusion

In sum, we conclude that trial counsel did not perform ineffectively when they did not present the foregoing evidence during trial. We also conclude that Brooks has failed to establish a *Giglio* violation. Thus, the postconviction court did not err in denying this claim.

Failure to Present Evidence Discussed During Opening Statements

[14] In this claim, Brooks again contends that trial counsel performed ineffectively when they failed to present the "critical, exculpatory" evidence discussed above. However, here he claims that counsel performed ineffectively because they "promised" during opening statements to present this evidence, but then failed to present it during trial. The postconviction court denied this claim, concluding that Brooks failed to demonstrate either deficiency or prejudice.

In the prior claim, we concluded that trial counsel made reasonable, strategic decisions not to present several pieces of evidence, and at the time of trial Brooks also agreed not to present this evidence. Thus, whether trial counsel performed ineffectively concerning the *failure to present* this evidence was previously addressed and will not be discussed further. Rather, the only additional claim presented by this issue is whether trial counsel, by failing to present the evidence after they told the jury during opening statements that it would be presented, performed ineffectively.

[15] Opening statements are not substantive evidence, but rather serve to outline what an attorney *expects* will be established by the evidence presented during trial. *Occhicone v. State,* 570 So.2d 902, 904 (Fla.1990). During the evidentiary hearing, Funk testified that he and Szachacz spent hours planning, rehearsing, and modifying their opening statement to incorporate what they believed the evidence would show during the retrial. However, during trial, the prosecutor strategically limited the direct examination of specific witnesses to prevent the defense from cross-examining them on certain subjects. When Funk and Szachacz attempted to cross-examine the witnesses concerning the evidence previously discussed, the prosecutor successfully objected to that questioning as outside the scope of direct ***227** examination. As a result, certain evidence counsel had previously stated "the jury would hear" was, in fact, only heard by the trial judge during a proffer. Funk testified that, as the trial progressed, he and Szachacz considered whether the benefits of presenting witnesses outweighed the procedural benefits afforded at the time to defendants who did not present a case-in-chief. They discussed the issue thoroughly with Brooks, and ultimately concluded that none of the evidence discussed by counsel during opening statements outweighed the value of retaining the opportunity to present the first and last closing statements.

We have, under similar circumstances, held such conduct by defense counsel to be reasonable and strategic. *See Beasley v. State,* 18 So.3d 473, 491–92 (Fla.2009) (concluding that counsel's decision not to present a defense case-in-chief to preserve the benefits of giving both first and last closing argument was a "reasonable defense strategy based on the procedural rules in force at the time of trial."). Based on the foregoing, we conclude that trial counsel did not perform deficiently when they failed to present the evidence previously discussed to support the assertions made during opening statements. Thus, the postconviction court did not err when it denied this claim.

Failure to Investigate and Present Mitigation

In his third claim, Brooks contends that his trial counsel failed to adequately investigate and present mitigating evidence. According to Brooks, had counsel conducted a proper investigation, they would have uncovered evidence that Brooks suffered from alcohol abuse and various mental deficiencies.

[16] **[17]** **[18]** **[19]** **[20]** **[21]** **[22]** To demonstrate that counsel was ineffective for failure to investigate or present mitigating evidence, a defendant must establish that the deficient performance of counsel deprived the defendant of a reliable penalty phase proceeding. *Hoskins v. State,* 75 So.3d 250, 254 (Fla.2011). Furthermore,

> It is unquestioned that under the prevailing professional norms ... counsel has an obligation to conduct a thorough investigation of the defendant's background. Moreover, counsel must not ignore pertinent avenues for investigation of which he or she should have been aware. It is axiomatic that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
>
> In the context of penalty phase errors of counsel, the prejudice prong of *Strickland* is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.
>
> [A defendant] must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the evidentiary hearing—and reweigh it against the evidence in aggravation. However, the Supreme Court reiterated in *Porter* that "we do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.' "

Simmons v. State, 105 So.3d 475, 503 (Fla.2012) (internal quotation marks and citations omitted).

***228** **[23]** **[24]** We have further explained that a competent defendant may control decisions that pertain to his or her defense, including the presentation of mitigation evidence, and that counsel will not be rendered ineffective for following the wishes of a competent defendant. *Dessaure v. State,* 55 So.3d 478, 484 (Fla.2010). However, a defendant may waive the presentation of mitigation only when the waiver is made knowingly, voluntarily, and intelligently. *State v. Larzelere,* 979 So.2d 195, 204 (Fla.2008). The decision to waive mitigation must not be made blindly. Rather, counsel must first investigate all avenues of potential mitigation and advise the defendant so that he or she reasonably understands what is being waived and its ramifications, and is able to make an informed and intelligent decision. *State v. Lewis,* 838 So.2d 1102, 1113 (Fla.2002); *see also Grim v. State,* 971 So.2d 85, 100 (Fla.2007) ("We have recognized that a defendant's waiver of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed.").

Waiver and Investigation

[25] During his first penalty phase trial, Brooks was not opposed to the presentation of mitigation. However, prior to the commencement of the second penalty phase on retrial, trial counsel Funk explained to the trial court that Brooks' decision with regard to the presentation of mitigation had changed:

> I can tell the Court that Mr. Brooks and Mr. Szachacz and myself have had long, long, long heart-to-heart discussions that include this topic about waiving mitigation, Judge. It's not something that's knee jerk as a result of a verdict that's not favorable to Mr. Brooks. He's maintained his innocence from day one and continues to. In terms of mental health mitigation, Mr. Brooks wouldn't allow us to pursue that route long before the guilty verdict, since we became involved in the case. Mr. Szachacz and I are well aware of the mitigators that are out there available and would have been recognized, and I feel confident that Mr. Brooks is making a knowing, intelligent waiver of his right to present, and I think it is a right to present mitigation no matter what I recommended. I'm not saying

> I recommended one way or the other, but I don't think it matters. I think what matters is that we've investigated and we're ready to put on the mitigation, Judge, and certainly we are, so I think the Court needs to go through that colloquy with Mr. Brooks.

Funk later told the trial court, "I don't intend on saying a word to this jury. That's what Mr. Brooks has instructed me to do, that I am not to stand up before this jury, No. 1, to present any mitigation and therefore to argue in favor of mitigation, well, of course, because we're not presenting any." Thereafter, the trial court inquired on three additional instances whether Brooks wished to present mitigation. However, on each occasion, Brooks reiterated he had not changed his mind and that he did not want to present mitigation.

During the evidentiary hearing, trial counsel testified that they actively investigated mitigation and discussed the possible presentation of mitigation with Brooks throughout trial. Szachacz testified that he and Funk interviewed Brooks' parents; reviewed his military, educational, and employment history; and reviewed the mitigation presented during the first penalty phase proceeding. Funk and Szachacz additionally considered presenting mental health mitigation, but decided against it because there was no evidence in Brooks' background or during the trial proceedings that indicated Brooks suffered from mental ***229** illness. Ultimately, Brooks directly instructed Funk and Szachacz not to present mitigation, contest aggravation, cross-examine penalty phase or *Spencer* hearing witnesses, file a sentencing memorandum, or in any way contest the imposition of the death penalty. In fact, during the evidentiary hearing, Brooks was asked by the postconviction court whether he wanted to present mental health mitigation during the postconviction proceedings. He responded:

> Your Honor, after the first trial—*I mean after the trial when I got the guilty verdict, understandably I was not in the mind set to deal with the sentencing phase so I didn't really want anything to do with it. I'm done with it.* And then when this appeal came around, my focus has always been on the guilt phase of it, not the sentencing phase. *So when [postconviction counsel] asked me about it at the time, I was still focused on the guilt and didn't want to have anything to do with it.* But now that it's an issue, I don't mind it being presented. I have no objection to it being presented, so I guess my answer in the short-term is yes, [postconviction counsel] can present it.

(Emphasis supplied.)

The foregoing facts reflect that after Brooks was initially convicted, he was amenable to the presentation of mitigation. When Brooks' convictions were reversed on appeal, Funk and Szachacz reviewed the mitigation in the record, communicated frequently with Brooks' parents regarding the presentation of mitigation evidence during the second penalty phase, and spent countless hours discussing the case with Brooks. After Brooks was convicted a second time, he made the conscious decision not to present mitigation and directly instructed Funk and Szachacz not to contest the imposition of the death penalty. Trial counsel obeyed his wishes, and Brooks was sentenced to death for both murders. A decade later, Brooks admitted during the evidentiary hearing that after being convicted a second time he was "not in the mind set to deal with the sentencing phase so I didn't really want anything to do with it." We conclude that trial counsel did not perform deficiently when they failed to present mitigation evidence during the penalty phase or to contest the imposition of the death penalty. Trial counsel conducted a reasonable investigation into potential mitigation and explained the benefits of presenting mitigation to Brooks. With that information, Brooks exercised his right to make a knowing, voluntary, and intelligent waiver of the presentation of mitigation, and counsel cannot be deemed deficient for honoring Brooks' decision not to contest the death penalty. *See Dessaure,* 55 So.3d at 484.

Evidence Not Presented

[26] Furthermore, even if we were to conclude that counsel performed deficiently, Brooks has failed to present mitigation evidence during the evidentiary hearing that undermines confidence in his sentences. Brooks contends that had trial

counsel conducted a reasonable investigation, they would have discovered that he: (1) drank alcohol daily and struggled with alcohol abuse; (2) suffered from PTSD; and (3) suffered from an extreme emotional or mental disturbance, and his ability to conform his conduct to the requirements of law was substantially impaired at the time of the murders.

Funk testified during the evidentiary hearing that no one he communicated with, including Brooks, indicated that Brooks abused alcohol at the time of the murders. Funk further noted that:

> Unfortunately or fortunately for [Brooks], he had a mom and dad that ***230** loved him and a supportive family [as he] went through high school and the military. I think he had some alcohol—like a DUI or drinking in the military, but to me nothing earth shattering in terms of an exacerbation of some latent mental health defect or any behaviors or exhibiting anything that would reflect any significant head trauma, nor was any reported to us ever.

Dr. Eisenstein, a clinical psychologist, testified during the evidentiary hearing that he examined Brooks and concluded he exhibited signs of brain dysregulation, and suffered from chronic PTSD and alcohol abuse. Dr. Eisenstein additionally testified that Brooks was suffering from an extreme emotional or mental disturbance and lacked the ability to conform his conduct to the requirements of law. However, Dr. Eisenstein admitted that Brooks was generally uncooperative during clinical testing and did not provide his best effort. In fact, Brooks ended the first day of psychological testing early, and refused to see Dr. Eisenstein when the doctor returned on a second day to conduct additional testing. [8] As a result, Dr. Eisenstein conceded during cross-examination that his diagnoses were tentative and were undermined by Brooks' decision to not cooperate during the evaluation process. The State further challenged Dr. Eisenstein's conclusions that Brooks was incapable of conforming his conduct to the requirements of law:

> STATE: Just as you didn't speak to any of the witnesses whose presence he was in that night or that early morning about his condition as far as the use of alcohol, you haven't spoken with any of them or considered their accounts as to whether he exhibited any behavior that was abnormal during the night of the murders or the early morning after?
>
> DR. EISENSTEIN: Correct.
>
> STATE: Wouldn't you find that helpful to know what other persons say, this is how he looked that night, in forming [your opinion that Brooks was unable to conform his conduct to the requirements of law]?
>
> DR. EISENSTEIN: Yes, that would have been helpful.
>
> STATE: Was it something you asked for and weren't given, or something you just did not ask for?
>
> ....
>
> DR. EISENSTEIN: I didn't ask for it, no.

As noted above, when reviewing whether a defendant has established prejudice on a claim alleging ineffectiveness for the failure to present mitigation, this Court considers the totality of the available mitigation evidence—both that adduced at trial and during the evidentiary hearing—and reweighs it against the evidence in aggravation. *Simmons,* 105 So.3d at 503. Here, the evidence presented in aggravation is significant. The trial court found four aggravating circumstances for the murder of three-month-old Stuart, and five aggravating circumstances for the murder of Carlson, including HAC and CCP. Similar to mitigation found by the trial court during the penalty phase, the mitigation Brooks presented during the evidentiary hearing pales in comparison to this overwhelming aggravation. While Brooks presented evidence that he suffered from alcohol abuse after his discharge from the military, he failed to present any evidence linking his alcohol abuse to his life and conduct. Dr. Eisenstein's testimony regarding ***231** mental health mitigation was not only extensively impeached, but its value was significantly diminished by Brooks' failure to cooperate.

Thus, we conclude that: (1) Brooks waived the presentation of mitigation; (2) Brooks' trial counsel conducted a reasonable investigation into available mitigation; and (3) the evidence presented by Brooks during the evidentiary hearing does not create a reasonable probability sufficient to undermine confidence in the outcome of his sentences. Trial counsel did

not perform ineffectively, and the postconviction court did not err when it denied this claim.

Newly Discovered Evidence

[27] [28] [29] [30] To obtain relief based on a claim of newly discovered evidence, a defendant must meet two requirements. First, the evidence must not have been known, and it must appear that the evidence could not have been known through the use of due diligence. *See Jones v. State,* 709 So.2d 512, 521 (Fla.1998). Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *Id.* Newly discovered evidence satisfies the second prong of this test if it weakens the case against a defendant so as to give rise to a reasonable doubt as to his or her culpability. *Id.* at 526. In determining whether a new trial is warranted, the reviewing court must consider all newly discovered evidence which would be admissible, and evaluate the weight of both the newly discovered evidence and the evidence which was introduced during trial. *See id.* at 521. This determination includes an evaluation of whether: (1) the evidence goes to the merits of the case or constitutes impeachment evidence; (2) the evidence is cumulative to other evidence presented; (3) there are any inconsistencies in the newly discovered evidence; and (4) the evidence is material and relevant. *Id.*

[31] [32] When a postconviction court rules on a newly discovered evidence claim after an evidentiary hearing, this Court will affirm those determinations that involve findings of fact, the credibility of witnesses, and the weight of the evidence provided they are supported by competent, substantial evidence. *Melendez v. State,* 718 So.2d 746, 747–48 (Fla.1998); *Blanco v. State,* 702 So.2d 1250, 1251 (Fla.1997). As with other postconviction claims, this Court reviews the postconviction court's application of the law to the facts de novo. *Hendrix v. State,* 908 So.2d 412, 423 (Fla.2005).

During the second evidentiary hearing, Brooks presented Ferguson, who testified that he saw Carlson with Gundy between 10:30 and 11 p.m. on the night of the murders. If true, this testimony would be beneficial to Brooks because evidence presented during trial appeared to conclusively demonstrate that at 10:20 p.m., Brooks and his codefendant were located inside a vehicle that was detained by law enforcement several miles from the crime scene. Although the postconviction court found the first prong of the newly discovered evidence test had been satisfied, in its order it concluded that Ferguson's testimony was "thoroughly impeached by the State," and "not worthy of belief," explaining:

> Mr. Ferguson testified that he learned of Rachel Carlson's murder the day after the crimes, in 1996, but did not report his account of seeing her with Gerrold Gundy until 2010. The Court finds this lengthy delay in coming forward with this information regarding a brutal double homicide to be one factor in the Court's conclusion that Ferguson's testimony is not credible.
>
> The Court further notes that Ferguson's handwritten affidavit does not contain the date of the crime, although the ***232** affidavit contains specific time frames. Glenn Swiatek, former attorney for co-Defendant Walker Davis, Jr., testified that when he was attending the deposition of Ferguson, prior to the deposition, Ferguson asked him what was the date of the crime. After Mr. Swiatek told him April 24, 1996, Ferguson wrote that date on the top of his affidavit. Ferguson's explanation for this action was that he was essentially "testing" Mr. Swiatek. The Court finds this explanation not credible.
>
> ....
>
> Mr. Ferguson testified that, on the night of the murder, he went to the residence of "Michelle" in Panama City, Florida. In his deposition, Ferguson testified that he could not remember Michelle's last name. Yet, an investigator working for the Defendant's counsel testified at the evidentiary hearing that the investigator was provided the name Michelle *Roberts.* The investigator testified he could not locate the "Michelle Roberts" in question.
>
> Mr. Ferguson testified that he was an associate of Gerrold Gundy. However, Mr. Gundy also testified at the evidentiary hearing that he could not say he knew Mr. Ferguson. Mr. Gundy's testimony reflected that he was not an associate of Ferguson. The Court finds Gundy's testimony that he was not an associate of Ferguson's to be credible. As Mr. Funk testified at the March 2012 evidentiary hearing, having a witness such as Mr. Ferguson would only be helpful if he was believable and credible. Otherwise, such a witness could undercut all of the efforts of the defense. The Court finds that the testimony of Mr. Ferguson, if he were to testify on a retrial, would do just that.

(Citations and footnotes omitted.) Thus, the postconviction court concluded that Ferguson's testimony was not credible, it would undercut the defense and would probably not produce an acquittal on retrial, and denied relief.

On appeal, Brooks contends that the conclusion of the postconviction court that Ferguson was not credible was incorrect for three reasons. First, Brooks contends that independent corroborating evidence supports Ferguson's testimony, thereby proving that Gundy testified untruthfully about his whereabouts on the night of the murders. During the evidentiary hearing, Ferguson testified that he saw Gundy with Carlson at a club on the night she was murdered. Gundy disputed that fact and testified that he did not know Carlson, and that he did not go to the club on the night of the murders. However, Brooks notes that a witness told police Gundy was at the club at 10:30 p.m. that evening. Second, Brooks contends that the postconviction court erroneously relied upon the fact that Ferguson was a convicted felon and ignored Gundy's eight felony convictions, including convictions for crimes of dishonesty. Finally, Brooks alleges that the postconviction court ignored the fact that only Gundy, and not Ferguson, had a motive to present false testimony.

Brooks mischaracterizes the postconviction court's ruling on his newly discovered evidence claim as being based solely upon a finding that Gundy was a more credible witness than Ferguson. That assertion is not supported by the facts. As evidenced by the detailed discussion previously quoted, the postconviction court relied on Gundy's testimony as only one of many factors to conclude that Ferguson's testimony was not credible. In fact, the postconviction court mentioned Gundy's credibility only *once* in this section of the order. The court limited its reliance on Gundy's testimony to find only that Gundy was being truthful when he testified that *he did not* ***233** *know Ferguson.* The court also extensively detailed the factors that led it to conclude that Ferguson's testimony was not credible. Specifically, the postconviction court relied on Ferguson's inability to remember the date of the crime, and that no witness or any other independent evidence corroborated the only critical portion of Ferguson's testimony, which was that he saw Carlson and Gundy *together* at Club Rachel on the night of the murders.

Further, we have previously stated that courts may consider both the length of the delay and the reason the witness has failed to come forward sooner in evaluating newly discovered evidence claims. *Jones,* 709 So.2d at 521–22. Here, the postconviction court noted that Ferguson waited nearly *fifteen years* before reporting this information to law enforcement, and his explanation for not disclosing this evidence sooner was that he was not "a law enforcer." We conclude that the postconviction court's determinations that Ferguson's testimony was not credible, would have been of little or no value to the defense, and would probably not have produced an acquittal on retrial are supported by competent substantial evidence, and we affirm the denial of this claim.

Cumulative Error

[33] Brooks contends that the cumulative effect of the *Strickland, Giglio,* and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), violations and his newly discovered evidence claim deprived him of a fair trial and undermines confidence in his convictions and sentences. While Brooks contends that this Court should consider the alleged *Brady* errors in conjunction with his *Strickland, Giglio,* and newly discovered evidence claims, he has presented *no* argument on appeal to support the allegation that a *Brady* violation occurred. Although Brooks presented a *Brady* challenge below, his discussion of *Brady* on appeal was presented primarily in a footnote, in which he stated that:

> Although the facts underlying Mr. Brooks' claims are raised under alternative legal theories—i.e., *Brady, Giglio,* and ineffective assistance of counsel—the cumulative effect of these facts in light of the record as a whole must nevertheless be assessed. As with *Brady* error, the effects of the deficient performance must be evaluated cumulatively to determine whether the result of the trial produced a reliable outcome.

This Court has previously held that vague and conclusory allegations on appeal are insufficient to warrant relief. *Heath v. State,* 3 So.3d 1017, 1029 n. 8 (Fla.2009) ("Heath has waived his cumulative-error claim because his brief includes no argument whatsoever and instead consists of a one-sentence heading in his brief."); *see also Doorbal v. State,* 983 So.2d 464, 482–83 (Fla.2008) ("Doorbal neither states the substance of any of the claims that were summarily denied, nor provides an explanation why summary denial was

inappropriate or what factual determination was required on each claim so as to necessitate an evidentiary hearing. We conclude that this general, conclusory argument is insufficient to preserve the issues raised in the 3.851 motion, and, therefore, this claim is waived."). Accordingly, Brooks has waived his *Brady* claim.

We additionally conclude that Brooks is not entitled to relief under this claim because each of Brooks' allegations of error independently lacks merit. *Hurst v. State,* 18 So.3d 975, 1015 (Fla.2009).

PETITION FOR WRIT OF HABEAS CORPUS

Standard of Review

[34] **[35]** **[36]** Claims of ineffective assistance of appellate counsel are appropriately presented ***234** in a petition for writ of habeas corpus. *See Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000). To determine whether a claim alleging ineffective assistance of appellate counsel warrants habeas relief, we evaluate: (1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and (2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Pope v. Wainwright,* 496 So.2d 798, 800 (Fla.1986); *see also Lynch v. State,* 2 So.3d 47, 84–85 (Fla.2008). In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman,* 761 So.2d at 1069; *see also Knight v. State,* 394 So.2d 997, 1001 (Fla.1981).

Analysis

Inconsistent Theories

[37] In his first habeas claim, Brooks contends that his appellate counsel performed ineffectively in two ways. Brooks first contends that his appellate counsel performed ineffectively when he failed to present a due process claim pursuant to *Bradshaw v. Stumpf,* 545 U.S. 175, 187–88, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005). Brooks asserts that the prosecution presented inconsistent theories of who the "knifeman" was during Brooks' and Davis' trials. To support this contention, Brooks claims that during Davis' trial, the prosecution maintained that "at a minimum, it was unclear as to who was the actual killer." Further, Brooks contends the prosecutor made several statements indicating that Davis orchestrated the plan to murder Carlson and Stuart. Brooks further alleges that during the closing statements of Davis' trial, the State urged the jury to recommend death sentences, even if Davis were not the killer, because Davis was a principal actor and was responsible for both murders. Brooks contends that this "ambiguity" regarding who was the "knifeman" vanished during his trial when the prosecution elicited testimony that: (1) Brooks was sitting in the backseat of Carlson's vehicle; and (2) whoever was sitting in the backseat of the vehicle killed Carlson and Stuart. Accordingly, Brooks asserts his due process rights were violated when the trial court relied on factual findings developed during his trial to impose sentences of death that were contradicted by the testimony and argument presented during Davis' trial.

The State contends that this Court should deny this claim based on *Raleigh v. State,* 932 So.2d 1054, 1065–67 (Fla.2006). In *Raleigh,* the defendant alleged in his postconviction motion that the State violated his right to due process under *Stumpf* by taking inconsistent positions during his trial and his codefendant's trial regarding the identity of the "principal actor" in the murder. *Id.* at 1065. This Court denied the claim, concluding that the due process concerns presented in *Stumpf* did not apply because the prosecutor in *Raleigh* did not take an inconsistent position, as the prosecution did in *Stumpf*. *Id.* at 1067.

Similar to the claim presented in *Raleigh,* the prosecutor here did not present inconsistent positions during Brooks' and Davis' trials. While there is no dispute that the prosecutor attempted to establish that Brooks was the "knifeman" during Brooks' trial, he did not attempt to establish that Davis was the "knifeman" during the Davis trial. In fact, the prosecutorial statements from the Davis trial indicate that the State actively sought the death penalty for Davis by relying almost exclusively ***235** on the fact that Davis orchestrated the plan to murder Carlson and Stuart. In other words, it was the State's position that Davis was the mastermind who requested that Brooks assist him with his plan to murder Carlson and Stuart. Thus, unlike the situation in *Stumpf,* the State did not first attempt to establish that Davis was the "knifeman" and then inconsistently prosecute Brooks as the "knifeman" for the same murders. *See Stumpf,* 545 U.S.

at 180–81, 125 S.Ct. 2398. Rather, the prosecution simply argued two different inferences from the same record.

Based on the foregoing, we hold that counsel's decision not to present a *Stumpf* due process claim does not constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and we deny this subclaim. *See Valle v. Moore,* 837 So.2d 905, 908 (Fla.2002) (noting that "appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal"). [9]

Proportionality

[38] In the second portion of his first habeas claim, Brooks contends that his appellate counsel did not *adequately* contest the proportionality of the death sentences on direct appeal. Although Brooks does not dispute that his appellate counsel presented a proportionality challenge in his initial brief, his reply brief, and in a motion for rehearing, Brooks contends that counsel performed deficiently because he failed to incorporate additional evidence and arguments that were made during Davis' trial. According to Brooks, this evidence and these arguments would have established that his sentence should be reduced because Davis, who was sentenced to life imprisonment, was equally culpable.

In the initial brief on direct appeal, Brooks' counsel comprehensively attacked the trial court finding that Brooks was more culpable than Davis:

> Davis not only was the prime instigator for the murders, he was the one who had laid the foundation for Carlson's and Alexis' deaths long before Brooks entered the picture. He initiated the murder plot, he was its mastermind, and he kept it going after the repeated aborted attempts.
>
> Brooks may have been the one who killed but Davis had at least an equal culpability with him, and more reasonably he deserved greater blame than the defendant. Yet this co-defendant received a life sentence. Clearly, he could have received a death sentence, but he did not. And however much Brooks may deserve to die, this Court must reduce his death sentences to life imprisonment because when the trial judge imposed a life sentence on Davis it limited the punishment it could impose on Brooks. His culpability was no greater than Davis' and for that reason, he could not be sentenced to death. In short, but for Davis, Carlson and Alexis would be alive today, and Brooks would [be] a free man. A death sentence for this defendant is proportionately unwarranted.

(Citations omitted.) In his reply brief, counsel contended, "it is clear that the case for aggravation applies as equally to Davis as to Brooks."

This Court considered and rejected these arguments in a lengthy analysis. ***236** We determined the trial court's finding that Brooks was more culpable because he not only participated in the planning of the murders, but actually carried out the plan by fatally stabbing each of the victims, was supported by competent, substantial evidence. *Brooks II,* 918 So.2d at 209. Thus, we concluded that "[c]ontrary to Brooks' assertion, disparate treatment of Brooks as the 'knifeman' in the instant case is warranted," because Brooks was more culpable than Davis in the murders. *Id.*

Under nearly identical circumstances, this Court has previously denied similar claims that attempt to reargue proportionality as procedurally barred. *See Lawrence v. State,* 969 So.2d 294, 315 (Fla.2007) (denying as procedurally barred a habeas claim alleging ineffective assistance of appellate counsel for failing to present certain arguments as to why the sentence of death was inappropriate); *see also Zack v. State,* 911 So.2d 1190, 1210 (Fla.2005) (denying a claim as procedurally barred where claim "simply refashions a claim that was unsuccessfully raised on direct appeal"); *Rutherford v. Moore,* 774 So.2d 637, 645 (Fla.2000) (holding that when a claim is presented on direct appeal, the Court will not consider a claim that appellate counsel was ineffective for failing to present additional arguments in support of the claim on appeal). Based on this precedent, we deny this claim as procedurally barred.

Confrontation Clause

In his second habeas claim, Brooks contends that his appellate counsel performed ineffectively when he failed to assert that the trial court violated his constitutional right to confrontation when the court limited the cross-examination of several State witnesses. Brooks additionally contends that his appellate counsel performed ineffectively when he failed to challenge the presentation of the testimony of Dr. Michael Berkland.

Cross–Examination

[39] For the third time, Brooks attempts to allege ineffectiveness arising from the decision not to present the evidence previously discussed—i.e., the green Nissan, Gerrold Gundy, the hair, the timeline, the polygraph, and the crime scene dog. Here, Brooks contends that his right to confrontation was violated when the trial court prevented trial counsel from cross-examining several State witnesses to elicit testimony regarding this evidence. He contends that the trial court's ruling, which limited the cross-examination of State witnesses to only issues that were addressed on direct examination, "touched the core of [his] defense and entirely cut off his opportunity to impeach the State's witnesses."

We conclude that this claim lacks merit for several reasons. First, the plain language of section 90.612(2), Florida Statutes, expressly provides trial courts with the discretion to expand cross-examination beyond the subject matters discussed during direct examination. § 90.612, Fla. Stat. (2002) ("Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court *may, in its discretion,* permit inquiry into additional matters.") (emphasis supplied). Thus, pursuant to section 90.612(2), the trial court could have permitted the defense to cross-examine State witnesses on evidentiary matters that were outside the scope of direct examination, but it was not required to do so. Brooks appears to recognize that the decision not to permit additional cross-examination was within the trial court's discretion, as he does not contend that the trial court erroneously sustained the prosecutor's objections to questions that were outside the scope of direct ***237** examination. He also does not dispute that the testimony he sought to introduce was outside the scope of direct examination. Accordingly, we conclude that appellate counsel's failure to present a claim that the trial court erred in properly exercising its statutorily conferred discretion does not constitute deficient performance and certainly does not fall measurably outside the range of professionally acceptable performance.

Further, because Brooks does not dispute that the testimony he wished to present was outside the scope of direct examination, his only argument is that this testimony was critical to rebutting the State's case, and that his confrontation rights were violated when counsel was not permitted to cross-examine State witnesses in this manner. Brooks has failed to present any precedent demonstrating that the failure to permit a defendant to cross-examine witnesses on subject matters outside the scope of direct examination constitutes a constitutional violation. Thus, Brooks has not only failed to demonstrate deficiency, but he has also failed to establish that appellate counsel's failure to present this claim on direct appeal compromised the appellate process to such a degree that confidence in the correctness of the result has been undermined. We deny this subclaim.

Dr. Berkland's Expert Testimony

During the retrial, the State presented Dr. Jody Nielson, who conducted an autopsy of the victims and testified to their injuries and cause of death. Later, Dr. Berkland provided his opinions on several topics including: the victims' injuries; the manner and cause of death; the depth of the wounds; and how and in what order the wounds were inflicted. Dr. Berkland's testimony, however, was not based upon an autopsy he conducted, but rather another autopsy performed by Dr. Joan Wood, who did not testify during trial. Brooks contends that his confrontation rights were violated when the State presented Dr. Berkland's testimony without first demonstrating that Dr. Wood was unavailable to testify.

This case is similar to the situation we addressed in *Capehart v. State,* 583 So.2d 1009, 1012–13 (Fla.1991). In *Capehart,* the defendant objected to a medical examiner testifying at trial regarding the cause of death and the condition of the victim's body because that doctor did not perform the autopsy. *Id.* at 1012. We held that under section 90.704, Florida Statutes (1987), a medical examiner may, in his or her expert testimony, rely on facts or data not in evidence because such information is of a type reasonably relied upon by experts in the field. *Id.* We held that the expert testimony was proper where the expert formed an opinion based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case. *Id.* at 1013. Additionally, in *Geralds v. State,* 674 So.2d 96 (Fla.1996), we held it was proper to permit a medical expert to testify as to the cause of death, even though the expert did not perform the autopsy.

Here, the prosecutor specifically noted during trial that Dr. Wood was unavailable to testify due to health problems. Further, trial counsel did not object to Dr. Berkland's qualifications as an expert, nor does Brooks now contend that Dr. Berkland's testimony was not based upon an opinion that was developed after he independently reviewed autopsy

protocols, diagrams, and photographs taken both during Dr. Wood's autopsy and at the scene of the murders. Thus, because Dr. Berkland's testimony was presented in a manner consistent with our precedent, appellate counsel cannot be deemed ineffective for failing ***238** to present this nonmeritorious claim on appeal. *See Valle,* 837 So.2d at 908. Accordingly, we deny this subclaim.

Impermissible Prosecutorial Comments

In his third claim, Brooks contends that his appellate counsel performed ineffectively when he failed to challenge the prosecutor's impermissible comments, misstatements of the law, and attempts to inflame the jury. He further claims that the comments independently and cumulatively jeopardized the fairness of his trial.

Burden Shifting

[40] Brooks first contends that the prosecutor attempted to shift the burden to Brooks to prove his innocence in two ways. First, Brooks notes that during voir dire, the prosecutor told the jury with regard to the State's burden of proof: "It's not an easy concept to just rattle off what it means, but I'll tell you what's not in there.... *The State is not required to prove its case one hundred percent.*" (Emphasis supplied.) Brooks contends that this statement "minimized the certitude" that is required by both the United States and Florida Constitutions before a defendant may be convicted of a crime.

We addressed a nearly identical claim in *Morrison v. State,* 818 So.2d 432, 444 (Fla.2002). In *Morrison,* the prosecutor stated during voir dire, "Do you all understand that you don't have to be 100 percent, absolutely convicted [sic] that this man committed the crime in order to return a verdict of guilty?" Similar to Brooks, the defendant in *Morrison* claimed that the prosecutor's remarks to the venire improperly minimized the State's burden of proof and violated Morrison's rights to a fair trial and due process. *Id.* We denied the claim, relying upon *State v. Wilson,* 686 So.2d 569, 570 (Fla.1996), to conclude:

> In *Wilson,* the trial judge made extemporaneous remarks to the venire regarding the State's burden of proof, including the following statement: "I repeat, stress, and emphasize, the State does not have to convince you to an absolute certainty of the defendant's guilt. Nothing is one hundred percent certain." *Wilson,* 686 So.2d at 570. We acknowledged that the trial judge's preliminary instruction on reasonable doubt in *Wilson* was "not incorrect, as such ... [but] it was at least ambiguous to the extent that it might have been construed as either minimizing the importance of reasonable doubt or shifting the burden to the defendant to prove that reasonable doubt existed." *Id.* This Court, however, went on to say, "Notwithstanding, in view of the fact that the trial judge gave the standard jury instruction on reasonable doubt at the close of the evidence and told the jury that it must follow the standard instructions, we cannot say that error was committed." *Id.*
>
> The instant case involves a remarkably similar extemporaneous remark made by the prosecutor to the venire regarding the State's burden of proof. As we stated in *Wilson,* although such a statement may not be technically incorrect, it may be at least ambiguous to the extent that it might have been construed as either minimizing the importance of reasonable doubt or shifting the burden to the defendant to prove that a reasonable doubt existed. However, like the trial court in *Wilson,* the trial court in the instant case gave the standard jury instruction on reasonable doubt at the close of evidence and told the jury it must follow the standard instructions. Given that the trial court in the instant case *also* instructed the venire to disregard the statement and read the standard reasonable doubt instruction to the venire *immediately following* the prosecutor's comment, as well as re-read the reasonable doubt instruction while ***239** swearing in the jury, it stands to reason that the curative actions taken in the instant case were at least as effective as those taken by the trial judge in *Wilson. See Williams v. State,* 674 So.2d 155 (Fla. 4th DCA 1996) (holding any harm created by prosecutor's statement that State's burden was not to prove guilt to "100 percent certainty" was cured by the court's curative instruction coupled with the fact that the court subsequently correctly charged the jury).

Morrison, 818 So.2d at 444–45. Here, the prosecutor was asked during voir dire whether it was the State's burden to prove "beyond a shadow of a doubt" whether an individual was a principal in a crime. The prosecutor responded in the negative, explaining, "I'm going to tell you right now that the State has the burden in this case. The State willingly accepts that burden. The State must prove the guilt of Lamar Brooks beyond any reasonable doubt." The statement in question occurred later during the prosecutor's explanation, and was one isolated sentence in a nearly two-page response to the juror's inquiry, during which defense counsel did not object.

After the jury was sworn, the trial court instructed the jury that it was their "solemn responsibility to determine if the [S]tate has proved its accusation beyond a reasonable doubt." The court then later, after closing statements, read the standard jury instruction on reasonable doubt to the jury.

[41] We conclude that this case is materially indistinguishable from *Morrison* and *Wilson,* and had this claim been presented on appeal, it would have been rejected. Any ambiguity in the prosecutor's comments regarding the State's burden of proof was clarified satisfactorily when the trial court instructed the jury that the prosecutor's comments were not evidence and later read to the jury the standard instruction for reasonable doubt. Therefore, because appellate counsel cannot be deemed ineffective for failing to present nonmeritorious claims on appeal, we hold that this subclaim lacks merit. *See Valle,* 837 So.2d at 908.

[42] Second, Brooks contends that the prosecutor attempted to shift the burden of proof to him by improperly contending that there was no evidence connecting Gundy to the murders. It is true that the State may not comment on a defendant's failure to present a defense because doing so could lead the jury to erroneously conclude that the defendant has the burden of doing so. However, a prosecuting attorney *may* comment on the jury's duty to analyze and evaluate the evidence presented during trial and may provide his or her opinion relative to what reasonable conclusions may be drawn from the evidence. *Evans v. State,* 838 So.2d 1090, 1094 (Fla.2002); *Rodriguez v. State,* 753 So.2d 29, 38 (Fla.2000). Here, the comments relating to Gundy were limited. They only conveyed that the prosecutor believed no evidence was presented during trial to link Gundy to the murders. This was a reasonable comment based on the evidence presented during trial, and the comments in no way bolstered the State's case or shifted the burden to Brooks to prove that he was innocent. Thus, we conclude that had this subclaim been presented on appeal, it would have been rejected. Accordingly, this subclaim lacks merit. *See Valle,* 837 So.2d at 908.

Stabbing Gesture During Closing Statements

[43] Brooks contends that the prosecutor attempted to inflame the jury during closing statements when he made a stabbing gesture in the air and raised his voice while he was counting the number of stab wounds inflicted on the victims. After the ***240** trial court instructed the jury, the prosecutor admitted that he engaged in this conduct because he was "demonstrating what [he] believed was done to the victims." Brooks presents no precedent that demonstrates this type of prosecutorial behavior is improper.

In *State v. Duncan,* 894 So.2d 817, 829–31 (Fla.2004), we addressed a habeas claim alleging that appellate counsel was ineffective for failing to challenge the use of a dummy as a demonstrative aid during one eyewitness's testimony. During the State's case-in-chief, the prosecutor asked the eyewitness to demonstrate what he had observed through the use of a dummy. *Id.* at 829–30. Defense counsel objected to the use of the demonstrative aid, but the trial court overruled the objection. *Id.* On appeal, we noted that in *Brown v. State,* 550 So.2d 527, 528 (Fla. 1st DCA 1989), the Fifth District held:

> Demonstrative exhibits to aid the jury's understanding may be utilized when relevant to the issues in the case, but only if the exhibits constitute an accurate and reasonable reproduction of the object involved. The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion.

Duncan, 894 So.2d at 829 (quoting *Brown,* 550 So.2d at 528) (citations omitted). The prosecutor in *Brown* used a knife and a Styrofoam head during his closing statements to depict the extent of a victim's stab wounds. *See* 550 So.2d at 528. The Fifth District concluded that the demonstrative aids were "sufficiently accurate replicas to be allowable within the court's discretion." *Id.* Relying upon the standard articulated in *Brown,* we concluded in *Duncan:*

> The dummy was used to aid the jury's understanding of a relevant issue, namely guilt, and there is no claim that the exhibit was not an accurate and reasonable reproduction of the attack. Therefore, the determination as to whether to allow the use of a demonstrative exhibit was a matter within the trial court's discretion. The judge did not abuse his discretion in allowing the use of the

> demonstrative aid. Additionally, as in *Brown,* the overwhelming evidence of Duncan's guilt negates any reasonable possibility that his conviction resulted from the challenged demonstration.

Duncan, 894 So.2d at 830–31.

[44] Here, as in *Duncan,* Brooks does not contend that the reenactment was inaccurate or an unreasonable reproduction of what occurred. He instead asserts that it was used solely to inflame the emotions of the jury. However, as noted in *Brown,* it is within a trial court's discretion to allow the prosecutor to explain during closing statements what he reasonably believed would assist the jury in understanding the evidence that was presented during trial. *See Brown,* 550 So.2d at 529. Furthermore, the "overwhelming amount of properly admitted evidence upon which the jury could have legitimately relied in finding Brooks guilty in the instant matter," negates any reasonable possibility that his conviction resulted from the challenged demonstration. *Brooks II,* 918 So.2d at 194; *see also Duncan,* 894 So.2d at 830–31. Thus, we conclude that this subclaim lacks merit, and appellate counsel was not ineffective for failing to present this claim on appeal.

Burden Shifting Regarding Sentencing

Brooks contends under this subclaim that appellate counsel performed ineffectively when he failed to assert that the prosecutor improperly shifted the burden to Brooks to establish that life was the appropriate sentence. The prosecutor told the jury during penalty phase closing ***241** statements that "there are mitigating circumstances that you should consider and weigh against that aggravation, *and if you find that the mitigating circumstances outweigh the aggravating circumstances, then your vote should be for life.*" (Emphasis supplied.)

We deny this claim for two reasons. First, the prosecutor's statement is consistent with both the standard advisory sentence jury instruction and section 921.141(2), Florida Statutes (2002), which provides:

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) *Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist;* and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(Emphasis supplied); *see also* Fla. Std. Jury Inst. (Crim.) Homicide 7.11 ("Should you find sufficient aggravating circumstances do exist to justify recommending the imposition of the death penalty, it will then be your duty to determine *whether the mitigating circumstances outweigh the aggravating circumstances that you find to exist.*") (emphasis supplied). Second, this Court has consistently rejected claims that section 921.141(2) and the standard jury instruction require a defendant to establish that life is the appropriate sentence. *See, e.g., Wheeler v. State,* 4 So.3d 599, 611 (Fla.2009). Thus, we conclude that this subclaim lacks merit.

Conclusion

In sum, all of Brooks' claims of prosecutorial misconduct lack merit, and we therefore conclude that appellate counsel did not perform ineffectively by failing to present these claims on direct appeal.

Prejudicial Photographs

In his final claim, Brooks alleges that appellate counsel performed ineffectively when he failed to challenge the admission of over thirty-five photos, many of which he claims were gruesome, duplicative, and not relevant. This Court has consistently held that the initial test for determining the admissibility of photographic evidence is relevance, not necessity. *See Mansfield v. State,* 758 So.2d 636, 648 (Fla.2000). Photographs are admissible if they assist in explaining the nature and manner in which wounds were inflicted. *Bush v. State,* 461 So.2d 936, 939 (Fla.1984). Moreover, photographs are admissible to show the manner of death, the location of wounds, and the identity of the victim. *Larkins v. State,* 655 So.2d 95, 98 (Fla.1995). While trial courts must be cautious and not permit unduly prejudicial or particularly inflammatory photographs before the jury, a photograph will not be excluded as unduly prejudicial simply because the content depicted in the photograph is gruesome.

See Hampton v. State, 103 So.3d 98, 115 (Fla.2012). Finally, the admission of photographic evidence of a murder victim is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of discretion. *See id.*

During Brooks' second trial, the State sought the admission of several additional photographs and one video. Brooks does not specifically explain why the photographs were too gruesome, but rather alleges that the State presented too many photos that were duplicative and inflammatory. However, the fact that several similar ***242** photographs were presented does not demonstrate that the trial court erred in admitting them. The photographs and video were used either by the medical examiners or crime scene technicians to assist in explaining the condition of the crime scene, the position and location of the bodies, and the manner and cause of death, and were therefore directly relevant to several disputed issues of fact. We have previously held a trial court's admission of similar photos not to be an abuse of discretion. *See Bush,* 461 So.2d at 939 (noting that photographs are admissible if "they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted"); *see also Larkins,* 655 So.2d at 98 (explaining that photographs are admissible "to show the manner of death, the location of wounds, and the identity of the victim.")

Moreover, Brooks' counsel challenged the admission of five photographs on direct appeal, alleging that the probative value of the photos was substantially outweighed by their prejudice. *Brooks I,* 787 So.2d at 781. We rejected the claim and concluded that the trial court did not abuse its discretion in admitting the photographs because they were relevant to the medical examiner's determination as to the manner of Carlson's death. *Id.* It is, therefore, reasonable for appellate counsel to conclude, based on our previous holding during the first direct appeal that the trial court did not err in admitting several photographs that Brooks claimed were too gruesome and prejudicial, that this Court would again reject a similar claim when the photographs were presented in substantially the same manner. Thus, we conclude that Brooks has failed to establish any unfair prejudice associated with the admission of these photographs. The trial court did not abuse its discretion in admitting the photographs, and if Brooks had presented this claim on appeal, it would have been rejected. This claim, therefore, lacks merit, and appellate counsel cannot be deemed ineffective for failing to present it. *See Valle,* 837 So.2d at 908.

CONCLUSION

Based on the foregoing, we affirm the postconviction court's order denying postconviction relief on all claims. We also deny the petition for writ of habeas corpus.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, and PERRY, JJ., concur.

QUINCE, J., concurs in result only.

All Citations

175 So.3d 204, 40 Fla. L. Weekly S241

Footnotes

1 The trial court refused to consider as an aggravating factor that Stuart was less than twelve years of age, because it concluded that "consideration of that factor would constitute improper doubling with the aggravating factor of murder in the course of a felony predicated on aggravated child abuse." *Brooks II,* 918 So.2d at 187 n. 1.

2 Section 90.803(18)(e), Florida Statutes (1996), provides that an admission is a statement that is offered against a party and is: "[a] statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph."

3 Brooks contended on appeal that the trial court erred by finding that he committed the murders during the course of a felony (aggravated child abuse), and then applying the aggravating circumstance based on the aggravated child abuse. *Brooks II,* 918 So.2d at 197. Specifically, he alleged that "because the single act of stabbing [the child] formed the basis of both the aggravated child abuse aggravating factor under section 921.141(5)(d) of the Florida Statutes and the first-degree felony murder charge, the court should have found that the aggravated child abuse allegation 'merged' with the more serious homicide charge." *Id.*

A majority of the Court agreed with this argument, concluding that the aggravated child abuse based on a single stab wound would merge with the homicide, but found this error to be harmless. *Id.* at 198–99, 217 (Lewis, J., concurring in part, dissenting in part). However, in 2012, this Court receded from *Brooks* to the "extent it holds that felony murder cannot be predicated upon a single act of aggravated child abuse," and held that "the merger doctrine does not preclude a felony-murder conviction predicated upon a single act of aggravated child abuse that caused the child's death since aggravated child abuse is an enumerated underlying offense in the felony-murder statute." *State v. Sturdivant,* 94 So.3d 434, 441–42 (Fla.2012).

4 The same newly discovered evidence claim was also presented by Brooks' codefendant. Brooks and Davis agreed to a joint evidentiary hearing before the successor judge.

5 At the time of Brooks' retrial, Florida Rule of Criminal Procedure 3.250 provided that "a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury." However, in 2006, the Legislature created a new statutory provision, section 918.19, Florida Statutes, to govern closing statements in criminal trials. *In re Amend. to the Fla. Rules of Crim. Pro.—Final Arguments,* 957 So.2d 1164, 1165 (Fla.2007). The statute provides that the prosecution shall present the first closing statement, the defendant may respond, and the prosecution may then reply in rebuttal. *Id.* at 1166. In response to the change in the law, we amended rule 3.250 to eliminate the portion of the rule providing that the defense has the right to the final closing statement where the defendant offered no evidence during trial other than his or her own testimony. *Id.* We also adopted Florida Rule of Criminal Procedure 3.381, which states that in all criminal prosecutions, "the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury." *See* Fla. R.Crim. P. 3.381; *see also Final Arguments,* 957 So.2d at 1166–67. Thus, although it is not currently the law, at the time of Brooks' trial, the rules of criminal procedure provided a strategic advantage to defense counsel for not presenting witness testimony.

6 Brooks places particular emphasis on counsel's failure to present evidence that a Caucasian hair found in the victim's hand did not belong to him. However, during the evidentiary hearing, Szachacz testified he could not recall if DNA testing had been conducted on the hair sample, but recalled that during Brooks' first trial, a forensic hair expert testified that the hair was similar in color and appearance to that of Carlson herself. Further, Brooks presented no evidence during these proceedings that demonstrates the hair had any relevance to this case.

7 Brooks additionally claims that two other witnesses were prepared to testify regarding what they saw near the scene of the murders. However, Funk testified that those witnesses "had some significant impairment of their ability to recall and have recollection with accuracy," and noted that they had been presented during Davis' trial, where their testimony was significantly impeached. Thus, Brooks' trial counsel did not perform deficiently when they strategically decided not to present these witnesses. *Bolin v. State,* 41 So.3d 151, 159 (Fla.2010) (noting that "counsel is not ineffective where counsel decides not to present a witness with questionable credibility").

8 Brooks was not only uncooperative with Dr. Eisenstein, but he also *completely refused* to be evaluated by the State's expert.

9 Furthermore, *Stumpf* was decided over two years *after* Brooks' appellate counsel filed his initial brief. This Court has made clear that counsel cannot be held ineffective for failing to anticipate changes in the law. *Taylor v. State,* 62 So.3d 1101, 1111 (Fla.2011). In *Walton,* this Court expressly held that *Stumpf* did not recognize a new fundamental constitutional right that applies retroactively. *Walton v. State,* 3 So.3d 1000, 1005 (Fla.2009).

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APPENDIX A6

Florida Supreme Court Direct Appeal
Opinion I (April 5, 2001)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Brown v. State, Fla.App. 4 Dist., August 17, 2011

787 So.2d 765
Supreme Court of Florida.

Lamar Z. BROOKS, Appellant,
v.
STATE of Florida, Appellee.

No. SC94308.
|
April 5, 2001.
|
Rehearing Denied June 4, 2001.

Synopsis
Defendant was convicted in a jury trial in the Circuit Court, Okaloosa County, Jere Tolton, J., of first-degree murder, and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) victim's and nontestifying codefendant's statements were not admissible under state of mind exception to hearsay rule; (2) admission of codefendant's pre-arrest statements violated defendant's Sixth Amendment confrontation right; (3) codefendant's statements to witness and officer after murders were not admissible under co-conspirator exception to hearsay rule; (4) erroneous admission of evidence under numerous hearsay exceptions constituted reversible error; (5) defendant was not entitled to change of venue based on pretrial publicity; and (6) autopsy photographs were relevant to determination as to manner of victim's death.

Reversed and remanded.

Wells, C.J., and Harding, J., concurred in part and dissented in part and filed opinions.

West Headnotes (26)

[1] **Criminal Law** Then-Existing State of Mind or Body

Statements by victim to her coworkers, along with e-mail sent by victim to codefendant, who was defendant's cousin and victim's paramour, evidencing victim's intent to drive to town with codefendant on night of murders, were not admissible in State's case-in-chief under state of mind exception to hearsay rule, to show defendant's subsequent acts of driving to town with victim. West's F.S.A. § 90.803(3).

3 Cases that cite this headnote

[2] **Homicide** Victim

Ordinarily, victim's state of mind is not a material issue, nor is it probative of a material issue in murder case.

[3] **Homicide** Victim

Homicide victim's state of mind may be relevant to element of the crime.

2 Cases that cite this headnote

[4] **Homicide** Victim
Homicide Suicide
Homicide Self-Defense
Homicide Character and Habits of Victim
Homicide Accident or Misfortune

Homicide victim's state of mind may become relevant to issue in case where defendant claims: (1) self-defense; (2) that victim committed suicide; or (3) that death was accidental.

2 Cases that cite this headnote

[5] **Homicide** Victim

State of mind of victim-declarant may become issue in murder case when it is used to rebut a defense raised by defendant.

2 Cases that cite this headnote

[6] **Criminal Law** In General; Existence of Conspiracy

Out-of-court statements made by codefendant, who was defendant's cousin, evidencing codefendant's motive, plan, and intent to kill codefendant's paramour and paramour's baby were not admissible under co-conspirator

exception to hearsay rule, in absence of evidence suggesting that at time most of statements were made any conspiracy existed. West's F.S.A. § 90.803(18)(e).

2 Cases that cite this headnote

[7] **Criminal Law** Grounds of Admissibility in General

Trustworthiness and rationale behind co-conspirator hearsay exception is that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not. West's F.S.A. § 90.803(18)(e).

[8] **Criminal Law** Then-Existing State of Mind or Body

State of mind exception to hearsay rule allows admission of declarant's statements to prove only declarant's state of mind or to explain or prove only declarant's subsequent conduct. West's F.S.A. § 90.803(3).

4 Cases that cite this headnote

[9] **Criminal Law** Grounds of Admissibility in General

Out-of-court statements made by codefendant, who was defendant's cousin, evidencing codefendant's motive, plan, and intent to kill codefendant's paramour and paramour's baby were not admissible under state of mind exception to hearsay rule, to prove defendant's intent and motive. West's F.S.A. § 90.803(3).

[10] **Criminal Law** Confessions or Declarations of Codefendants

Admission of nontestifying codefendant's pre-arrest statements to agent, some statements of which were self-inculpatory on their own, violated defendant's Sixth Amendment right to confront witnesses against him, where codefendant made statements with "the tenor" of shifting blame from himself to defendant. U.S.C.A. Const.Amend. 6; West's F.S.A. § 90.804(2)(c).

6 Cases that cite this headnote

[11] **Criminal Law** Declarations Against Interest

Nontestifying codefendant or accomplice's confession or inculpatory statement which also implicates defendant should only be admitted under statement against interest exception to hearsay rule if it sensibly and fairly can be redacted to include only those statements which are solely self-inculpatory. West's F.S.A. § 90.804(2)(c).

9 Cases that cite this headnote

[12] **Criminal Law** Furtherance or Execution of Common Purpose

Criminal Law In General; Existence of Conspiracy

To admit evidence under co-conspirator exception to hearsay rule, state must establish: (1) that conspiracy existed; (2) that declarant/co-conspirator and defendant against whom statements are offered were members of conspiracy; and (3) that statements were made during course and in furtherance of conspiracy. West's F.S.A. § 90.803(18)(e).

7 Cases that cite this headnote

[13] **Criminal Law** Weight and Sufficiency

State must prove existence of conspiracy and each member's participation in it by a preponderance of evidence independent of hearsay statements sought to be admitted under co-conspirator exception to hearsay rule. West's F.S.A. § 90.803(18)(e).

4 Cases that cite this headnote

[14] **Criminal Law** Weight and Sufficiency

Sufficient independent evidence existed to establish a conspiracy between witness, defendant, and codefendant beginning on

evening two days before murder of codefendant's paramour and paramour's baby, and thus, statements made by codefendant in presence of defendant and witness and in furtherance of conspiracy were admissible under co-conspirator exception to hearsay rule; paramour was apparently "pestering" codefendant, who was married, for money to support baby, men talked of various ways to kill paramour, witness saw defendant and codefendant try on some latex gloves that evening and saw a "buck knife" on speaker of stereo, and independent and direct evidence placed defendant and codefendant together in town of murder on night of murders. West's F.S.A. § 90.803(18)(e).

2 Cases that cite this headnote

[15] **Criminal Law** Furtherance or Execution of Common Purpose

Codefendant's statements to witness and officer after murders were not admissible under co-conspirator exception to hearsay rule, in absence of evidence demonstrating that statements were made during continuation of conspiracy and agreement it encompassed. West's F.S.A. § 90.803(18)(e).

1 Case that cites this headnote

[16] **Criminal Law** Hearsay

Erroneous admission of evidence under numerous hearsay exceptions constituted reversible error, where errors denied defendant the opportunity to cross-examine and otherwise challenge critical and damaging testimony and evidence, nature of evidence against defendant was circumstantial, State's admitted theory at trial was to show that defendant and nontestifying codefendant, who was defendant's cousin, were inseparable in days leading up to murders, and through admission of numerous hearsay statements, State sought to impute codefendant's actions, statements, motive, and intent to defendant.

1 Case that cites this headnote

[17] **Criminal Law** Local Prejudice

Test for determining whether change of venue is necessary because of pretrial publicity is whether general state of mind of inhabitants of a community is so infected by knowledge of incident and accompanying prejudice, bias, preconceived opinions that jurors could not possibly put these matters out of their minds and try case solely on evidence presented in courtroom.

[18] **Criminal Law** Local Prejudice

Before ruling on motion for change of venue because of pretrial publicity, trial court is ordinarily permitted to attempt to empanel a jury.

1 Case that cites this headnote

[19] **Jury** Knowledge of Matters in General

To be qualified as a juror, person need not be completely ignorant of facts of case.

[20] **Criminal Law** Discretion of Court
Criminal Law Change of Venue

Motion for change of venue is addressed to trial court's discretion and will not be overturned on appeal absent a palpable abuse of discretion.

1 Case that cites this headnote

[21] **Criminal Law** Particular Offenses

Defendant was not entitled to change of venue based on pretrial publicity, even though most jurors had some knowledge about case, where trial court conducted individual voir dire regarding pretrial publicity and jurors' views on death penalty, court liberally granted defendant's challenges for cause to those jurors who indicated that because of their exposure to case, they might have had difficulty giving defendant a fair trial, and all jurors who eventually sat on case assured court that their prior knowledge would not affect their impartiality and that they could

decide case solely on evidence presented and instructions given by court.

[22] **Criminal Law** Purpose of Admission

Photographs are admissible if they assist medical examiner in explaining to jury the nature and manner in which wounds were inflicted.

7 Cases that cite this headnote

[23] **Criminal Law** Purpose of Admission

Photographs are admissible to show manner of death, location of wounds, and identity of victim.

9 Cases that cite this headnote

[24] **Criminal Law** Photographs Arousing Passion or Prejudice; Gruesomeness

Trial courts must be cautious in not permitting unduly prejudicial or particularly inflammatory photographs before jury.

7 Cases that cite this headnote

[25] **Criminal Law** Documentary Evidence

Trial court's decision to admit photographic evidence will not be disturbed absent an abuse of discretion.

2 Cases that cite this headnote

[26] **Criminal Law** Purpose of Admission

Autopsy photographs showing defensive wounds on victim's hands and arms and depicting bruises and hemorrhaging that were not readily apparent from first autopsy were relevant to determination as to manner of victim's death.

4 Cases that cite this headnote

Attorneys and Law Firms

***768** Kepler B. Funk and Keith F. Szachacz of Funk & Szachacz, P.A., Melbourne, FL, for Appellant.

Robert A. Butterworth, Attorney General, and Barbara J. Yates, Assistant Attorney General, Tallahassee, FL, for Appellee.

Opinion

PER CURIAM.

We have on appeal the judgment and sentence of the trial court adjudicating guilt of first-degree murder and imposing the death penalty upon Lamar Brooks. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. Because of the prejudice resulting from the erroneous admission of extensive hearsay testimony, we reverse Brooks' convictions and remand for a new trial.

FACTS

In the late night hours of April 24, 1996, Rachel Carlson and her three-month-old daughter, Alexis Stuart, were found stabbed to death in Carlson's running vehicle in Crestview, Florida. Carlson's paramour, Walker Davis, and Brooks were charged with the murders. Davis was married and had two children, and his wife was pregnant with their third child. However, the victim believed Davis was also the father of her child and demanded support ***769** from him.[1] Davis became concerned about this pressure. He was convicted of the murders and sentenced to life imprisonment. However, he did not testify at Brooks' trial.

Brooks lived in Pennsylvania but had traveled to Florida from Atlanta with his cousin Davis and several friends on Sunday, April 21, 1996. Brooks stayed with Davis at Eglin Air Force Base for a few days before returning to Pennsylvania. In interviews with the police, he informed them that on the following Wednesday evening, the night of the murders, he helped Davis set up a waterbed, watched some movies, and walked Davis's dog.

Contrary to Brooks' statements, several witnesses placed him and Davis in Crestview on the night of the murders, although no physical or direct evidence linked him to the crimes. Mark Gilliam testified about a conversation between Davis, Brooks and himself wherein all three men allegedly joked about various ways they would kill Carlson because of pressure she exerted on Davis to support her child. Gilliam testified that he did not take the conversations seriously and thought it was all a joke. In exchange for his testimony, the State promised Gilliam he would not be prosecuted in any manner

for his involvement in the murders of Carlson and Stuart. The State also presented the testimony of Terrance Goodman, a jailhouse informant and six-time convicted felon incarcerated with Brooks, who testified about comments Brooks made concerning the murders. In return for Goodman's testimony against Brooks, the State agreed to reduce a first-degree murder charge against him to a third-degree murder without a firearm charge and agreed to recommend a downward departure from the sentencing guidelines.

In addition to Gilliam and Goodman, the State was permitted to introduce, over objection, numerous hearsay statements made by Davis that were used against Brooks. Brooks was convicted of first-degree murder and sentenced to death. As noted, Davis had been previously convicted and sentenced to life, and his convictions and sentence were affirmed on appeal. *See Davis v. State,* 728 So.2d 341 (Fla. 1st DCA 1999).

Brooks raises fifteen issues in this appeal. [2] In light of our remand for a new trial, we find all the issues raised by Brooks moot, except those relating to the hearsay statements and issues (8) and (9) as they may affect the subsequent retrial of the case.

HEARSAY

Brooks asserts that his constitutional right to confront his accusers and the evidence against him by cross-examination ***770** and otherwise was violated throughout the trial by the admission of numerous hearsay statements made by persons who did not testify at trial. Most of the statements complained of were focused solely on Davis and his motives and plans to kill the victims. Indeed, Brooks claims that his trial was really a retrial of Davis, rather than a trial limited to evidence about Brooks.

Initially, Brooks alleges that the trial court erred in admitting statements made by Carlson to her friends on the night of the murders as to her relationship with Davis and her intended activities, as well as numerous statements made by Davis evidencing his intent to kill Carlson and her baby, his purchase of a life insurance policy for the baby, which named him as the primary beneficiary, and his intent to purchase an expensive vehicle in cash.

Carlson's Statements About Davis

Brooks argues that the trial court erred in admitting statements by Carlson to her coworkers, along with an e-mail sent by Carlson to Davis, evidencing her intent to drive to Crestview with Davis on the night of the murders. Several of Carlson's coworkers and friends testified that Carlson had told them that she and Davis were going to visit Davis's aunt in Crestview on the evening of April 24. Several of these people also testified she had told them that she needed some money from him and that she wanted him to sign some paternity papers. Michael Lynes, a computer employee at Eglin Air Force Air Base, testified that he retrieved an e-mail message sent by Carlson to Davis. The message was dated April 24 and read as follows: "We can go there again tonight, but I need gas money. Also, let's try to go a little earlier. I'm about to fall over I'm so tired from the last two nights. Also, if you can, I need some money for diapers. She's almost out and I'm flat broke. Call me." This message was deleted from Davis's computer at work at 7:03 a.m. on April 25, the morning after the murders.

[1] The trial court allowed this testimony as an exception to the hearsay rule under section 90.803(3), Florida Statutes (1997), which provides an exception for evidence of the state of mind of the maker of the statements when such state of mind is relevant to an issue at trial. Brooks claims this was error because a statement admitted to show state of mind is only allowed to prove the state of mind or subsequent act of the declarant, not of a defendant. Here, Brooks alleges that the trial court erred in allowing the State to introduce these statements directly against Brooks to show that Davis traveled to Crestview with Carlson on the night of the murders. We agree.

[2] Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (1997). Section 90.803 provides an exception to the hearsay rule and that the following are not inadmissible as evidence, even though the declarant is available as a witness:

> (3) Then-Existing Mental, Emotional, or Physical Condition.-
>
> (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

2. Prove or explain acts of subsequent conduct of the declarant.

§ 90.803(3), Fla. Stat. (1997). Under this exception, however, a declarant's statement ***771** of intent under section 90.803(3) is only admissible to infer the future act of the declarant, not the future act of another person. *See Bailey v. State,* 419 So.2d 721 (Fla. 1st DCA 1982) (stating that statements by a victim are not admissible to prove subsequent acts of a defendant). Further, ordinarily, a victim's state of mind is not a material issue, nor is it probative of a material issue in a murder case. *See Woods v. State,* 733 So.2d 980, 987 (Fla.1999). However, there are some exceptions to this general rule.

[3] **[4]** **[5]** First, a victim's state of mind may be relevant to an element of the crime. *See Stoll v. State,* 762 So.2d 870 (Fla.2000). Second, "the victim's state of mind may become relevant to an issue in the case where the defendant claims: (1) self-defense; (2) that the victim committed suicide; or (3) that the death was accidental." *Id.* at 874-75 (citing *Woods,* 733 So.2d at 987-88); *see also* Charles W. Ehrhardt, *Florida Evidence* § 803.3a (2000 ed.). Finally, the state of mind of the victim-declarant may become an issue in a case when it is used "to rebut a defense raised by the defendant." 762 So.2d at 875 (citing *State v. Bradford,* 658 So.2d 572, 574-75 (Fla. 5th DCA 1995)).

However, in the instant case, as in *Stoll,* the victim's state of mind was not relevant to an element of the crime. Moreover, Brooks did not claim either self-defense, that Carlson committed suicide, or that the death was accidental. Further, the record does not demonstrate that Carlson's state of mind became relevant to rebut a defense raised by the defendant Brooks. At trial, Brooks asserted no alibi defense and did not dispute that he was in Crestview on the night of the murders.

Moreover, we find that *Bradford* is inapplicable here. In *Bradford,* the defendant was charged with the first-degree murder of his ex-girlfriend. Part of the evidence against the defendant was the presence of his fingerprints in the victim's new car. In response to this evidence, the defendant claimed that his fingerprints were in her car because even after their break-up, the victim would visit him and would allow him into her car. To rebut this explicit claim, the State sought to introduce statements under § 90.803(3)(a)(1) made by the victim to her daughter expressing fear of her ex-boyfriend. These statements included the victim's changing of apartments and vehicle so that the defendant would not be able to find her. The trial court disallowed these statements. On appeal, the Fifth District disagreed and held:

> The victim's statements of fear are not admissible as proof that it was the defendant who killed her, but her statements of fear are admissible to rebut the defendant's theory that the victim willingly let him inside her car and that is how his fingerprints got in her car. If the defendant does not put forth the theory that the victim willingly let him in the car, then her state of mind would not be an issue.

658 So.2d at 575. As in *Bradford,* it is initially important to note that Carlson's statements could not be admitted to prove that Brooks killed her and her baby, especially since the statements reflected Carlson's intent to travel to Crestview with Davis, not Brooks. Importantly, even the *Bradford* court specifically noted that in this context, the statements could only be used as rebuttal evidence of the claim asserted by the defendant. *See id.* at 575. In the instant case, the State sought and was permitted to introduce the statements in its case-in-chief, not as rebuttal evidence. Second, and more importantly, because the State used the statements to show Brooks' subsequent acts of driving to Crestview with Carlson, their admission was error. As noted earlier, under section 90.803(3), ***772** statements of intent can ordinarily be used to prove the subsequent acts of the declarant, not a defendant. *See Bailey.* For the foregoing reasons, we find that the State failed to demonstrate any proper predicate for admitting these statements against Brooks, and the trial court erred in allowing these out-of-court statements to be heard by the jury.

Davis's Statements

Brooks' major complaint about hearsay is that the trial court erred in allowing numerous hearsay statements made by Davis out of court and well before any alleged conspiracy was established, evidencing his motive, plan, and intent to

kill Carlson and her baby. Specifically, the State introduced the testimony of Steve Mantheny, a life insurance salesman. He testified that on February 20, 1996, almost two months before the murders, Davis applied for a life insurance policy naming his baby, Stuart, as the insured and himself as the primary beneficiary. At trial, Brooks objected not only to Mantheny's testimony but also to the introduction of the actual life insurance policy. Wayne Samms, a friend of Davis, was permitted to testify that about a month before the murders, Davis complained to him that Carlson kept "bugging him" and asking him for money, and "that her and the little dip were done." He understood this to mean that Davis was going to kill them and that he was not going to pay them any more money. The State also introduced the testimony of David Johnson, a car dealer, who testified that in the early part of April, Davis talked to him about purchasing a car worth about $32,000 and that "Davis was coming into some money." Similarly, Anthony Sievers, another friend of Davis, testified that Davis told him he was contemplating getting a new car and that there would be no payments involved. [3] Finally, Rochelle Jones, a friend of Davis, testified as to a conversation she had with Davis on Monday or Tuesday before the murders in which Davis told her that a man owed him money and he was going to get the money, but that he would have to "smoke the dip with the baby" because she would be able to tie him to that man. She understood smoking the dip with the baby to mean that he would have to "kill that girl, the baby."

[6] As noted, the trial court also allowed these statements under the state of mind exception to the hearsay rule of section 90.803(3). On appeal, the State now argues that they were properly admitted as statements of a co-conspirator under section 90.803(18)(e), claiming that a conspiracy existed between Davis, Brooks and Mark Gilliam. However, the State's argument on appeal is without merit because to qualify under the co-conspirator exception of section 90.803(18)(e), a statement must be made during the course of the conspiracy and in furtherance of it. *See* § 90.803(18)(e), Fla. Stat. (1997); *see also Foster v. State,* 679 So.2d 747 (Fla.1996). There is simply no record evidence even suggesting that at the time most of the ***773** above statements were made any conspiracy existed. In fact, the evidence is to the contrary and demonstrated that if any conspiracy existed it was formed shortly before the murders. [4]

[7] The State contends that these statements should be admitted even though they were made by Davis because of the close and inseparable connection between Brooks and Davis during Brooks' visit and stay in Florida. However, by this argument the State is ignoring the limitations of the co-conspirator hearsay exception of section 90.803(18)(e), which requires (1) that these statements be made during and in furtherance of a conspiracy, and (2) that independent evidence establish the conspiracy before the statements are allowed. The trustworthiness and rationale behind the co-conspirator hearsay exception is "that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not." *United States v. Trowery,* 542 F.2d 623, 626 (3d Cir.1976). As noted, at the time the above statements were made, there was no evidence of a conspiracy or that one would occur; therefore, those statements are devoid of the requisite trustworthiness contained in the co-conspirator exception. The statements are clearly hearsay not covered by any other recognized exception to the hearsay rule.

[8] **[9]** As earlier noted, it is clear that section 90.803(3) allows the admission of a declarant's statements to prove only the declarant's state of mind or to explain or prove only the declarant's subsequent conduct. *See, e.g., Jones v. State,* 440 So.2d 570, 577 (Fla.1983); *Bailey.* Therefore, this rule also renders Davis's statements inadmissible to prove Brooks' intent and motive. *See, e.g., Sandoval v. State,* 689 So.2d 1258 (Fla. 3d DCA 1997). In *Sandoval,* the defendant sought to introduce her codefendant's statements to show the defendant's state of mind and to explain her actions. The trial court sustained the State's objection to the introduction of the evidence. On appeal, the Third District agreed with the trial court and held:

> [S]ection [90.803(3)] permits the admission of a *declarant's* statements to prove the *declarant's* state of mind or explain the *declarant's* subsequent conduct. *See e.g., Jones v. State,* 440 So.2d 570, 577 (Fla.1983). The declarant here, is the co-defendant and not Sandoval.

Id. at 1259. As in *Sandoval,* the trial court here should not have allowed Davis's statements to be used against Brooks to establish motive, absent any evidence of a conspiracy at the time the statements were made.

Therefore, we find the trial court abused its discretion in admitting Davis's numerous statements to Samms, Johnson,

Sievers, and Mantheny, and Brooks was substantially prejudiced as a result. [5]

***774** Statements Against Interest

[10] Next, Brooks alleges that his Sixth Amendment right to confront the witnesses against him was violated when the trial court admitted statements made by Davis to agent Dennis Haley prior to his arrest. We agree.

After the murders, but prior to his arrest, Davis was interviewed by investigators on several occasions. In his first two interviews, Davis denied even being in Crestview on the night of the murders. However, in a subsequent interview on the Monday after the murders and after being confronted with evidence placing him in Crestview, he admitted driving to Crestview with Carlson on the night of the murders. At trial, the State sought to introduce six statements under the "statements against interest exception" to the hearsay rule, made by Davis to the investigator on that day to show that Brooks was with Carlson and Davis in the car on the night of the murders. These six statements were: (1) admitting that Davis was in Crestview on the night of the murders; (2) that he and Brooks drove there with Carlson on the night of the murders; (3) that they arrived around 9 p.m.; (4) that the murders occurred shortly after they arrived; (5) that Davis was in the car when the murders occurred; and (6) that a glove was worn during the murders. The trial judge allowed in evidence the statements that Davis drove to Crestview with Carlson on the night of the murders and the time that they arrived. As a result, Lt. Jerome Worley testified that Davis admitted driving to Crestview on the night of the murders with Carlson and that they arrived there around 9 p.m. He also testified to the jury that immediately after the interview during which these statements were made, not only was Davis arrested, but an arrest warrant was immediately prepared for the arrest of Brooks.

Section 90.804(2)(c) provides:

> (2) HEARSAY EXCEPTIONS.-The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:
>
> ....
>
> (c) *Statement against interest.*-A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement. [6]

§ 90.804(2)(c), Fla. Stat. (1995). "The reliability of these statements flows from the fact that they are against the interest of the declarant at the time when they are made [as well as the presumption that a] person does not make statements which will subject him or her to civil or criminal sanctions unless they are true." Charles W. Ehrhardt, *Florida Evidence* § 804.4 (2000 ed.); *see also Williamson v. United States,* 512 U.S. 594, 599, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) ("Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to ***775** make self-inculpatory statements unless they believe them to be true."). [7]

[11] The trial judge here had some reservations concerning the admissibility of Davis's statements because he felt that although Davis admitted driving to Crestview with Carlson on the night of the murders and being present in the car at the time of the murders, Davis was actually trying to shift the blame to Brooks in his statement. On this issue, the U.S. Supreme Court has pointed out:

> The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
>
> ... And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.

Williamson, 512 U.S. at 599-600, 114 S.Ct. 2431. Therefore, assuming the other requirements of section 90.804(2)(c) are met, it follows that a nontestifying codefendant or accomplice's confession or inculpatory statement which also implicates the defendant should only be admitted if it "sensibly and fairly can be redacted to include only

those statements which are solely self-inculpatory." *Franqui v. State,* 699 So.2d 1332, 1339 (Fla.1997) (Anstead, J., concurring in part and dissenting in part).

Just recently, the United States Supreme Court comprehensively addressed this issue in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). In *Lilly,* the defendant, his brother Mark, and Gary Barker, were arrested after a two-day crime spree by the three which included stealing liquor and guns and resulted in the abduction of Alex DeFilippis. DeFilippis was later shot and found dead. During police questioning, Mark admitted stealing the alcoholic beverages, but claimed that the defendant and Barker stole the guns and that the defendant shot DeFilippis. At defendant's trial, the State of Virginia called Mark as a witness and sought to have him testify to the statements that he made to the police. The State subsequently was allowed to introduce the statements as declarations against interest of an unavailable witness. [8] On appeal, the Virginia Supreme Court approved the admission of the statements. The United States Supreme Court accepted certiorari on the issue of whether introduction of this testimony violated Lilly's Sixth Amendment right to confront the witnesses against him, and reversed the Virginia decision. The Court held:

> The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.

***776** *Id.* at 134, 119 S.Ct. 1887. The Court also explained:

> It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice-that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Id. at 137, 119 S.Ct. 1887. Applying these principles, the Court held it was error to admit Mark's statements even though other evidence at trial corroborated portions of Mark's statements and even though the police had informed him of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). [9] *See id.* at 137-38, 119 S.Ct. 1887.

Accordingly, the Court concluded that neither the words that Mark spoke nor the setting in which he was questioned provided any basis for concluding that his comments regarding petitioner's guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting. *See id.* at 139, 119 S.Ct. 1887. Moreover, the Court held that Mark was primarily responding to the officer's leading questions, and thus, "Mark had a natural motive to attempt to exculpate himself as much as possible." *Id.* Finally, the Court remanded the case to the state court to determine whether the error in admitting the statements was harmless beyond a reasonable doubt. *See id.* at 140, 119 S.Ct. 1887.

As noted by Ehrhardt, although *Lilly* may not have established an absolute rule of inadmissibility of a non-testifying accomplice's confession as a declaration against penal interest when used by the prosecution, the Court gave no indication of any specific factors that could establish sufficient reliability to admit the statements and satisfy the defendant's protections under the Sixth Amendment. *See Ehrhardt, supra,* § 804.4. In fact, the opinion makes it highly unlikely that a prosecutor will be able to establish "particularized guarantees of trustworthiness." *See id.* The opinion also left unanswered the question of whether it would be appropriate to introduce solely those statements that directly inculpate the declarant as was done by the trial judge in this case. However, the Court in *Williamson* clearly stated: "[T]he fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral ***777** statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded." 512 U.S. at 600, 114 S.Ct. 2431 (citation omitted).

In the instant case, Brooks raises a Confrontation Clause objection as did the defendant in *Lilly.* Moreover, the trial judge concluded, and we agree, that Davis's statements to the police were made with "the tenor" of shifting blame from himself to Brooks since they were made pursuant to extensive questioning by police and after Davis was confronted with inculpatory evidence. As a result, we conclude that even

though several of Davis's statements were self-inculpatory when considered on their own, when viewed in conjunction with his other statements and under the circumstances in which they were made, it is obvious they were predominantly self-serving in attempting to shift blame, and thus lacked the necessary "guarantees of trustworthiness." [10]

Moreover, Lt. Worley testified that immediately after Davis made those statements, an arrest warrant was prepared for Brooks. Finally, the State specifically relied and focused on these statements when in closing argument, the prosecutor improperly informed the jury they had not heard everything Davis had told Agent Haley in that interview, the obvious inference being there was more damaging evidence than what had been presented. Accordingly, it was error to admit them. *See Lilly; Williamson; Franqui v. State,* 699 So.2d 1332, 1335 (Fla.1997) (finding that codefendant's confession was substantially incriminating to defendant and that the circumstances of codefendant's confession did not demonstrate the particularized guarantee of trustworthiness sufficient to overcome the presumption of unreliability that attaches to accomplices' hearsay confessions implicating the defendant).

Co-conspirator Hearsay Exception

Brooks also argues that the trial court erred in admitting other statements made by Davis under the co-conspirator hearsay exception because the State failed to prove the existence of a conspiracy. At trial, Mark Gilliam testified that on the Monday evening before the murders, Davis had said that a woman was pestering him for money, that she should be killed in the ghetto and that he would choke her. In response to Davis's statements, Gilliam testified that Brooks suggested that she should be shot, but then Gilliam himself interjected that she should be stabbed instead. He also testified that Davis offered to pay him $500 for driving them to Crestview to kill Carlson because it was a slow town, and that Brooks would get paid between $4000 and $8000 for his participation. On cross-examination, Gilliam testified that he thought none of these statements were serious and the discussion was all a joke.

Additionally, Brooks alleges that even assuming the existence of a conspiracy, the trial court erred in allowing Davis's statements made to Rochelle Jones after the murders had occurred. At trial, Jones testified that after the murders, Davis confronted her on several occasions and told her, "You ain't seen me" and asked her whether she was "still cool." Moreover, on Saturday evening after the murders, she testified that Davis had told her that "they [Brooks and Davis] had went out there [Crestview] to rob this guy and that they shot at him and they took his money and ***778** they said that the guy probably killed Rachel because she had set him up." Finally, Brooks alleges that the trial court erred in allowing Officer Glenn Barberree to testify about the contents of his interview with Davis after the murders. Over Brooks' objection, Barberree testified that Davis had told him that he was at his home in Eglin with Brooks on the evening of the murders. As with Jones' statements, the trial court admitted this testimony under the co-conspirator exception to the hearsay rule. The State contends that the testimony of these witnesses was properly admitted under the co-conspirator exception to the hearsay rule. We must again review that exception.

[12] **[13]** Section 90.803(18)(e) provides that "[a] statement by a person who was a co-conspirator of the party [made] during the course and in furtherance of the conspiracy" is not inadmissible as evidence even though the declarant is unavailable as a witness. In order to admit evidence under this exception, the State must establish:

> (1) that a conspiracy existed; (2) that the declarant/coconspirator and the defendant against whom the statements are offered were members of the conspiracy; and (3) that the statements were made during the course and in furtherance of the conspiracy.

State v. Edwards, 536 So.2d 288, 292 (Fla. 1st DCA 1988); *see also* Charles W. Ehrhardt, *Florida Evidence* § 803.18e (2000 ed.). The State must prove the existence of the conspiracy and each member's participation in it by a preponderance of the evidence *independent* of the hearsay statements sought to be admitted. *See Foster v. State,* 679 So.2d 747, 753 (Fla.1996).

[14] In the instant case, we conclude that a review of the record reflects sufficient independent evidence to establish a conspiracy between Gilliam, Davis and Brooks beginning on the Monday evening after their return from Atlanta. In addition to the statements already discussed, Gilliam also testified that he witnessed Brooks and Davis try on some

latex gloves that evening to see if they fit and that he saw a "buck knife" on the speaker of the stereo. He also testified concerning his own statements that they should stab Carlson, and Brooks' testimony that she should be shot. We conclude that this evidence was sufficient to establish their intent to conspire to kill Carlson.

Additionally, independent and direct evidence placed Brooks and Davis together in Crestview on the night of the murders. Therefore, we conclude that the trial court did not err in finding that the State met its burden of proving by a preponderance of the evidence the existence of a conspiracy to murder Carlson, and as a result, we agree that the statements Davis made in furtherance of the conspiracy in the presence of Gilliam and Brooks were properly admitted by the trial court. *See Larzelere v. State,* 676 So.2d 394, 406 (Fla.1996) (holding that defendant's calculated plan to murder the victim involving conspirational association with her son was sufficient to establish the existence of a conspiracy and made her son's hearsay statements admissible against the defendant under section 90.803(18)(e)); *Romani v. State,* 542 So.2d 984, 986 (Fla.1989) (holding that sufficient evidence existed to find that a conspiracy existed for purposes of section 90.803(18)(e) where co-conspirator's statement that defendant offered to pay $10,000 to anyone who would commit the murder was corroborated by evidence that the defendant withdrew $10,000 from her bank account, deposited it into another account and later withdrew it again).

[15] Notwithstanding the finding of a conspiracy, however, we find it was error ***779** to admit Davis's statements to Jones and Barberree made after the murders. As noted previously, to be admissible under section 90.803(18)(e), statements must be made during and in furtherance of the conspiracy. Florida courts have consistently held that for purposes of section 90.803(18)(e), a conspiracy ordinarily ends when the crime has been committed. *See, e.g., Calvert v. State,* 730 So.2d 316, 319 (Fla. 5th DCA 1999); *Burnside v. State,* 656 So.2d 241, 245 (Fla. 5th DCA 1995); *Usher v. State,* 642 So.2d 29, 31 (Fla. 2d DCA 1994); *Moore v. State,* 503 So.2d 923, 924 (Fla. 5th DCA 1987); *Wells v. State,* 492 So.2d 712, 719 (Fla. 1st DCA 1986). The State has demonstrated no basis in the record for a contrary holding here.

In *Wells,* the First District specifically held that "statements made which tend to shield 'coconspirators' after the objective of the conspiracy is completed do not give rise to an additional conspiracy to cover up the original crime." *Id.* at 719 (citing *Krulewitch v. United States,* 336 U.S. 440, 444, 69 S.Ct. 716, 93 L.Ed. 790 (1949)). Applying this rule, the First District held that the trial court had erred in admitting statements under section 90.803(18)(e) that were made after the crimes were committed in the absence of evidence demonstrating that the statements were made during the continuation of the conspiracy and the agreement it encompassed. As a result, the admission of Davis's statements to Jones and Barberree was error.

Cumulative Analysis

[16] Our faith in the judicial system in this country is deeply rooted in the adversarial nature of its legal proceedings, especially in the criminal system where every defendant has the constitutional right and guarantee to confront the witnesses and evidence presented against him. Here, the erroneous admission of evidence under numerous hearsay exceptions denied Brooks the opportunity to cross-examine and otherwise challenge critical and damaging testimony and evidence. Further, in light of the circumstantial nature of the evidence against Brooks and the State's substantial reliance on the hearsay evidence, we find that the State has failed to demonstrate beyond a reasonable doubt that the admission of this inadmissible hearsay "did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986).

Our review of the record in light of the State's theory at trial as well as the circumstantial nature of the evidence against Brooks establishes that the cumulative effect of the numerous errors discussed above in the admission of improper hearsay unfairly prejudiced Brooks. In the instant case, the State's admitted theory at trial was to show that Davis and Brooks were inseparable in the days leading up to the murders. In fact, in its opening argument, the State referred to them as "siamese twins." Thereafter, through the admission of numerous hearsay statements, the State sought to impute Davis's actions, statements, motive and intent to Brooks. This is particularly troublesome in this case where the trial court itself struggled with the admissibility of this evidence and concluded that this case was being tried on the basis of numerous hearsay exceptions. As such, the admission of this evidence constituted reversible error. *See, e.g., Selver v. State,* 568 So.2d 1331 (Fla. 4th DCA 1990); *Bailey v. State,* 419 So.2d 721 (Fla. 1st DCA 1982).

In *Bailey* for example, the court held that hearsay statements admitted under section 90.803(3), which tended to establish a motive for the defendant to have committed the homicide, could not be deemed harmless where the State's evidence was ***780** almost wholly circumstantial. *See id.* at 722. In Brooks' case, most of the evidence against Brooks was circumstantial and there was no physical evidence linking him to the murders or crime scene. Additionally, although Mark Gilliam testified as to Brooks' financial motive, Gilliam was heavily impeached at trial and he testified that he thought it was all a joke. In fact, Gilliam subsequently recanted his trial testimony, although he later reaffirmed it. The other evidence against Brooks came from a jailhouse informant who received a very favorable plea bargain from the State in his own murder case in exchange for his testimony against Brooks. Moreover, the statements by Davis introduced as statements against interest were also highly prejudicial. Further, in referring to these statements, the State specifically told the jury during closing arguments that they did not hear everything Davis said to the police on that night. This was clearly improper and illustrates the State's attempt to inform the jury of the precise nature of the statements that the trial judge tried to conceal from the jury and reflects the dangers which the United States Supreme Court warned about in *Lilly.* Accordingly, we conclude that the State has not demonstrated beyond a reasonable doubt that the error "did not contribute to the verdict or alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *DiGuilio,* 491 So.2d at 1135.

STRIKE VENIRE AND CHANGE OF VENUE

Because some other issues may occur on retrial we resolve several other claims of error by Brooks. Brooks argues that the trial court erred in denying his motions to strike the venire and change venue because the pretrial publicity in this case denied Brooks a fair and impartial trial.

[17] **[18]** **[19]** **[20]** This Court has provided the following test to determine whether a change of venue is necessary because of pretrial publicity:

> The test for determining change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and the accompanying prejudice, bias, preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Rolling v. State, 695 So.2d 278, 284 (Fla.1997) (quoting *McCaskill v. State,* 344 So.2d 1276, 1278 (Fla.1977)). Before ruling on such a motion, trial courts are ordinarily permitted to attempt to empanel a jury. *See Henyard v. State,* 689 So.2d 239, 245 (Fla.1996). This process provides trial courts with an opportunity to determine through the *voir dire* examination of prospective jurors whether it is actually possible to find individuals who have not been so infected by the pretrial publicity that they are unable to independently review the evidence at trial. *See Rolling,* 695 So.2d at 285. To be qualified as a juror, a person need not be completely ignorant of the facts of the case. *See id.* Rather, the issue may turn on the nature and extent of the pretrial information the juror has acquired and an analysis as to whether a juror "can lay aside his impression or opinion" based upon any pretrial information and "render a verdict based on the evidence presented in court." *Id.* (quoting *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961)). As with other pretrial motions, "[a] motion for change of venue is addressed to the trial court's discretion and will not be overturned on appeal absent a palpable abuse of discretion." *Cole v. State,* 701 So.2d 845, 854 (Fla.1997).

***781** **[21]** Admittedly, most jurors called in the instant case had some knowledge about the case. However, in response, the trial judge conducted individual *voir dire* regarding pretrial publicity and the jurors' views on the death penalty. Importantly, the record reflects that the trial court liberally granted Brooks' challenges for cause to those jurors who indicated that because of their exposure to the case, they might have had difficulty giving Brooks a fair trial. Finally, as noted by the State, all jurors who eventually sat on Brooks' case assured the court that their prior knowledge would not affect their impartiality and that they could decide the case solely on the evidence presented and the instructions given by the court. Therefore, we find no abuse of discretion in denying Brooks' motion to change the venue to another location. *See Cole,* 701 So.2d at 853-54.

PHOTOGRAPHS

Brooks also argues that the trial court erred in admitting five autopsy photographs of the victims introduced during the medical examiner's testimony alleging that the probative value of the photos was substantially outweighed by their prejudice. At trial, Dr. Joan Wood testified concerning the autopsy she conducted in Oregon before and after the victims' funeral. Although she conceded that it was difficult to examine the victims because of the first autopsy that had been performed and since many of the wounds had already been stitched, she nevertheless was able to testify about injuries to Carlson that were not apparent at the first autopsy, done less than twenty-four hours after the murders. Pursuant to her autopsy, Dr. Wood concluded that Carlson had been choked as well as stabbed. Moreover, she testified that the photographs of the original autopsy did not depict numerous defensive stab wounds on the victim's hands and arms. In fact, of the multiple stab wounds inflicted on Carlson, Dr. Wood testified that eighteen of them were defensive and reflected that many of the injuries and stab wounds occurred while Carlson was still alive.

[22] **[23]** **[24]** **[25]** We have consistently held that the initial test for determining the admissibility of photographic evidence is relevance, not necessity. *See Mansfield v. State,* 758 So.2d 636 (Fla.2000). Photographs are admissible if "they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted." *Bush v. State,* 461 So.2d 936, 939 (Fla.1985). Moreover, photographs are admissible "to show the manner of death, location of wounds, and the identity of the victim." *Larkins v. State,* 655 So.2d 95, 98 (Fla.1995). On the other hand, trial courts must be cautious in not permitting unduly prejudicial or particularly inflammatory photographs before the jury. However, a trial court's decision to admit photographic evidence will not be disturbed absent an abuse of discretion. *See Mansfield,* 758 So.2d at 648.

[26] In the instant case, three of the five photographs objected to by Brooks showed the defensive wounds on Carlson's hands and arms that Dr. Wood testified to. Moreover, the other two photographs depicted bruises and hemorrhaging that were not readily apparent from the first autopsy. As such, we conclude the photographs in question were relevant to Dr. Wood's determination as to the manner of Carlson's death. Accordingly, we find that the trial court did not abuse its discretion in admitting the photographs.

CONCLUSION

Because of the prejudicial nature of the extensive inadmissible hearsay testimony introduced at trial, we reverse Brooks' ***782** convictions and sentence imposed, and remand for a new trial.

It is so ordered.

SHAW, ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

WELLS, C.J., concurs in part and dissents in part with an opinion.

HARDING, J., concurs in part and dissents in part with an opinion.

WELLS, C.J., concurring in part, dissenting in part.

I write separately today because of my concern that the majority does not adhere to this Court's on-point precedent regarding a nontestifying declarant's statement that inculpates both the declarant and accused as established in *Franqui v. State,* 699 So.2d 1312 (Fla.1997) (*Franqui I*). Based upon that precedent, I depart from the majority over the admissibility of two statements which the trial court admitted but the majority finds inadmissible. However, I concur with the majority that a reversal is required here because the other errors described by the majority are not harmless beyond a reasonable doubt. *See id.* at 1322.

My disagreement with the majority is over the proffered statements that Davis made to Agent Haley and then Lieutenant Worley.[11] The trial court found four of the six proffered statements inadmissible because those statements were untrustworthy in that they impermissibly shifted blame to Brooks. The trial court found the other two statements as redacted were sufficiently trustworthy and thus admissible.[12] As the majority correctly notes, these two admitted statements were purely self-inculpatory from Davis's perspective after redaction. *See* Majority op. at 777.

The real issue here is whether, in a trial separate from the trial of another codefendant, a statement made by a nontestifying codefendant declarant may be admitted when

properly redacted to include only those statements that are purely self-inculpatory from the declarant's perspective. [13] I do not read a direct answer to this question in the majority opinion. My conclusion is that the statement is admissible if relevant.

***783** The Supreme Court interpreted the federal statement against interest rule [14] very narrowly to allow only those purely self-inculpatory statements to be admitted under the exception. *See Williamson v. United States,* 512 U.S. 594, 600, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). However, the Supreme Court's interpretation of the federal exception was not based upon the Confrontation Clause; rather, the decision was based on the Supreme Court's construction of the federal hearsay rules. *See id.* The Supreme Court wrote, "Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements." *Id.* Thus, there is no Sixth Amendment requirement that Florida must read its statement against interest exception as narrowly as the federal judiciary reads its own exception.

This Court has not explicitly approved of such a narrow definition for our reading of the term "statement" in Florida's statement against interest exception. [15] I do not agree with Professor Ehrhardt's [16] analysis of our case law on this point. Nor is such a narrow reading required by the Confrontation Clause. *See Williamson,* 512 U.S. at 600, 114 S.Ct. 2431. In any event, even is we were to assume that Florida followed the federal court in reading Florida's statement against interest exception narrowly, the two statements at issue would still be admissible.

This Court in *Franqui I* noted that *Williamson* would authorize the introduction of those portions of a statement that are purely self-inculpatory from the declarant's perspective. *See Franqui I,* 699 So.2d at 1320. In fact, in *Williamson,* the Supreme Court remanded the case for the lower courts to examine the hearsay statements at issue there to determine which portions of the hearsay statements were self-inculpatory and thus were properly admitted. *See Williamson,* 512 U.S. at 604, 114 S.Ct. 2431. It naturally follows that a trial court may redact a declarant's statement and admit only those statements which are purely self-inculpatory from the declarant's perspective. *See id.; Franqui I,* 699 So.2d at 1340.

Here, there is no question that the trial judge sifted through the six proffered statements and admitted the two statements ***784** that were self-inculpatory from Davis's perspective. [17] The prosecution proffered Davis's statement, and the trial court carefully carved out the self-inculpatory portions of Davis's statement. The trial court properly denied admission to those statements that shifted blame to Brooks. The majority agrees that the two admitted statements as redacted were self-inculpatory from Davis's perspective. *See* Majority op. at 777. These two self-inculpatory statements as redacted were against Davis's penal interest; thus, these statements fall under section 90.804(2)(c), Florida Statutes.

The majority's reliance upon a concurring and dissenting opinion in *Franqui II* is misplaced, especially in light of this Court's extensive analysis in *Franqui I,* decided one week prior to *Franqui II,* that reached a conclusion contrary to that of today's majority. I would conclude that the two statements at issue were properly admitted under *Franqui I.* Because I believe this Court should remain true to its precedent, I would allow these two statements to be admitted upon remand under authority of *Franqui I.*

HARDING, J., concurring in part and dissenting in part.
I agree with the majority that Brooks is entitled to a new trial based upon the prejudicial errors that occurred here. However, I do not agree with the majority that the admission of statements by Brooks' accomplice Davis constituted error in this case.

The majority concludes that Brooks' Sixth Amendment right to confront witnesses was violated when the trial court admitted several statements against interest made by Davis to a law enforcement investigator prior to his arrest. The trial court excluded any statements that implicated Brooks in the murder or made any reference to Brooks. The court only allowed in evidence statements that Davis drove to Crestview with the victim on the night of the murders and that they arrived at 9 p.m. The law enforcement agent who testified as to these hearsay statements against interest also testified that after these statements were made Davis was arrested and a warrant was prepared for the arrest of Brooks.

The majority relies upon a recent plurality opinion by the United States Supreme Court, *see Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), to conclude that it was error to admit Davis's statements because they were "predominantly self-serving in attempting to shift blame [to Brooks], and thus lacked the necessary 'guarantees of trustworthiness.' " Majority op. at 777. I do not believe

that *Lilly* is applicable to the instant case. As noted above, *Lilly* was a plurality opinion and the language from *Lilly* cited in the majority's opinion did not garner a majority of the Supreme Court. The one thing that a majority of the Supreme Court did agree on in *Lilly* was that the "admission of the untested confession of [the accomplice] violated the petitioner's Confrontation Clause rights." 527 U.S. at 139, 119 S.Ct. 1887. As Justice ***785** Scalia explained in his separate opinion, the "[accomplice] told police officers that [Lilly] committed the charged murder" and the "prosecution introduced a tape recording of these statements at trial without making [the accomplice] available for cross-examination. In my view, this is a paradigmatic Confrontation Clause violation." *Id.* at 143, 119 S.Ct. 1887 (Scalia, J., concurring in part and concurring in the judgment). The instant case hardly compares to *Lilly.* The trial court did not allow in statements which facially implicated Brooks in the murders. In fact, the court redacted the statements to remove any reference to Brooks.

In my mind this case is controlled by *Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), in which the Supreme Court held that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only that defendant's name, but any reference to his or her existence. *See also United States v. Vogt,* 910 F.2d 1184, 1191-92 (4th Cir.1990) (declining to extend *Bruton*'s [18] protection where defendant's name was redacted from nontestifying codefendant's statement which incriminated defendant by inference).

The statements admitted by the trial court here are the same type of statements that were found admissible in *Richardson:* they did not implicate Brooks on their face, and in fact did not even make any reference to him; the statements only became incriminating when linked with other evidence introduced at trial.

In *Richardson* the Supreme Court specifically declined to extend *Bruton*'s protection to circumstances where a defendant's name is redacted, even though the statement's application to defendant is linked up by other evidence properly admitted against the defendant. The Court explained that if *Bruton* were extended to confessions incriminating by connection (as opposed to confessions incriminating on their face), then it would be impossible to predict the admissibility of a confession in advance of trial. 481 U.S. at 209, 107 S.Ct. 1702. The Court warned that such a "contextual implication doctrine" would lend itself to manipulation by the defense and, even without manipulation, would result in numerous mistrials and appeals. *Id.* In a subsequent opinion, the Supreme Court further explained that *Richardson* depends "in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself, and which became incriminating 'only when linked with evidence introduced later at trial.' " *Gray v. Maryland,* 523 U.S. 185, 196, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998) (holding that confession which substituted blanks and the word "delete" for the defendant's proper name falls within the class of statements to which *Bruton*'s protections apply).

However, I do agree with the majority that it was improper for the prosecutor to inform the jury that they had not heard everything that Davis had told the investigator in his interview, thereby implying that there was more damaging evidence than what had been presented. *See* majority op. at 777. Indeed, the Supreme Court found it significant that the confession at issue in *Richardson* omitted all reference to the defendant, as well as any indication that anyone other than the speakers had participated in the crime, and did not show that it had been redacted. *See Richardson,* 481 U.S. at 203, 107 S.Ct. 1702; ***786** *Gray,* 523 U.S. at 196-197, 118 S.Ct. 1151. On retrial I would warn the prosecutor that reference to the inadmissible portions of Davis's statements could result in a Confrontation Clause violation.

All Citations

787 So.2d 765, 26 Fla. L. Weekly S203

Footnotes

1 DNA tests performed after the murders revealed that Davis was not the father.

2 These issues are: (1) error in applying the state of mind hearsay exception; (2) error in applying the co-conspirator hearsay exception; (3) error in admitting codefendant's statements under the statement against interest hearsay exception; (4) error in dismissing recanted testimony from the State's two main witnesses; (5) error in allowing bargained for testimony; (6) error in allowing improper comments during closing arguments; (7) error in failing to dismiss certain jurors, in allowing others to sit as jurors, and in allowing an improper comment to the jury during jury selection; (8) improper admission of photographs; (9) failure to strike the venire and change venue; (10) error in admitting codefendant's statements to Officer Barberree under the co-conspirator hearsay exception; (11) error in denying motion for judgment of acquittal; (12) improper application of aggravating factors; (13) error in finding and weighing mitigating evidence; (14) error in allowing the introduction of victim impact evidence; and (15) error in finding death sentence proportional.

3 At trial, Brooks objected to statements Davis made to Sievers a few days after the murders to the effect that if Davis had killed the victims, he would have shot them rather than stab them. The State sought to introduce these statements under the state of mind exception of section 90.803(3)(a) to show that even though his baby had just been killed, Davis nevertheless was talking about how he would have done it. Because of this indifference toward the victims, the State maintained that he could have easily been involved in the murders, and by association, Brooks as well. However, the trial judge denied the admission of these statements claiming that the prejudicial nature of these statements outweighed their probative value in showing that Davis did not have a great deal of concern for his baby. We agree with the trial court's ruling on this issue.

4 We have held that evidence of a defendant's desire or intent can be relevant when used to establish motive for a murder. *See Walker v. State,* 707 So.2d 300, 310 (Fla.1997). In *Walker,* in order to help establish the defendant's motive for the murders of his ex-girlfriend and his son, the State sought to introduce evidence of Walker's desire that the victim abort their child. However, in contrast to *Walker,* the statements here were not made by Brooks, but by Davis, and they provided a motive directly for Davis, not Brooks. Notwithstanding, the State improperly sought to use them to impute Davis's motive to Brooks.

5 It is not clear from the record whether the statements to Sievers were made before or after the murders. To the extent they were made before the murders, it was also error to introduce them. However, we find that it was not error to admit Davis's statements to Jones since they were made during the alleged conspiracy.

6 Although the rule itself only requires corroboration for exculpatory statements, it has been held that inculpatory statements must also be supported by corroborating circumstances which clearly indicate the trustworthiness of the statements. *See Maugeri v. State,* 460 So.2d 975, 977 n. 3 (Fla. 3d DCA 1984) (citing *United States v. Riley,* 657 F.2d 1377, 1383 (8th Cir.1981)).

7 Rule 804(b)(3) of the Federal Rules of Evidence is the federal counterpart to section 90.804(2)(c) and is practically identical in its content.

8 Mark was unavailable as a witness because he invoked his Fifth Amendment privilege against self-incrimination. In the present case, Davis also invoked his Fifth Amendment right against self-incrimination; therefore, he was also deemed unavailable.

9 On the issue of which court was the appropriate court to rule on the statements' admissibility, the court stated:

> Nothing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness. To the contrary, those opinions indicate that we have assumed, as with other fact-intensive, mixed questions of constitutional law, that “[i]ndependent review is ... necessary ... to maintain control of, and to clarify, the legal principles” governing the factual circumstances necessary to satisfy the protections of the Bill of Rights. *Ornelas v. United States,* 517 U.S. 690, 697 [, 116 S.Ct. 1657, 134 L.Ed.2d 911]

> (1996).... [T]he surrounding circumstances relevant to a Sixth Amendment admissibility determination do not include the declarant's in-court demeanor (otherwise the declarant would be testifying) or any other factor uniquely suited to the province of trial courts. For these reasons, when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause.

Id. at 136-37, 119 S.Ct. 1887.

10 In fact, the State conceded that its purpose for introducing Davis's statements, even those that only seemed to inculpate Davis, was to show that Brooks must have also been involved under the State's theory throughout the trial that Brooks and Davis were inseparable.

11 The six statements made by Davis at issue are: (1) Davis admitted he was in Crestview the night of murders; (2) Carlson drove Davis and Brooks to Crestview that night; (3) Brooks, Davis, and Carlson arrived in Crestview at about 9 p.m.; (4) the murders occurred shortly after their arrival; (5) Davis was in the car when the murders were committed; and (6) a glove was worn during the murders.

12 The two statements admitted by the trial court are: (1) Davis and Carlson drove to Crestview that night; and (2) Davis and Carlson arrived in Crestview about 9 p.m.

13 The majority undertakes a lengthy analysis of the plurality opinion in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999). It should be noted, however, that *Lilly* is a plurality opinion. The majority cites to *Lilly* for the proposition that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." Majority op. at 775 (quoting *Lilly,* 527 U.S. at 134, 119 S.Ct. 1887). This Court previously had arrived at this conclusion. *See Franqui I,* 699 So.2d at 1319.

> In *Franqui I,* this Court found that a nontestifying declarant's statement or confession that inculpated both the declarant and the accused was not within a firmly-rooted hearsay exception. *See id.* at 1319. Thus, under *Franqui I,* a nontestifying declarant's hearsay statement which inculpates both the declarant and accused can only be admitted upon a showing that "the totality of the circumstances in which ... [the statement or] confession was made makes the statement inherently trustworthy and renders the declarant particularly worthy of belief." *Id.* at 1319.

14 *See* Fed. Rule Evid. 804(b)(3).

15 *See* § 90.804(2)(c), Fla. Stat. (1995).

16 *See* Charles W. Ehrhardt, *Florida Evidence* § 804.4, at 826 (2000). Ehrhardt states:

> The Florida Supreme Court has cited with approval [footnote 15 citing *Franqui v. State,* 699 So.2d 1332 (Fla.1997)] *Williamson v. United States,* in which the United States Supreme Court narrowly construed Federal Rule 804(b)(3) so that only those declarations or remarks within a confession that "are individually self-incriminatory" are included within the exception as a statement against penal interest.

Ehrhardt, *supra* at 826 (second footnote omitted).

I do not agree with Professor Ehrhardt's commentary as to *Franqui v. State,* 699 So.2d 1332 (Fla.1997) (*Franqui II*). The majority in *Franqui II* never cited to *Williamson.* In fact, one week prior to deciding *Franqui II,* this Court decided *Franqui I.* In *Franqui I,* this Court provided extensive analysis regarding redacting codefendants' statements. *See Franqui I,* 699 So.2d at 1317. There, this Court reviewed *Williamson,* but

the majority did not hold that Florida would require a narrow reading of our statement against interest exception. *See Franqui I,* 699 So.2d at 1320.

Justice Anstead did hold that view in his separate opinion in *Franqui I* and acknowledged his view was different than the majority's: "I disagree with much of the majority's framework for analyzing Franqui's claim that his right to confront the witnesses against him was violated in this case...." *Franqui I,* 699 So.2d at 1329 (Anstead, J., concurring in part and dissenting in part).

17 This issue normally rises in a joint trial situation where the declarant, a codefendant, makes a hearsay statement inculpating both the defendant and the declarant codefendant. The redacted statement is usually admitted only against the codefendant declarant and not against the defendant. Here, the defendant was tried separately from Davis, the declarant. Thus, the trial court first had to determine whether the declarant's statement as redacted was even relevant against the defendant. The normal relevance test applied. Here, the trial court found the two statements relevant when it allowed Davis's two redacted statements to come before the jury.

18 *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

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APPENDIX A7

Florida Supreme Court Direct Appeal
Opinion II (June 23, 2005)

918 So.2d 181
Supreme Court of Florida.

Lamar Z. BROOKS, Appellant,
v.
STATE of Florida, Appellee.

No. SC02–538.
|
June 23, 2005.
|
Rehearing Denied Dec. 22, 2005.

Synopsis

Background: Defendant was convicted in a jury trial in the Circuit Court, Okaloosa County, Jere Tolton, J., of first-degree murder, and was sentenced to death. Defendant appealed. The Supreme Court, 787 So.2d 765,reversed and remanded. On remand, defendant was convicted of first-degree murder, and was sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] trial court did not abuse its discretion by admitting evidence that coperpetrator took out a $100,000 life insurance policy on child victim's life for purposes of establishing source of funds coperpetrator promised to defendant for his role in the killings;

[2] substance of record of telephone conversation that took place between Department of Revenue employee and individual who identified herself as victim was not admissible under business records exception to hearsay rule;

[3] trial court's error in admitting testimony regarding substance of record was harmless;

[4] aggravated child abuse merged into homicide and could not constitute valid death penalty aggravating circumstance or basis for felony murder conviction;

[5] no reasonable possibility existed that cumulative errors contributed to conviction;

[6] testimony that defendant told witness he would rather shoot approaching police officer than return to jail was relevant to show consciousness of guilt; and

[7] death sentence was not disproportionate when compared to coperpetrator's life sentence.

Affirmed; rehearing denied.

Pariente, C.J., concurred in part, dissented in part, and filed opinion in which Anstead, J., concurred.

Lewis, J., concurred in part, dissented in part, and filed opinion in which Wells and Bell, JJ., concurred.

Pariente, C.J., dissented on denial of rehearing and filed opinion in which Anstead, J., concurred.

Lewis, J., dissented on denial of rehearing and filed opinion.

West Headnotes (38)

[1] **Homicide** Collection of insurance

Trial court did not abuse its discretion in capital murder prosecution by admitting evidence that coperpetrator took out a $100,000 life insurance policy on child victim's life for purpose of establishing the source of funds coperpetrator promised to defendant for his role in killing victim and victim's mother; witness testified that defendant and coperpetrator had each promised to pay witness $500 for his role in the execution to act as the driver for the killing plot, witness testified that coperpetrator had promised to pay defendant $10,000 to kill victim, and evidence indicated that coperpetrator and defendant were of limited financial means.

1 Case that cites this headnote

[2] **Criminal Law** Necessity and scope of proof

Criminal Law Reception and Admissibility of Evidence

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion.

16 Cases that cite this headnote

[3] **Homicide** Collection of insurance

Coperpetrator's act of taking out a $100,000 life insurance policy on child victim's life was admissible in capital murder prosecution to show defendant's motive and intent to kill victim and victim's mother, where direct corroborated evidence conclusively established that coperpetrator and defendant established a plan to murder victim's mother, and that coperpetrator did not have the $10,000 he promised to pay to defendant to complete the plan.

1 Case that cites this headnote

[4] **Homicide** Collection of insurance

For a life insurance policy to be admissible in criminal prosecution, there must be a nexus between the policy and the crime charged.

[5] **Criminal Law** Particular records

Homicide Pecuniary motive

Substance of record of telephone conversation that took place between Department of Revenue employee and individual who had identified herself as victim and who requested that a case be opened against coperpetrator for child support was not admissible under business records exception to hearsay rule to show defendant's motive and intent in capital murder prosecution; while State advanced at trial the theory that defendant was motivated to kill, at least in part, by the desire to aid his coperpetrator in evading child support payments to victim, very little record evidence existed demonstrating that either coperpetrator or defendant was aware of victim's desire to obtain child support or any steps taken by victim to actually obtain such support. West's F.S.A. § 90.803(6)(a).

1 Case that cites this headnote

[6] **Criminal Law** Business records in general

For a record to be admissible under business record exception to hearsay rule, it must be shown that the record was (1) made at or near the time of the event recorded; (2) by or from information transmitted by a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) that it was the regular practice of that business to make such a record. West's F.S.A. § 90.803(6)(a).

5 Cases that cite this headnote

[7] **Criminal Law** Business records in general

Criminal Law Business records; books of entry

To the extent the individual making a record does not have personal knowledge of the information contained therein, the second prong of the predicate for admission of record under business record exception to hearsay rule requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity; if this predicate is not satisfied, then the information contained in the record is inadmissible hearsay, unless it falls within another exception to the hearsay rule. West's F.S.A. § 90.803(6)(a).

6 Cases that cite this headnote

[8] **Criminal Law** Documentary and demonstrative evidence

Trial court's error in admitting, for purposes of establishing defendant's motive and intent, testimony regarding substance of record of telephone conversation that took place between Department of Revenue employee and individual who had identified herself as victim was harmless in capital murder prosecution, where there was an overwhelming amount of properly admitted evidence upon which jury could have legitimately relied in finding defendant guilty. West's F.S.A. § 90.803(6)(a).

1 Case that cites this headnote

[9] **Criminal Law** Merger of offenses

Aggravated child abuse merged into homicide and could not constitute a valid death penalty aggravating circumstance or basis for defendant's felony murder conviction, where defendant delivered a single stabbing blow that resulted in child victim's death. West's F.S.A. § 921.141(5)(d).

14 Cases that cite this headnote

[10] **Criminal Law** Private Writings and Publications

Two notes recovered from coperpetrator's leg cast when it was removed shortly after the murders were not admissible in capital murder prosecution to show existence of conspiracy between defendant and coperpetrator, or evidence of defendant's consciousness of guilt, where State offered no evidence that either coperpetrator or defendant wrote the notes.

[11] **Witnesses** Forgetful witnesses

State was not entitled to impeach witness's testimony in capital murder prosecution that she did not remember defendant changing into shorts after the murders, where witness's inability to recall was not synonymous with providing trial testimony that was inconsistent with a prior statement, and there was no basis on which to conclude that witness fabricated her lack of recollection.

8 Cases that cite this headnote

[12] **Criminal Law** Instructions on Particular Points

Trial court's error in refusing to provide the coconspirator hearsay instruction requested by defense counsel was harmless in capital murder prosecution; sufficient evidence existed to establish a conspiracy between defendant and coperpetrators beginning two days prior to murders.

[13] **Criminal Law** Documentary and demonstrative evidence

Trial court's error in admitting two notes recovered from coperpetrator's leg cast when it was removed shortly after the murders, to show existence of conspiracy between defendant and coperpetrator or evidence of defendant's consciousness of guilt, was harmless in capital murder prosecution, where the substance of the notes was established through independent witness testimony.

[14] **Criminal Law** Witnesses

Trial court's error in allowing State to impeach witness's testimony that she did not remember defendant changing into shorts after the murders was harmless in capital murder prosecution, where neither witness nor any other witness who placed defendant in area where murders occurred indicated that he or his clothes were covered in blood, and State did not seek to introduce any blood-stained clothing.

3 Cases that cite this headnote

[15] **Criminal Law** Documentary and demonstrative evidence

Criminal Law Witnesses

Criminal Law Elements and incidents of offense

Sentencing and Punishment Harmless and reversible error

No reasonable possibility existed that trial court's errors in admitting testimony regarding coperpetrator's child support record, in admitting notes recovered from coperpetrator's leg cast, in impeaching witness, in failing to provide coconspirator hearsay instruction, and in relying in sentencing on the aggravating factor that the murders were committed during the course of an act of aggravated child abuse contributed to first-degree murder conviction; none of the errors committed were fundamental, none of errors went to the heart of State's case, and even if errors

had not been committed, jury would have heard evidence of guilt.

9 Cases that cite this headnote

[16] **Criminal Law** Grounds in general

When Supreme Court finds multiple harmless errors, it must consider whether, even though there was competent substantial evidence to support a verdict and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

25 Cases that cite this headnote

[17] **Criminal Law** Subsequent Condition or Conduct of Accused

Criminal Law Particular acts

Witness's testimony that defendant, on first failed attempt on victim's life, told him he would rather shoot approaching police officer rather than return to jail was relevant to show defendant's consciousness of guilt in capital murder prosecution, and thus was not inadmissible character evidence. West's F.S.A. § 90.404(2)(a).

1 Case that cites this headnote

[18] **Criminal Law** Character or Reputation of Accused

Evidence of a defendant's bad acts is inadmissible if solely relevant to demonstrate the bad character of the accused or the propensity of the accused to engage in criminal conduct. West's F.S.A. § 90.404(2)(a).

[19] **Criminal Law** Purposes for Admitting Evidence of Other Misconduct

Evidence of bad acts is admissible if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried. West's F.S.A. § 90.404(2)(a).

[20] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

Homicide Threats against third person

Probative value of witness's testimony that defendant, on first failed attempt on victim's life, told him that he would rather shoot approaching police officer rather than return to jail sufficiently outweighed danger of unfair prejudice to be admissible in capital murder prosecution; defendant's statement provided the proof of his individual intent to commit murder and acknowledgment of guilt, and as case involved the stabbing death of a woman and her infant child, introduction of the threat by defendant against the police officer was unlikely to suggest an improper basis to the jury for resolving the matter. West's F.S.A. § 90.403.

3 Cases that cite this headnote

[21] **Criminal Law** Particular offenses

Defendant failed to show he was entitled to change of venue for his retrial on charge of first-degree murder; 12 persons who were selected as jurors possessed that which the parties determined was an acceptable level of knowledge regarding the facts of the case and no knowledge of defendant's previous conviction resulting from his earlier trial, and trial court and counsel thoroughly questioned each of the jurors involved in the discussions and eliminated any juror with any knowledge regarding the status of the case as a retrial.

[22] **Criminal Law** Local Prejudice

Standard for determining whether prejudice warrants a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and the accompanying prejudice, bias,

and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

[23] **Sentencing and Punishment** Degree of proof

The standard of review for whether an aggravating factor exists during capital sentencing proceeding is whether it is supported by competent, substantial evidence.

[24] **Sentencing and Punishment** Degree of proof

Aggravating factors during capital sentencing proceeding require proof beyond a reasonable doubt, not mere speculation derived from equivocal evidence or testimony.

[25] **Sentencing and Punishment** Sufficiency

An aggravating factor may be supported entirely by circumstantial evidence in capital sentencing proceeding, but the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor.

[26] **Sentencing and Punishment** Personal or pecuniary gain

Substantial competent evidence supported death penalty aggravating circumstance that child victim's murder was committed for pecuniary gain; direct evidence adduced showed that coperpetrator promised defendant $10,000 for the murder of victim's mother, and the only logical inference to be drawn from the promise of such a large sum of money, coupled with evidence demonstrating that coperpetrator was of limited economic means, was that coperpetrator and defendant knew of the existence of the $100,000 insurance policy on victim's life and the need to kill child victim to obtain the proceeds.

2 Cases that cite this headnote

[27] **Sentencing and Punishment** Planning, premeditation, and calculation

Sentencing and Punishment Vileness, heinousness, or atrocity

Substantial competent evidence supported death penalty aggravating circumstance that child victim's murder was committed in a cold, calculated, and premeditated manner; murder was part of the prearranged plan hatched by coperpetrator and defendant and was necessary for defendant to obtain the $10,000 promised to him, witnesses testified to prior failed attempts on life of victim's mother, and evidence indicated that victim was killed with one fatal blow to the heart, followed by the infliction of postmortem mutilation wounds.

2 Cases that cite this headnote

[28] **Sentencing and Punishment** Planning, premeditation, and calculation

Sentencing and Punishment Vileness, heinousness, or atrocity

To establish the existence of cold, calculated and premeditated aggravating circumstance, the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill, but that heightened premeditation does not have to be directed toward the specific victim.

[29] **Criminal Law** In particular prosecutions

Prosecutor's act during closing arguments, in which prosecutor questioned defendant's failure to tell police about the insurance policy taken out on child victim by coperpetrator and by constructing straw man defenses, did not improperly shift burden to defendant to prove his innocence in capital murder prosecution.

[30] **Criminal Law** In argument in general

To merit a new trial, a prosecutor's comments must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.

4 Cases that cite this headnote

[31] **Criminal Law** Matters Not Sustained by Evidence

Record supported finding that prosecutor did not improperly construct an alibi for purposes of challenging it during closing argument of capital murder prosecution.

[32] **Criminal Law** Matters not within issues

Defendant was not entitled to mistrial during retrial for first-degree charge based on the State's repeated references to his previous trial; references were plainly inadvertent and almost inscrutable since they were made during the course of complicated sequences of questions regarding prior statements by witnesses.

1 Case that cites this headnote

[33] **Sentencing and Punishment** Sentence or disposition of co-participant or codefendant

Determination that defendant was more culpable than coperpetrator was supported by substantial evidence and, thus, defendant's death sentence was not disproportionate when compared to coperpetrator's sentence of life imprisonment; while coperpetrator participated in the planning and to some extent in the murder of the two victims, the evidence showed that defendant was individual who delivered the fatal blows to both victims.

1 Case that cites this headnote

[34] **Sentencing and Punishment** Proportionality

Supreme Court has an obligation to review the proportionality of death sentences by considering the totality of the circumstances of the case and comparing the sentence with that imposed in other capital cases.

[35] **Sentencing and Punishment** Proportionality

In conducting proportionality review of death penalty in cases where more than one defendant is involved, Supreme Court performs an analysis of relative culpability guided by the principle that equally culpable codefendants should be treated alike in capital sentencing and receive equal punishment.

4 Cases that cite this headnote

[36] **Criminal Law** Sentencing

A trial court's determination regarding relative culpability of coperpetrators in first-degree murder case constitutes a finding of fact and will be sustained on review if supported by competent, substantial evidence.

2 Cases that cite this headnote

[37] **Sentencing and Punishment** Manner and effect of weighing or considering factors

Record supported finding that trial court did not give great weight to jury's recommendation of death penalty in capital murder prosecution after defendant had waived the presentation of mitigating evidence; record indicated that trial court did not instruct the jury that its sentencing recommendation would be given great weight, sentencing order made no reference to the weight actually accorded the recommendation, and the length, thoroughness, and tone of the sentencing order strongly implied that the trial judge's sentencing determination was based on the weighing of the aggravating and mitigating factors and on jury's recommendation. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.141.

3 Cases that cite this headnote

[38] **Sentencing and Punishment** Use and effect of report

Sentencing and Punishment Reception of evidence

In cases in which a capital defendant waives mitigating evidence during penalty phase, a court must prepare a presentence investigation report (PSI) and is permitted to call witnesses in mitigation to the extent the PSI alerts the trial court to the probability of significant mitigation.

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PER CURIAM.

We have on appeal a judgment of conviction of two counts of first-degree murder and corresponding sentences of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons stated herein, we affirm the convictions of Lamar Z. Brooks and his sentences of death.

FACTS AND PROCEDURAL HISTORY

This is the second appearance of Brooks before this Court on appeal of his convictions and sentences of death for the first-degree murders of Rachel Carlson and her infant daughter, Alexis Stuart. On April 5, 2001, this Court reversed Brooks' initial convictions and sentences for the murders based on the "erroneous admission of extensive hearsay testimony," and remanded the case for a retrial. *See Brooks v. State,* 787 So.2d 765, 768 (Fla.2001) (hereinafter "*Brooks I* "). The decision in *Brooks I* set forth the facts giving rise to the charges filed in the instant case as follows:

> In the late night hours of April 24, 1996, Rachel Carlson and her three-month-old daughter, Alexis Stuart, were found stabbed to death in Carlson's running vehicle in Crestview, Florida. Carlson's paramour, Walker Davis, and Brooks were charged with the murders. ***187** Davis was married and had two children, and his wife was pregnant with their third child. However, the victim believed Davis was also the father of her child and demanded support from him. [n.1] Davis became concerned about this pressure. He was convicted of the murders and sentenced to life imprisonment. However, he did not testify at Brooks' trial.
>
> [n.1.] DNA tests performed after the murders revealed that Davis was not the father.
>
> Brooks lived in Pennsylvania but had traveled to Florida from Atlanta with his cousin Davis and several friends on Sunday, April 21, 1996. Brooks stayed with Davis at Eglin Air Force Base for a few days before returning to Pennsylvania. In interviews with the police, he informed them that on the following Wednesday evening, the night of the murders, he helped Davis set up a waterbed, watched some movies, and walked Davis's dog.
>
> Contrary to Brooks' statements, several witnesses placed him and Davis in Crestview on the night of the murders, although no physical or direct evidence linked him to the crimes.

Brooks I, 787 So.2d at 768–69.

Upon retrial, Brooks was again convicted and sentenced to death. The jury recommended the death sentence by a nine-to-three vote for the murder of Carlson, and an eleven-to-one vote for the murder of Stuart. The trial court followed the recommendations, finding the following factors in aggravation for the murders of both Carlson and Stuart: [1] (i) the previous conviction of another capital felony; (ii) the commission of a capital felony in a cold, calculated, and premeditated manner (CCP); (iii) the commission of a capital felony for pecuniary gain; and (iv) that the murder occurred during the commission of the felony of aggravated child abuse. The trial court also found that Carlson's murder was especially heinous, atrocious, or cruel (HAC). Despite Brooks' waiver of the right to present mitigating evidence, defense counsel described to the trial court the mitigating evidence he would have presented, and the trial court found several factors in mitigation. [2]

Brooks has appealed his convictions and sentences, raising fourteen issues. These claims are discussed further herein.

LIFE INSURANCE POLICY

[1] **[2]** Under Florida law, all relevant evidence, defined as that tending to prove or disprove a material fact, is admissible unless otherwise provided by law. *See* ***188** §§ 90.401, .402, Fla. Stat. (2002). Relevant evidence is inadmissible, however, where the probative value is substantially outweighed by the danger of unfair prejudice. *See* § 90.403, Fla. Stat. (2002). The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion. *See, e.g., Ray v. State,* 755 So.2d 604, 610 (Fla.2000); *Zack v. State,* 753 So.2d 9, 25 (Fla.2000).

In Brooks' retrial, the trial court permitted, over defense counsel's objection, insurance salesman Steve Mantheny to testify regarding only the existence of a $100,000 life insurance policy purchased by Davis in February 1996, which named the minor Stuart child as the insured and Davis as the primary beneficiary. The trial court admitted the policy for the limited purpose of establishing the source of the $10,000 which the State's witness, Mark Gilliam, testified Davis had promised to pay Brooks to murder Carlson. The trial court expressly excluded the policy as evidence of Brooks' motive for murder. On appeal, Brooks contends that the trial court committed the same error as this Court found during the initial review by admitting evidence beyond the parameters of the conspiracy to prove Brooks' motive and intent. Brooks notes that the State ignored the trial court's evidentiary ruling by repeatedly arguing and using the insurance policy as evidence of motive for both Davis and Brooks.

We hold that the trial court did not abuse its discretion in admitting evidence concerning the existence of a $100,000 life insurance policy for the purpose of establishing the source of the funds promised to Brooks for his role in killing Rachel Carlson and Alexis Stuart. At trial, the State established the existence of a conspiracy to kill the victims through the testimony of Mark Gilliam, a fellow member of the military and a friend of Brooks, who accompanied Brooks and Davis to Eglin Air Force Base on April 21, 1996. Gilliam testified that in the early evening hours of Monday, April 22, 1996, Davis expressed his desire to murder a woman who had been pestering him for money. According to Gilliam, the conversation proceeded with the three men each suggesting the best way to murder the woman. Gilliam stated that although he initially thought the discussion was in jest, a murder plan developed pursuant to which Davis would lure the woman, Carlson, to his apartment to pick him up, and Gilliam and Brooks would then follow behind in Gilliam's vehicle to a predesignated place in Crestview, at which time Brooks would exit the car and shoot the victim, Carlson. Gilliam testified that the three attempted to actually execute the plan that evening and the following evening, but that each attempt ended in failure. [3]

According to Gilliam, Brooks and Davis had each promised to pay him $500 for his role in the execution to act as the driver for the plot. Gilliam also testified that Davis had promised to pay Brooks $10,000 to kill Carlson. This is direct evidence of the plot to murder and the nexus to a large sum of money. The source of payment was connected to the existence of the life insurance policy.

Evidence regarding the payment of these relatively large sums of money was coupled with testimony demonstrating that Davis and Brooks were of limited financial means. Davis's coworker, Paul Keown, ***189** testified that Davis worked in the hospital laboratory at Eglin Air Force base, a position that presumably did not garner a large salary. Friends of Davis testified that, at the time of the crime, he was married with two children and a third on the way. Gilliam testified that neither Brooks nor Davis had access to a car at the time of the murders, and that Davis did not have a telephone at his house. Gilliam also expressed doubt that either Brooks or Davis had the $500 that each had promised to pay him for driving the car. Through the testimony of Thomas Hardin, a fellow airman and friend of Davis, the jury learned that Brooks had to receive a $244 wire transfer of the funds he needed to purchase an airline ticket to return from Florida to Philadelphia. On the basis of the evidentiary record, the trial court reasonably concluded that the insurance policy was relevant to establish the source of the money Davis promised to pay Brooks for his part in the crimes. *See Dyas v. State,* 260 Ark. 303, 539 S.W.2d 251, 261 (1976) (deeming testimony regarding life insurance policies relevant to motive underlying conspiracy and murder because it supported the connection between the policies and the co-conspirator wife's ability to pay the killers a far greater amount than the contract stipulated for her husband's murder).

[3] Moreover, we resolve that it would not have constituted error for the trial court to admit the life insurance policy as evidence of Brooks' motive and intent. To the contrary, the

source of funding to be utilized to pay Brooks and Brooks' motive are inextricably intertwined. [4] Given that Davis was a low-ranking member of the military, with a wife and growing family to support, without even access to an automobile, and no telephone in his home, it strains credulity to conclude that Brooks and Davis would not have considered the source from which Davis planned to obtain the $10,000. Indeed, Brooks would have been even more familiar with the precarious state of his cousin's finances than Gilliam, who was a stranger to Davis, but nonetheless testified that neither man appeared to have the $500 to pay him to drive the car. Also, Brooks acknowledged in his statements that he was aware of Alexis Stuart, and that his cousin had denied paternity of the baby. This evidence amply supports the inference that the insurance proceeds in the plan of Davis and Brooks were essential to the plot and the insurance policy on the infant's life was inextricably intertwined with the conspiracy. On the basis of this record, it would have been permissible to introduce the insurance policy as evidence of Davis's intent and ability to pay Brooks to complete the conspiracy to commit the murders and Brooks' motive and intent to fulfill his commitment to the conspiracy and complete the act.

[4] We recognize that permitting a life insurance policy to be placed into evidence without a proper foundation may result in undue prejudice. For that reason, based on the facts presented in the instant matter, we endorse the rule employed by the Georgia state courts, which requires a nexus between the crime charged and the life insurance policy. *See Stoudemire v. State,* 261 Ga. 49, 401 S.E.2d 482, 484 (1991) ("[I]n order to admit evidence of an insurance policy there must be some independent ***190** evidence of a nexus between the crime charged and the existence of the insurance policy."); *see also Givens v. State,* 273 Ga. 818, 546 S.E.2d 509, 513 (2001). [5] In the instant case, we determine that evidence establishing the substantial sum of money Davis promised to pay Brooks to complete the conspiracy to commit murder coupled with evidence of the modest financial means of Davis—a condition that would not have escaped his cousin's notice under these circumstances —more than satisfies this nexus requirement. Accordingly, Steve Mantheny's limited testimony establishing that Davis had procured a policy on Alexis Stuart's life was properly admitted.

We decline to require direct evidence establishing beyond a reasonable doubt that Brooks knew about the existence of the life insurance policy. We recognize that some state courts have conditioned the admissibility of life insurance policies on the defendants' knowledge. Most notably, in *People v. Mitchell,* 105 Ill.2d 1, 85 Ill.Dec. 465, 473 N.E.2d 1270 (1984), the Illinois Supreme Court reaffirmed its rule that "admission of evidence of a life insurance policy must be predicated upon evidence of the defendant's knowledge of its existence, its validity, or believed validity, and that he will benefit therefrom." *Id.* at 1274 (citing *People v. Gougas,* 410 Ill. 235, 102 N.E.2d 152 (1951)). The reasoning that compelled the outcome in *People v. Mitchell* does not, however, apply with equal force in the instant matter.

People v. Mitchell involved a mother's alleged aggravated battery and attempted murder of her seventeen-month-old daughter. Attempted murder is a specific intent crime, and the court noted that the only evidence of intent introduced by the prosecution was a $10,000 life insurance policy on the baby's life and the defendant's own statements, which established that she had intended to strike her child but not that she intended to kill her. *See id.* at 1274. Indeed, the court specifically determined that the defendant's actions of placing a cool compress on the child's forehead and taking her to the emergency room for medical attention were inconsistent with an intent to commit murder. *See id.* On this basis, the court determined that the trial court had erred in admitting evidence of the life insurance policy where the state had failed to prove that the policy was in force at the time of the offense or that the policy played a role in the defendant's actions. *See id.* at 1275.

In contrast to the scenario in *People v. Mitchell,* the life insurance policy admitted here did not fill a vacuum in the evidentiary record on a necessary element of proof. Direct, corroborated evidence conclusively established a plan to murder Rachel Carlson. Direct, corroborated evidence also established that Davis did not have the $10,000 he promised to pay Brooks to complete the plan. The direct and logical inference that arises from this evidence is that Brooks knew that his cousin would be forced to tap into some substantial source to pay him the $10,000. While such evidence stops short of substantiating that Brooks knew of the exact insurance policy, or all the facts surrounding it, it more than amply supports the admission of the policy as evidence of the motive possessed by ***191** Brooks to murder both Carlson and Stuart.

The partially dissenting opinion of Chief Justice Pariente cites to a number of other cases in which courts have held that the defendant's knowledge of a life insurance policy must be laid as a predicate to its admission. These cases are factually distinguishable and do not control the analysis in the instant

matter. In most of the cases cited by the dissent, the defendant was the beneficiary under the deceased's life insurance policy. Under such a scenario, it is only logical to require evidence establishing that the defendant knew of the policy in support of admitting it as evidence of motive. Such a principle does not govern here, where Brooks' motive, in pertinent part, was to collect $10,000—a sum that would have been impossible for Davis to marshal in the absence of a large payout from a source such as an insurance policy. Thus, the policy is relevant and highly probative to Brooks' motive and can be logically and properly established through the inference that Davis informed Brooks of the policy to prove the bona fides of his promise to pay. [6] Even the few conspiracy cases cited by the dissent are likewise distinguishable on the basis that the source of the money for Brooks' payment was at issue in the instant matter.

Moreover, contrary to Brooks' contention, *Brooks I* does not preclude as irrelevant any evidence of Davis's motive arising outside the time frame of the conspiracy. Evidence of one coconspirator's motive can indeed illuminate the motive of others. In *Strickland v. State,* 122 Fla. 384, 165 So. 289 (1936), this Court reviewed the second-degree murder conviction of Coy Strickland who had been hired by Jim McCall to kill the victim, Tom Spear. *See id.* at 290. Strickland raised four claims of error, the first of which asked this Court to consider whether "[i]n a separate trial of a defendant whose motive for killing the decedent the state purported to prove, is evidence admissible to show the distinct or separate motive of an accomplice not on trial?" *Id.* at 289. In answering in the affirmative, we stated:

> A material fact to the issue in this case was motive, not only motive of the accused which was shown to be that of pecuniary gain, but also in establishing the fact that McCall was the actor in hiring the accused to commit the act which caused the death of Spear it was material to show that there was a motive for McCall to hire Strickland to perform that act. The motive which actuated McCall was material because that motive would show, or tend to show, a reason why he would be willing to pay Strickland to commit the murder.

Id. at 290.

Applying the principle established in *Strickland* to the instant case, it follows that the insurance policy provided Davis a motive to be part of the plot to kill Alexis Stuart, and the source of the proceeds for the payment to Brooks of $10,000 to murder both the baby and her mother. The $10,000, which the cash-strapped Davis would have been unable to pay but for the insurance proceeds, in turn, provided Brooks with the motive of pecuniary gain to commit the crimes. Ultimately, the admonition articulated in *Brooks I,* that it was improper to use the statements made by Davis outside the scope of the conspiracy to impute motive to Brooks, cannot be severed from the facts of that case, which ***192** involved the admission of numerous hearsay statements allegedly made by Davis that were pertinent *only* to Davis's motive and intent. [7] In *Brooks I,* this Court did not address evidence, such as the insurance policy itself, that is both highly probative and relevant to the motive of both Davis and Brooks. [8]

ADMISSIBILITY OF BILLIE MADERO'S TESTIMONY

[5] The trial court admitted, over defense counsel objection, the testimony of Billie Madero, an employee of the Department of Revenue, who testified that she documented a call received from an individual who had identified herself as Rachel Carlson and requested that a case be opened against Walker Davis, Jr., for child support. The information obtained from Carlson during the telephone conversation was recorded on a template sheet of paper containing standard questions to provide the Department of Revenue identical information from every caller. The State attempted to introduce Madero's summary of the phone conversation under the business record exception to the hearsay rule.

Brooks mounts two challenges to the child support claim record. First, Brooks argues that the record was totally irrelevant with regard to his motive because there was no evidence demonstrating that he even knew of the record. Brooks also asserts that the State failed to establish a proper foundation showing that it was indeed Carlson who placed the call. The State counters that the record was probative of motive for both Davis and Brooks because it illuminated why

Davis hired Brooks—namely to kill Carlson and Stuart to avoid child support obligations. We conclude that the trial court abused its discretion in admitting the record.

As previously indicated, the State advanced at trial the theory that Brooks was motivated to kill, at least in part, by the desire to aid his cousin in evading child support payments. There is very little record evidence, however, demonstrating that either Davis or Brooks was aware of Carlson's desire to obtain child support or any steps taken by Carlson to actually obtain such support. The summary record of the telephone conversation testified to by Madero was not a complaint for child support that Davis would have been served with or would have received a copy of. Davis's knowledge of Carlson's support request rests on the sole asserted inference that Carlson would not have paid the $25 fee charged to open a child support case at the Department of Revenue without first seeking a negotiated settlement with Davis, coupled with testimony from Davis's ***193** neighbors and Gilliam that Carlson was seen at Davis's apartment in the days shortly before the murders crying and agitated.

Brooks did admit in a police statement that he knew of Stuart's existence and that his cousin had denied paternity of the child. There is no direct evidence, however, that Carlson had demanded child support payments from Davis. To the contrary, Mark Gilliam testified that during the initial stages of his participation in the conspiracy, Davis had only informed Gilliam that he intended to kill the woman who had been pestering him for money for a stereo. No mention was made of child support payments. Without evidence showing that Davis or Brooks knew of Carlson's support request, the Department of Revenue record is irrelevant to anyone's intent and motive.

[6] **[7]** The admission of Madero's testimony violates the proscription against hearsay evidence. To be admissible as a business record, it must be shown that the record was (1) made at or near the time of the event recorded; (2) by or from information transmitted by a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) that it was the regular practice of that business to make such a record. *See Quinn v. State,* 662 So.2d 947, 953 (Fla. 5th DCA 1995); § 90.803(6)(a), Fla. Stat. (2002). To the extent the individual making the record does not have personal knowledge of the information contained therein, the second prong of the predicate requires the information to have been supplied by an individual who does have personal knowledge of the information and who was acting in the course of a regularly conducted business activity. *See Quinn,* 662 So.2d at 953; *Van Zant v. State,* 372 So.2d 502, 503 (Fla. 1st DCA 1979). If this predicate is not satisfied, then the information contained in the record is inadmissible hearsay, unless it falls within another exception to the hearsay rule. *See Quinn,* 662 So.2d at 953–54; *see also Hill v. State,* 549 So.2d 179, 181 (Fla.1989); *Johnson v. Dep't of Health & Rehabilitative Servs.,* 546 So.2d 741, 743 (Fla. 1st DCA 1989); *Harris v. Game & Fresh Water Fish Comm'n,* 495 So.2d 806, 809 (Fla. 1st DCA 1986) ("The general rule is that a hearsay statement which includes another hearsay statement is admissible only when both statements conform to the requirements of a hearsay exception."); *Van Zant,* 372 So.2d at 503.

The business record exception does not permit the admission into evidence of the hearsay statements within the Department of Revenue record. The information in the record regarding the alleged relationships between Carlson, Stuart, and Davis was not within Madero's personal knowledge, but was supplied by Rachel Carlson, who, obviously, was not acting within the course of a regularly conducted business activity. The scenario is similar to that recently faced by the Fifth District in *Reichenberg v. Davis,* 846 So.2d 1233 (Fla. 5th DCA 2003), in which the district court determined that the information contained within the records of the Department of Children and Families pertaining to the alleged sexual abuse of a seven-year-old boy was not admissible under the business records exception because it was relayed by witnesses, and not "based upon the personal knowledge of an agent of the 'business.' " *Id.* at 1234; *see also Van Zant,* 372 So.2d at 503 (determining that the business record exception did not extend to the information contained within a probable cause affidavit and sworn complaint because the source of the information contained within the record was the victim, not the person who prepared the record). Without an alternative exception ***194** to cover the hearsay contained in the Department of Revenue record developed from a telephone call, the substance of the record should not have been admitted into evidence here. *See Hill,* 549 So.2d at 181.

[8] We thus conclude that the trial court erred in admitting Madero's testimony regarding the substance of the Department of Revenue record. The impact of the trial court's error in admitting this evidence is subject to evaluation under a harmless error analysis as set forth in *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986). There, this Court held:

> The harmless error test ... places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

Id. at 1135 (citation omitted).

Applying the *DiGuilio* standard, we determine that the State has established beyond a reasonable doubt that the admission of the limited record information did not contribute to the verdict in the instant case. To the extent Brooks' motive and intent were issues at trial, the State established Brooks' motive of pecuniary gain with Gilliam's testimony that Davis promised Brooks $10,000 to commit murder, coupled with the evidence that Davis was a man of modest means who had procured a $100,000 insurance policy on the life of Alexis Stuart. There is no reasonable possibility that the error in admitting the limited Department of Revenue record, which could have only served to provide an alternative theory of Brooks' motive, contributed to Brooks' conviction.

There is an overwhelming amount of properly admitted evidence upon which the jury could have legitimately relied in finding Brooks guilty in the instant matter. Importantly, during this trial, Mark Gilliam related detailed, substantiated information regarding the two failed attempts he, Brooks, and Davis had made on Carlson's life. Gilliam testified that on Monday, April 22, 1996, Davis phoned Carlson from the hospital asking her to meet him at his home where Gilliam and Brooks were secretly waiting in Gilliam's car. According to Gilliam, he and Brooks followed the vehicle occupied by Davis and Carlson in the direction of the predesignated place in Crestview where, according to plan, Brooks was to shoot Carlson. Gilliam established that Brooks had a pistol-grip shotgun and latex gloves with him in the car. Gilliam's version of events was partially corroborated by the testimony of a law enforcement officer who performed a consensual search of Davis's home after the murders and discovered a short-handled shotgun. In addition, the crime scene analyst testified that the smudged hand impressions found at the crime scene were consistent with the perpetrator wearing latex gloves.

Gilliam further testified that during the course of the duo following Carlson's car on the night of the first failed murder attempt, Carlson was stopped by a law enforcement officer for speeding. Gilliam explained that he drove by Carlson's stopped car, made two u-turns, and pulled up a short distance behind her. This testimony was partially corroborated by that of Florida State Trooper Michael Hulion, who reported that he stopped Carlson for ***195** speeding on Monday, April 22, and noted the presence of a baby in the back seat as well as a black male in the passenger seat. Gilliam further described that as this was occurring a second police officer drove to a position behind his vehicle, approached his car, and began questioning the two men as to why they had positioned their vehicle behind Carlson's stopped vehicle. Testimony at trial confirmed that a sheriff's deputy had in fact run a check on Gilliam's license plates that evening in the vicinity of Crestview.

Gilliam also described in detail the second attempt to effectuate the murder, which occurred on the following day, Tuesday, April 23, and followed largely the same sequence of events with Carlson picking Davis up at a local shopping center and Gilliam and Brooks following behind. According to Gilliam, the second attempt ended in failure because Gilliam became separated from Carlson's car at a stop light. Gilliam stated that he and Brooks proceeded to the predesignated location in Crestview and waited for the plan to unfold, but Davis and Carlson did not appear. Gilliam's testimony was supported by the testimony of the officers who questioned Gilliam after the murders and related that he placed “Xs” on a map of Crestview that corresponded to the area in which the victims' bodies were found. Finally, Gilliam stated that he backed out of the murder plan and left Eglin the morning of April 24 to return to his base at Fort Benning, Georgia. Gilliam testified that prior to his departure, Davis helped him secure false hospitalization documents to explain his delayed return to his base.

Gilliam's testimony regarding the failed attempts to proceed with the murder provides compelling and persuasive evidence of Brooks' involvement in the murders of Rachel Carlson and Alexis Stuart. This testimony was not presented during Brooks' initial trial. In light of the totality of the evidence, there is no reasonable possibility that the admission of the limited child support record information could have contributed to the jury verdict. *See DiGuilio,* 491 So.2d at 1135.

Gilliam's testimony is not, however, the only evidence supporting Brooks' conviction. Record evidence also firmly establishes Brooks' presence in Crestview in the vicinity of the crime scene in close proximity to the time of the murders. Witnesses Irving Westbrook and Charles Tucker testified that they saw two men walking in the vicinity of the murder scene, away from where Carlson's car was later found, around the time of the murder. According to Irving Westbrook, one of the men had a limp. Their testimony was corroborated by witness Kea Bess who had previously been introduced to Davis by a mutual friend on the Sunday prior to the murders. Bess testified that she saw Davis, whom she recognized because of the cast on his leg, and another man walking rapidly in the opposite direction from the crime scene. According to Bess, one of the men was carrying a bag.

Witness Michelle Thomas testified that Davis and Brooks visited her Crestview apartment, located only a few blocks from the scene of the crime, [9] on the night of the murders shortly after 9 p.m. She stated that both men were wearing black nylon pants and that Brooks carried a black backpack. Thomas testified that Brooks used the bathroom, Davis asked for a towel, and both men used the telephone. [10] ***196** The presence of Brooks and Davis in Thomas's apartment that evening was also corroborated by the testimony of Nikki Henry, a friend of Thomas, who arrived just as the two men were walking away from the location.

The presence of Brooks and Davis in Crestview on the night of the murders was further established and verified by the testimony of Rochelle Jones. Jones stated that she received a call from Davis on the night of the murders requesting that she come to a particular location to provide transportation for the duo. Davis gave Jones directions to drive to a street in Crestview between a credit union and an animal hospital. [11] Jones's testimony was corroborated by telephone records, and the testimony of a police officer who stopped Jones for speeding as she drove back to Eglin Air Force base, who noted the presence of two black males in her vehicle and requested that Davis assume operation of the vehicle because Jones was operating the vehicle with a suspended license. The testimony of Jones was further corroborated by that of Glenese Rushing, who was using the automatic teller machine at the Crestview credit union on the night of the murders and reported seeing two people across the street at the animal hospital entering a car that subsequently made a u-turn in the credit union parking lot. [12] The testimony of Jones also establishes that whatever transportation Brooks and Davis may have used to travel to Crestview that evening was apparently unavailable for the return trip.

Record evidence also demonstrates the guilty knowledge of Brooks regarding the murders. In contrast to the multitude of witnesses who placed Brooks in Crestview near the crime scene on the night of the murders, Brooks consistently denied being in the community during his police interviews. According to Air Force Office of Special Investigations Agent Karen Garcia, Brooks claimed that he and his cousin remained in Davis's apartment near Eglin Air Force base assembling a waterbed on the night of the murders, leaving only briefly to walk Davis's dog. At one point during his interview with Agent Garcia, Brooks stated, “Walker is on his own. If he did something, he's on his own.” The investigator from the office of the State Attorney, Michael Hollinhead, also interviewed Brooks shortly after the murders. Hollinhead testified that when he attempted to develop information from Brooks regarding the person named “Mark” (subsequently identified as Gilliam), who had accompanied Brooks to Davis's home on April 21, Brooks became “evasive.”

The identity of Brooks as the individual who killed Carlson and Stuart is also supported by substantial evidence. Forensic evidence established that both Carlson and Stuart were killed by a person seated in the rear driver's-seat of the vehicle, [13] and ***197** that no one occupied the front passenger's seat at the time of Carlson's stabbing. [14] Other evidence demonstrated that Brooks was the individual seated in the back seat of Carlson's vehicle. Importantly, Davis was in a leg cast at the time of the murder. That fact renders it highly unlikely that Davis would have been able to sit in the back seat of a car in a position that would have left him able to muster the leverage utilized to mount this attack from behind. Moreover, a shoe print was found on Carlson's shoulder. A forensic expert opined that the print was consistent with the killer extricating himself from the vehicle by climbing over the victim's body, which was found in the front seat, or opening the driver's-side front door and kicking Carlson over. Either feat would have been almost impossible for a

man in a leg cast. Moreover, Davis sat in the front passenger seat during the prior failed murder attempts as established by the trooper who stopped Carlson for speeding and testified to seeing a baby in the back seat and a black man in the right front seat.

On the basis of this record, there is no reasonable possibility that the erroneous admission of the limited testimony of Madero regarding the child support record contributed to Brooks' conviction. As detailed above, the State introduced extensive, substantial, direct, and corroborated testimony regarding the plan to murder Rachel Carlson and the role of Brooks as killer. The jury also heard a significant amount of direct testimony and other evidence which placed Brooks in the vicinity of the crime scene on the night of the murders without transportation back to Eglin. The forensic evidence demonstrated that the victims were killed by someone occupying the back seat of Carlson's car, and that no one occupied the passenger seat at the time of the murders. The only reasonable inference to draw from the forensic evidence, coupled with the direct testimony concerning the role of Brooks as the killer, and the fact that Davis was in a leg cast at the time of the murders, is that it was Brooks who inflicted the fatal blows. The State clearly established the motive of pecuniary gain and the guilty knowledge attributable to Brooks through the content of his police statements. All of this evidence was properly admitted before the jury to be utilized by the jury in reaching its verdict. For these reasons, we conclude that the trial court's error in admitting the limited testimony of Madero and the Department of Revenue record was harmless beyond a reasonable doubt.

AGGRAVATED CHILD ABUSE

[9] Brooks argues on appeal that the trial court erred by finding that he committed the murders during the course of a felony, which was aggravated child abuse as defined by statute, and then applying the aggravated child abuse aggravating circumstance set forth in section 921.141(5)(d), Florida Statutes (2002), during sentencing. He contends that because the single act of stabbing Stuart formed the basis of both the aggravated child abuse aggravating factor under section 921.141(5)(d) of the Florida Statutes and the first-degree felony murder charge, the court should have found that the aggravated child abuse allegation "merged" with the more serious homicide charge. Thus, according to Brooks, the State should have been totally precluded from invoking the ***198** felony murder doctrine and should have been limited to proving first-degree murder only on the theory of premeditation for both murders. Brooks does not merely attack the use of the underlying felony as an aggravator; he asserts that the state is prohibited from using aggravated child abuse as the felony crime. We agree.

This Court addressed the same claim in *Lukehart v. State,* 776 So.2d 906 (Fla.2000), where the defendant shook a baby and the baby thereafter died. The defendant in *Lukehart* argued that there was no felony separate from the homicide. In making this argument, Lukehart relied on *Mills v. State,* 476 So.2d 172, 177 (Fla.1985), which addressed the issue of whether convictions of first-degree murder and aggravated battery could both stand when arising out of the same act. This Court found in *Mills* that the two convictions could not stand and vacated the conviction for aggravated battery. While we rejected the analogy to *Mills* in *Lukehart* because the facts were distinguishable, *Mills* is applicable to the instant matter.

In *Mills,* the defendant broke into a house in the middle of the night intending to steal something. When the homeowner awoke to investigate, the defendant shot and killed him. The defendant was charged with one count of felony murder, one count of burglary while armed with a firearm, and one count of aggravated battery with a firearm. This Court held that while the defendant could be found guilty of all three charges, it was not proper to convict him for aggravated battery and simultaneously for homicide as a result of one shotgun blast. *Mills,* 476 So.2d. at 177. In that limited context, we concluded that the felonious conduct merged into one criminal act. *Id.* As we explained in *Mills,* "We do not believe that the legislature intended dual convictions for both homicide and the lethal act that caused the homicide without causing additional injury to another person or property." *Id.*

Thus, *Mills* clearly bars a conviction of aggravated battery where a single act of aggravated battery also causes a homicide. This determination is based on the fact that the aggravated battery has merged into the homicide. Likewise, had Brooks been charged with aggravated child abuse, he could not have been convicted of that crime. That is because aggravated child abuse is an aggravated battery, the only difference being that the victim is a child. *See* 827.03(2), Fla. Stat. (2002) (" 'Aggravated child abuse' occurs when a person: (a) commits aggravated battery on a child....'). In light of the fact that Brooks delivered a single stabbing blow that resulted in Alexis Stuart's death, the act constituting the aggravated child abuse merged into the infant's homicide.

Generally, aggravated child abuse can be a separate charge and serve as the felony in a felony murder charge. This is the situation that occurred in *Mapps v. State,* 520 So.2d 92 (Fla. 4th DCA 1988), in which the defendant was convicted of felony murder with the underlying felony being aggravated child abuse. In *Mapps,* the defendant threw, shook, or struck a ten-month old child causing a skull fracture which killed the child. The defendant argued that the aggravated battery "merged" into the homicide and could not constitute a valid basis for a felony murder charge. The Fourth District disagreed and found that the underlying felony need not always be independent of the killing as a prerequisite for a conviction of felony murder. *See id.* at 93.

Importantly, however, in *Mapps,* there were separate acts of striking, shaking, or throwing which led to the killing of the child. In contrast, the instant case involved the single act of stabbing which caused a single injury. In a case such as this where ***199** the *Mills* rule prevents a conviction of aggravated battery because a single act caused both an aggravated battery and a homicide, aggravated battery cannot then serve as the underlying felony of the felony murder charge. It makes no difference that Brooks was not charged or convicted of aggravated child abuse because that crime, under these facts, merges with the homicide itself. In the instant matter, the action underlying the aggravated child abuse factor constituted the fatal stab wound that killed Alexis Stuart. Because there is no separate offense of aggravated child abuse, that crime cannot logically serve as the underlying felony in a felony murder charge.

The trial court's error in relying on the aggravated child abuse factor in aggravation has no impact on the sentencing determination for either murder. Had the aggravated child abuse factor not been available, the trial court could have properly applied the aggravator that the victim, Alexis Stuart, was less than twelve years of age, resulting in the loss of no aggravation as it pertains to the murder of Alexis Stuart. [15] While elimination of the aggravated child abuse factor results in the loss of one aggravator as applied to the murder of Rachel Carlson, such a loss would not have impacted the determination of sentence in that matter. Four aggravators continue to apply to the murder of Rachel Carlson, including both HAC and CCP. The aggravating factors continue to substantially outweigh any mitigation, which supports application of the death sentence for Rachel Carlson's murder.

ADDITIONAL ERRORS

[10] We turn now to address three other errors asserted to have been committed by the trial court. The first error we address is the trial court's decision to admit two notes recovered from Davis's leg cast when it was removed shortly after the murders, on May 2, 1996. One piece of paper contained the following two written statements, "What time is the first flight and the name," and "US Air, 545, $244.00, Sgt. Samms." The second note also contained two written statements, the first being, "Mark would have cracked up" and the second stating, "Events, Home to walk Heavy and then to home." In response to defense counsel's objection, the State argued that the notes, written in two different handwriting styles, were relevant to connect the coconspirators through the lies they told law enforcement, to link each of them to the night of the murders, and to show consciousness of guilt. On appeal, the State stresses the fact that the notes capture the lie told by Brooks during his interview with police that he and Davis were at Davis's apartment on the night of the murders setting up a waterbed and left the apartment only for a brief time to walk Davis's dog. [16]

The trial court admitted the notes as additional evidence to show an association between Brooks and Davis from which the jury could determine the existence of a conspiracy and as evidence from which the jury could infer Brooks' consciousness of guilt. Brooks contends on appeal that the trial court abused its discretion in admitting the notes because there is no evidence connecting him to the notes. We agree.

The only person to whom the notes reasonably could be linked was Davis because they were found on his person and bore his ***200** fingerprint. The notes were never connected in any form or fashion to Brooks. While the State contends that the notes were jointly authored and constitute a conversation of sorts in which the co-conspirators solidified the lies they would tell police, it offered no evidence that either Davis or Brooks wrote the notes. The State's argument that the lies of Brooks to law enforcement officers tied him to the notes similarly fails to persuade us that they were admissible, because the State offered no evidence as to when the notes were drafted or when they were placed in Davis's cast.

[11] We also find error in the trial court's decision to allow the State to impeach the trial testimony of witness Melissa Thomas with the statement she had previously given police. At trial, Melissa Thomas testified that on the night of the

murders, Davis and Brooks came to her Crestview apartment at approximately nine o'clock. In her testimony, she relayed that each man arrived at her apartment clothed in black nylon pants and that Brooks used the bathroom. Thomas further testified that she recalled being interviewed by police shortly after the murders. When the State asked whether she recollected telling Agent Haley during the course of the interview that Brooks came out of the bathroom wearing shorts, Thomas answered, "No, I don't remember."

Subsequently, the State called Agent Haley to testify regarding his interview of Thomas, including the portion in which she stated that Brooks changed into shorts in the bathroom. Defense counsel made multiple objections, including that the impeachment was improper because Thomas's trial testimony did not materially differ from her police statement. The trial judge allowed the impeachment, determining that her trial testimony and previous statement were "contradictory to a degree."

The trial court erred in permitting this impeachment of Thomas's testimony. Florida courts have held that a witness's inability to recall making a prior statement is not synonymous with providing trial testimony that is inconsistent with a prior statement. *See James v. State,* 765 So.2d 763, 766 (Fla. 1st DCA 2000); *Calhoun v. State,* 502 So.2d 1364, 1365 (Fla. 2d DCA 1987) (deeming it improper to impeach a witness who testified that she could not recall stating that she had a reputation as an aggressive female police officer with the testimony of another witness who heard her make such a statement). In *James,* the district court adopted the reasoning employed by the Oregon Court of Appeals in holding:

> The controlling issue on appeal is whether it was appropriate to impeach [a witness'] asserted lack of memory by showing substantive statements that she made when her memory was fresh. As a matter of logic, that is not appropriate impeachment by inconsistent statement. The fact that a witness once stated something was true is not logically inconsistent with a subsequent loss of memory. The only thing that is inconsistent with a claimed loss of memory is evidence that suggests that the witness in fact remembers.

James, 765 So.2d at 766 (quoting *State v. Staley,* 165 Or.App. 395, 995 P.2d 1217, 1220 (2000)).

In support of the contrary position, the State quotes from *Morton v. State,* 689 So.2d 259 (Fla.1997), where this Court determined that "[i]n a case where a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the witness with a prior inconsistent statement." *Id.* at 264. However, the State fails to ***201** include the very next sentence, where the *Morton* Court clarified its holding by stating that, "[o]f course, the statement should be truly inconsistent, and caution should be exercised in permitting impeachment of a witness who has given favorable testimony but simply fails to recall every detail unless the witness appears to be fabricating." *Id.*

Importantly, the trial judge in the instant case allowed the impeachment of Thomas's testimony because he found her testimony inconsistent to a degree with her prior statement, not because he determined that she was fabricating her inability to recall the content of her police statement. Given the other detailed evidence provided by Haley and the fact that Brooks' retrial occurred six years after the murders were committed, there is no basis on which to conclude that Thomas fabricated her lack of recollection. For that reason, the trial court erred in permitting the impeachment of Thomas's trial testimony with her previous statement. The State compounded the error by impermissibly relying on the impeachment as substantive evidence in closing arguments. *See McNeil v. State,* 433 So.2d 1294, 1295 (Fla. 1st DCA 1983) (reversing conviction based in large part on impeachment evidence improperly considered as substantive evidence).

[12] Finally, we conclude that the trial court erred in refusing to provide the coconspirator hearsay instruction requested by defense counsel. Section 90.803(18)(e) of the Florida Statutes provides that "[u]pon request of counsel, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph." § 90.803(18)(e), Fla. Stat. (2002). As characterized by Brooks on appeal, the requirement to give

the instruction is mandatory, not permissive, and it is not within the trial court's discretion to refuse counsel's request.

[13] **[14]** Applying the standard articulated in *DiGuilio,* we determine that each of these errors was harmless beyond a reasonable doubt. *See DiGuilio,* 491 So.2d at 1135. We note that the substance of the notes retrieved from the leg cast of Davis was established through independent witness testimony. Air Force Special Agent Garcia relayed that Brooks denied being in Crestview the night of the murders, and indicated that he and Davis remained in Davis's apartment leaving only briefly to walk Davis's dog, Heavy. Airman Hardin testified that he accompanied Brooks to purchase a plane ticket back to Philadelphia for which Brooks was wired $244. With the information already a part of the record, there is no reasonable possibility that the erroneous admission of the notes themselves contributed to the conviction. The same conclusion can be drawn regarding the improper impeachment of Melissa Thomas. Permitting Agent Haley to testify to the prior statement of Thomas, in which she indicated that Brooks had changed into shorts in her bathroom, did not contribute to his conviction. Neither Thomas nor any of the witnesses who placed Brooks in Crestview on the night of the murders indicated that he or his clothes were covered in blood. The State did not recover or seek to introduce any blood-stained clothing. In the absence of any such evidence, testimony that Brooks changed clothes in Thomas's bathroom is of no consequence. Finally, given that sufficient evidence existed to establish a conspiracy between Gilliam, Brooks, and Davis beginning Monday, April 22, *see Brooks I,* 787 So.2d at 778, Brooks was not prejudiced by the trial court's refusal to give the coconspirator hearsay instruction ***202** as requested. *See Boyd v. State,* 389 So.2d 642, 646 (Fla. 2d DCA 1980).

CUMULATIVE ERROR ANALYSIS

[15] **[16]** We have determined that five errors of law occurred during the course of Brooks' retrial, including the erroneous admission of Madero's testimony regarding the child support record, the erroneous admission of the notes recovered from Davis's leg cast, the improper impeachment of Melissa Thomas, the trial court's failure to provide the coconspirator hearsay instruction as requested by defense counsel, and the erroneous reliance in sentencing on the aggravating factor that the murders were committed during the course of an act of aggravated child abuse. Having found multiple harmless errors we must consider whether

> even though there was competent substantial evidence to support a verdict ... and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

Jackson v. State, 575 So.2d 181, 189 (Fla.1991) (quoting *Seaboard Air Line R.R. Co. v. Ford,* 92 So.2d 160, 165 (Fla.1956) (on rehearing)).

Our decision in *Jackson* is particularly instructive in this regard. There, we determined that the trial court had committed multiple errors, including the admission of a portion of a state witness's testimony explaining that members of the defendant's family had threatened him, permitting the State to tell the jury to draw inferences from the failure of the defendant's mother to testify, and instructing the jury that they could infer consciousness of guilt from flight. *See id.* at 187–88. We determined that the cumulative effect of those errors did not warrant reversal of the defendant's conviction because (1) none of the errors were fundamental; (2) none went to the heart of the state's case; and (3) the jury would have still heard substantial evidence in support of the defendant's guilt. *See id.* at 189. Thus this Court concluded, "Considering the weight of the errors and the magnitude of the totality of the evidence against Jackson, we find there is no reasonable possibility that these three errors contributed to the conviction." *Id.*

The errors committed in the instant case are of like kind and quality to those committed in *Jackson.* As in that case, we determine that none of the errors committed were fundamental, none went to the heart of the State's case, and, as outlined in the analysis of the admissibility of Madero's testimony, the jury would have still heard extensive and substantial evidence in support of Brooks' guilt. On the basis of the record before us, we determine that there is no reasonable possibility that the cumulative effect of the errors in this case contributed to Brooks' conviction.

BROOKS' THREAT AGAINST LAW ENFORCEMENT OFFICER

[17] During Gilliam's testimony regarding the first failed attempt on Carlson's life, the trial court permitted him to relay that when he and Brooks were approached by the police officer after they had pulled behind Carlson's car, Brooks proclaimed that "he can't go back," and he was "going to have to shoot them," meaning the officer. Upon having his recollection refreshed with a previous statement, Gilliam testified that Brooks asserted he "can't go back to jail." Gilliam stated that he encouraged Brooks to put the shotgun away and that Brooks did so, hiding the shotgun under the seat covers in the back.

***203** Brooks does not challenge on appeal, and indeed this Court perceives no tenable grounds to challenge, the general admission of Gilliam's testimony regarding the events of April 22, including the circumstances surrounding Carlson's stop for speeding and law enforcement officers' subsequent questioning of Gilliam and Brooks. Brooks limits his challenge to the admissibility of his stated desire to shoot the police officer who approached Gilliam's vehicle rather than return to jail.

[18] **[19]** Abuse of discretion is the standard of review applicable to the instant claim. *See, e.g., Ray,* 755 So.2d at 610; *Zack,* 753 So.2d at 25. Evidence of a defendant's bad acts is inadmissible if solely relevant to demonstrate the bad character of the accused or the propensity of the accused to engage in criminal conduct. *See Williams v. State,* 110 So.2d 654, 663 (Fla.1959); *see also* § 90.404(2)(a), Fla. Stat. (2002). Evidence of bad acts is admissible, however, "if it casts light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity or a system or general pattern of criminality so that the evidence of the prior offenses would have a relevant or a material bearing on some essential aspect of the offense being tried." *Williams,* 110 So.2d at 662.

According to the State, the expressed intent of Brooks to shoot the police officer rather than return to jail was relevant to establish his guilty knowledge regarding his involvement in a criminal enterprise.[17] In support of this contention, the State directs our attention to two cases, *Wyatt v. State,* 641 So.2d 355 (Fla.1994), and *Straight v. State,* 397 So.2d 903 (Fla.1981). In *Straight,* this Court held:

> When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstances.

397 So.2d at 908. Applying that principle, the *Straight* Court deemed relevant and admissible in a murder prosecution evidence of the defendant's flight and attempt to evade arrest. *See id.* at 908. In *Wyatt,* this Court applied the same principle in deeming admissible the defendant's statements to police officers upon his arrest that he "was glad he did not have a gun when he got stopped, otherwise he would have shot the officer." *Wyatt,* 641 So.2d at 358. In 1997, this Court refined the principle articulated in *Straight* to provide that there "must be evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in [a] specific case." *Escobar v. State,* 699 So.2d 988, 995 (Fla.1997), *abrogated on other grounds by Connor v. State,* 803 So.2d 598 (Fla.2001).

The principle articulated in *Wyatt* and *Straight* and refined in *Escobar* is equally applicable to the stated intent by Brooks to shoot the police officer to avoid returning to jail. The evidence shows that ***204** at the time Brooks uttered the statement, he, Davis, and Gilliam were involved in a conspiracy to commit murder. The statement of Brooks demonstrates that he was aware of the criminality of his actions at the time of the traffic stop and the precarious position he was in with regard to the approaching officer.

The counter-argument, that the threat to shoot the officer has no relevance to the guilty knowledge of Brooks concerning the stabbing death of a mother and daughter committed two days later, misses the fundamental connection between the threat and the crime charged. Brooks did not make the threat in the context of a random traffic stop on any given day. He and Gilliam were following the intended victim, had the murder weapon and a pair of latex gloves in their possession, and, but for the traffic stop, would have proceeded to the predesignated place in Crestview to commit murder. Had the murder plan been foiled because of the police stop, due to the discovery by the police of the gun or some other piece of incriminating evidence, Brooks' statements certainly would be relevant and admissible under *Wyatt* and *Straight.* The relevancy of the threat voiced by Brooks against the law enforcement officer to his guilty knowledge is not diminished merely because his desire to evade prosecution and the

successful completion of the planned crime were attenuated in time.

[20] Though relevant, the statement by Brooks still may have been inadmissible if its probative value was outweighed by unfair prejudice. *See* § 90.403, Fla. Stat. (2002). Brooks argues that this is the case, and exhorts this Court to conduct the section 90.403 balancing test in accordance with the factors articulated in *State v. McClain,* 525 So.2d 420 (Fla.1988). In that case, this Court applied the principles advanced by Professor Ehrhardt for weighing the probative value of evidence against the threat of unfair prejudice, including the need for the evidence, the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, the chain of inference necessary to establish the material fact, and the efficacy of any limiting instruction. *See id.* at 422.

According to Brooks, the evidence "fails" the balancing test because the other portions of Gilliam's testimony amply demonstrated Brooks' intent, and the threat against the police officer simply portrayed Brooks as an individual determined to kill anyone who might send him back to jail. We disagree. The proffered analysis underestimates the probative value of the evidence. While Gilliam's testimony tends to establish the existence of a conspiracy, the statements by Brooks more clearly provide the proof of his individual intent to commit murder and acknowledgment of guilt. Moreover, in a case such as this, which involved the stabbing death of a woman and her infant child, introduction of the threat by Brooks against the police officer was unlikely to suggest an improper basis to the jury for resolving the matter.

CHANGE OF VENUE

[21] Brooks also argues that the trial court erred in failing to grant his change of venue request. Conceding that he did not exhaust his peremptory challenges or request additional challenges during jury selection, Brooks contends that the problem he faced empaneling an unbiased jury was systemic and beyond the scope of individual jurors. Brooks further argues that the venue challenge involved more than just pretrial publicity, but also a demonstrated prejudice against him as evidenced by several factors, including discussions about the case among members of ***205** the jury pool and the purportedly deceptive answers given during voir dire. [18]

[22] As in his initial appeal, where Brooks presented a claim of error based on the trial court's refusal to strike the venire and change venue, his instant claim does not satisfy the standard set forth in *Rolling v. State,* 695 So.2d 278 (Fla.1997), for measuring prejudice in the trial community. *Rolling* requires a determination of "whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and the accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom." *Id.* at 284 (quoting *McCaskill v. State,* 344 So.2d 1276, 1278 (Fla.1977)).

The trial court conducted an individual voir dire of every prospective juror who indicated that he or she had any knowledge regarding the case beyond the scant facts outlined by the State at the commencement of voir dire. These jurors were questioned regarding their knowledge of the case and the previous legal proceedings and the impact any such knowledge would have on their fairness and impartiality. The parties agreed toward the end of the voir dire process that anyone who knew that Brooks was being retried would be excused, regardless of whether they indicated that such knowledge would impact their ability to serve. Thus, the twelve persons who were actually part of the jury below possessed that which the parties determined was an acceptable level of knowledge regarding the facts of the case and no knowledge of the previous conviction resulting from the earlier trial.

With regard to the purported discussions among prospective jurors about the status of the case, the contention advanced by Brooks fails to account for the fact that the trial court and counsel thoroughly questioned each of the jurors involved in the discussions and eliminated any juror with any knowledge regarding the status of the case as a retrial. Brooks also draws our attention to one potential juror's report of hearing a female member of the jury pool uttering aloud her presumption of guilt in the instant matter. However, the trial court and counsel exhaustively questioned the potential juror making the report, who could not identify the woman who allegedly made such a statement, and none of the potential jurors seated in the area could corroborate his story. Finally, the contention that potential jurors gave arguably deceptive answers must fail as the two individuals identified by Brooks as giving evasive answers did not serve on his jury panel. There is simply no basis in the record to support the contention that anyone on the jury in this case knew that Brooks was being tried a second

time, let ***206** alone harbored presumptions based on that fact, or was prejudiced against him for any other reason.

AGGRAVATING FACTORS APPLICABLE TO ALEXIS STUART

Brooks next challenges the trial court's findings with regard to the aggravating factors applicable to the murder of Alexis Stuart. According to Brooks, the evidence does not establish that Brooks murdered Stuart for pecuniary gain or that Brooks killed Stuart as part of the premeditated plan to murder Carlson.

[23] **[24]** **[25]** The standard of review for whether an aggravating factor exists is whether it is supported by competent, substantial evidence. *See Almeida v. State,* 748 So.2d 922, 932 (Fla.1999). Aggravating factors require proof beyond a reasonable doubt, "not mere speculation derived from equivocal evidence or testimony." *Hardwick v. State,* 521 So.2d 1071, 1075 (Fla.1988). An aggravating factor may be supported entirely by circumstantial evidence, but "the circumstantial evidence must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." *Hildwin v. State,* 727 So.2d 193, 194 (Fla.1998) (quoting *Geralds v. State,* 601 So.2d 1157, 1163 (Fla.1992)).

[26] The pecuniary gain factor is permitted where the murder "is an integral step in obtaining some sought-after specific gain." *Hardwick,* 521 So.2d at 1076. In the instant case, the trial court determined that the only motivating reason for Brooks to murder Stuart was to collect the $10,000 promised by Davis. This determination is supported by competent, substantial evidence.

The direct evidence adduced at trial was that Brooks had been promised $10,000 for the murder of Carlson. The only logical inference to be drawn from the promise of such a large sum of money, coupled with evidence demonstrating that Davis was of limited economic means, is that Davis and Brooks knew of the existence of the $100,000 insurance policy on Stuart's life and the need to kill the baby to obtain the proceeds. Such evidence establishes that the elimination of Stuart was an "integral step" in obtaining the $10,000 and, as such, amply supports the trial court's finding of the pecuniary gain aggravating factor. *See Hardwick,* 521 So.2d at 1076.

[27] The trial court's determination that the murder of Alexis Stuart was committed in a cold, calculated, and premeditated manner is also supported by competent substantial evidence. As discussed above, the baby's murder was part of the prearranged plan hatched by Davis and Brooks and was necessary for Brooks to obtain the $10,000 promised. Gilliam's averred ignorance of Alexis Stuart's existence or a plan to murder the baby does not, as Brooks contends, undermine the trial court's conclusion. As previously discussed, Brooks would have been more familiar with the economic status of Davis and his modest finances and naturally more inquisitive with regard to the source of the $10,000 payment. Brooks also admitted to knowing about the baby and that his cousin had denied paternity. Record evidence further demonstrates that Gilliam was not privy to every aspect of the murder plan, with Brooks and Davis stepping behind closed doors to discuss the plan out of Gilliam's earshot.

[28] Furthermore, even if a prearranged plan to murder Stuart was not shown, the CCP aggravator is nonetheless properly applied in the instant case. As this Court has determined, the cold, calculated, and premeditated aggravating factor can be supported by evidence that the defendant planned to kill, even if the actual ***207** victim was other than the intended victim. *See Bell v. State,* 699 So.2d 674, 677 (Fla.1997) (determining that application of CCP was not precluded where the victims murdered were not the actual subjects of the defendant's plan to kill). To establish the existence of CCP, "the State must show a heightened level of premeditation establishing that the defendant had a careful plan or prearranged design to kill," but that heightened premeditation "does not have to be directed toward the specific victim." *Id.* at 677–78; *see also Sweet v. State,* 624 So.2d 1138, 1142 (Fla.1993) ("It is the manner of the killing, not the target, which is the focus of [the CCP] aggravator.").

Mark Gilliam's testimony regarding the failed attempts by the trio on Carlson's life, the plan to commit the act at a predesignated spot in a high crime neighborhood, Brooks' possession of the murder weapon and latex gloves, and discussion—at least with respect to Gilliam—of a viable cover up story leaves no reasonable doubt that Brooks had a prearranged design to kill. *See Bell,* 699 So.2d at 677 ("Cold, calculated, premeditated murder can be indicated by the circumstances showing such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course."). Thus, the CCP aggravator applies to Stuart's murder, regardless of whether she was the primary intended victim. Moreover, the trial court's finding that Stuart was

killed with one fatal blow to the heart, followed by the infliction of postmortem mutilation wounds is supported by competent, substantial evidence,[19] and further bolsters the application of the CCP aggravator to the murder of Stuart because it reflects a desire to make both murders appear to be slashing murders.

CLOSING ARGUMENTS

[29] **[30]** **[31]** Brooks contends that the State made multiple improper statements in its closing argument. According to Brooks, the State shifted the burden to him to prove his innocence by questioning his failure to tell the police about the insurance policy and by constructing straw man defenses, improperly stated that Brooks was responsible for Davis's actions that occurred outside of the conspiracy, and impermissibly attacked a purported "alibi" that Brooks never presented. To merit a new trial, the prosecutor's comments "must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Spencer v. State,* 645 So.2d 377, 383 (Fla.1994).

After a close review of the record, we conclude that Brooks mischaracterizes the proceedings and that no improper burden-shifting occurred. To the contrary, the comments challenged by Brooks constitute permissible comment on the evidence presented, *see Morrison v. State,* 818 So.2d 432, 445–46 (Fla.2002), and defenses raised. *See Lynn v. State,* 395 So.2d 621, 623 (Fla. 1st DCA 1981). Similarly, to the extent the prosecutor's closing arguments created a misimpression regarding the law of principals, it was properly clarified by the trial court's instruction on that point. *See Bush v. State,* 809 So.2d 107, 117 (Fla. 4th DCA 2002). Finally, we determine that the State did not improperly construct an alibi defense for the purpose of challenging ***208** it. The State did not make reference to the failure of Brooks to call an alibi witness or make insinuations designed to undermine the viability of any alibi defense that the State itself introduced.

REFERENCES TO PREVIOUS TRIAL

[32] Brooks also argues that the trial court erred in denying his motion for mistrial based on the State's repeated references to his previous trial. After a review of the challenged comments in the context of the entire record, we determine that the references to Brooks' previous trial were plainly inadvertent and almost inscrutable since they were made during the course of complicated sequences of questions regarding prior statements by witnesses in this matter. Moreover, none revealed that Brooks had been convicted. On this basis, we conclude that the trial court did not err in refusing to grant Brooks' motion for mistrial. *Compare Jackson v. State,* 545 So.2d 260, 263 (Fla.1989) (determining that prosecution's intentional solicitation of testimony regarding the appellant's prior conviction was reversible error) *with Sireci v. State,* 587 So.2d 450, 452 (Fla.1991) (determining that refusal to grant mistrial based on prosecutor's reference to appellant's time on death row was not in error where the record reflected that the impact of merely mentioning a prior death sentence was negligible).

PROPORTIONALITY

[33] Brooks also argues that the death penalty is proportionately unwarranted in the instant case. According to Brooks, his death sentences are disproportionate because Davis instigated, planned, and helped carry out the murders of Carlson and Stuart, yet received life sentences. Brooks contends that this Court must reduce a death sentence where, as here, a codefendant who is equally or more culpable in the murder is sentenced to life. Brooks further posits that the evidence does not support the trial court's conclusion that Brooks actually committed the murders.

[34] **[35]** **[36]** This Court has an obligation to review the proportionality of death sentences by considering the totality of the circumstances of the case and comparing the sentence with that imposed in other capital cases. *See Shere v. Moore,* 830 So.2d 56, 60 (Fla.2002). In cases where more than one defendant is involved, the Court performs an additional analysis of relative culpability guided by the principle that "equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." *Id.* A trial court's determination regarding relative culpability constitutes a finding of fact and will be sustained on review if supported by competent, substantial evidence. *See Puccio v. State,* 701 So.2d 858, 860 (Fla.1997).

In the sentencing order, the trial court gave little mitigatory weight to the fact that Davis received a life sentence. In so determining, the trial court made the following finding:

> In analyzing the life sentence imposed on Walker Davis, Jr., it is important to acknowledge that although Walker Davis, Jr. participated in the planning and to some extent in the murder of the two victims, the evidence showed that Davis was the front seat passenger of the vehicle and did not deliver the fatal blows to either of the victims. Lamar Brooks stated to Terrance Goodman that on the night of the murders he was the backseat passenger of Rachel Carlson's car. This admission coupled with the testimony of the medical examiner and the bloodstain pattern expert establishes that Lamar Brooks was the occupant ***209** of the car who carried out the plan to murder both the victims.
>
> This Court is satisfied from the totality of the evidence that Lamar Brooks not only participated in the planning of the murders of the two victims, but actually carried out the plan by fatally stabbing each of the victims. Therefore, Lamar Brooks is more culpable than Walker Davis, Jr., in the murders of Rachel Carlson and Alexis Stuart.

The trial court's findings regarding the relative culpability of Davis and Brooks are supported by competent, substantial evidence.

As previously discussed, competent, substantial evidence introduced during the guilt phase established that the fatal blows inflicted on each of the victims were delivered by an individual seated in the rear seat on the driver's side of Carlson's car, and that Brooks was that individual. Additional evidence introduced during the *Spencer* hearing supported that conclusion. At that time, the State introduced the testimony of Terrance Goodman, Brooks' former cellmate. According to Goodman, Brooks discussed "offing a broad" one night when he was high, but never directly admitted to killing Carlson or Stuart. Goodman also testified that Brooks reported being in the back seat of the car listening to a personal, portable stereo the night he committed the murder.

Brooks challenges the quality of Goodman's recollection, noting the relative ambiguity and inconclusiveness of his responses. However, the trial court, the tribunal in the best position to judge witness credibility, gave credence to Goodman's testimony. There is no basis for this Court to supplant the deferential standard of review accorded such decisions. *See Shaw v. Shaw,* 334 So.2d 13, 16 (Fla.1976) (reiterating that the trial court is in a superior position "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses"). Moreover, the trial court made clear that it based the weight it accorded to Davis's life sentence on the totality of the evidence in the case.

Contrary to Brooks' assertion, disparate treatment of Brooks as the "knifeman" in the instant case is warranted. *See, e.g., Downs v. State,* 572 So.2d 895 (Fla.1990) (determining that evidence supported the trial court's conclusion that Downs was the triggerman and thus more culpable than his codefendant); *Slater v. State,* 316 So.2d 539 (Fla.1975) (determining death penalty disproportionate where the triggerman received a life sentence and the accomplice was sentenced to death). Our decision in *Gamble v. State,* 659 So.2d 242 (Fla.1995), is particularly relevant. There, we found no error relative to the trial court's decision to ascribe "some" mitigatory weight to the codefendant's life sentence. *See id.* at 245. In that case, both codefendants planned and executed the bludgeoning and strangulation murder of their landlord. *See id.* at 244. Both co-defendants were at the murder scene at the time of the murder, and there was some question as to which was responsible for actually killing the victim. *See id.* The jury recommended the sentence of death for Gamble by a ten-to-two majority, and the trial court followed that recommendation. *See id.* After the close of Gamble's penalty phase, Love, Gamble's codefendant, pled guilty to first-degree murder in exchange for a life sentence. *See id.* at 245. This Court rejected the assertion that the distinction between the sentences rendered Gamble's death sentence disproportionate. *See id.*

As in *Gamble,* both Davis and Brooks planned and executed the murder of Carlson and Stuart. Like codefendant Love in ***210** *Gamble,* Davis was present at the murder scene at the time of the murders, and may have helped inflict some of the nonfatal injuries suffered by Carlson. However, evidence establishes that Davis did not inflict the fatal injuries, and, judging from the blood spatter evidence, was not even present in Carlson's vehicle at the time the lethal stab wounds were delivered. For these reasons, the trial court did not err in determining that Brooks' relative culpability for the murders exceeded that of Davis and in ascribing little weight to Davis's life sentence. *See Gamble,* 659 So.2d at 245; *see also Gordon v. State,* 704 So.2d 107, 117–18 (Fla.1997) (rejecting disproportionality argument where conspirator who had instigated and paid for the contract killing and supplied the killers with a cell phone to call the victim's home and place of work received a life sentence after a jury trial and the conspirator actually responsible for the killing received a death sentence).

REMAINING CLAIMS

Finally, Brooks argues that the trial court erred in refusing to require the jury to return a special verdict setting forth which aggravators they found and by what vote in violation of Brooks' right to a trial by jury under the Sixth Amendment to the United States Constitution and the Eighth Amendment proscription against cruel and unusual punishment. This claim is meritless. *See Johnson v. State,* 904 So.2d 400 (Fla. 2005).

[37] Brooks also argues that the trial court violated the procedure set forth in section 921.141 of the Florida Statutes, and the Eighth Amendment to the United States Constitution in giving great weight to the jury's sentencing recommendation. Brooks' challenge on this issue is two-fold. First, he claims that the trial court violated this Court's holding in *Muhammad v. State,* 782 So.2d 343 (Fla.2001), by according the recommendation of Brooks' penalty phase jury great weight despite the fact that Brooks waived the presentation of mitigating evidence. In *Muhammad,* we determined that reversible error occurred when the trial court afforded "great weight" to the jury's recommendation when that jury did not hear any evidence in mitigation. *See id.* at 363. The jury instructions in that case informed the jury that their recommendation would be given great weight, *see id.* at 363 n. 9, and the sentencing order specifically stated that the jury's recommendation was given great weight in the final sentencing decision. *See id.* at 363.

In the instant matter, by contrast, the trial court did not instruct the jury that its sentencing recommendation would be given great weight. Likewise, the sentencing order makes no reference to the weight actually accorded the recommendation. Indeed, the length, thoroughness, and tone of the sentencing order strongly imply that the trial judge's sentencing determination is based on the weighing of the aggravating and mitigating factors and on the jury's recommendation. Thus, the record establishes that the trial court properly viewed the jury's recommendation as required by *Muhammad.*

[38] Brooks also argues that the trial court should have required the presentation of mitigating evidence, most notably Davis's life sentence, to the jury. There is nothing in existing case law that would require the trial court to take that step. The decision in *Muhammad* simply requires trial courts presiding over cases in which the defendant waives mitigating evidence to "require the preparation of a PSI [presentence investigation]," and permits the court to call witnesses in mitigation to the extent the PSI "alert[s] the trial court to the probability of significant mitigation." *Id.* at 363–64. The decision in *Muhammad* ***211** did not compel the trial court to present Davis's life sentence to the jury. This conclusion is bolstered by the strength of the trial court's findings with regard to the relative culpability of Brooks and Davis—a determination that is amply supported by the record.

CONCLUSION

For the foregoing reasons, we affirm Brooks' convictions of first-degree murder and death sentences.

It is so ordered.

QUINCE and CANTERO, JJ., concur.

PARIENTE, C.J., concurs in part and dissents in part with an opinion, in which ANSTEAD, J., concurs.

LEWIS, J., concurs in part and dissents in part with an opinion, in which WELLS and BELL, JJ., concur.

PARIENTE, C.J., concurring in part and dissenting in part.
I agree with the majority that there could be no crime of aggravated child abuse based on a single stab wound because that crime merges with the homicide. I thus concur in that part of the majority opinion. However, I would reverse the convictions based on the erroneous admission of evidence identifying Walker Davis as the primary beneficiary of a life insurance policy on Alexis Stuart, the infant child of Davis's paramour, Rachel Carlson. Because the State did not lay a proper foundation in the form of knowledge of the policy by Brooks, Davis's alleged codefendant, the policy was inadmissible against Brooks either to establish the source of payment for the murders of Stuart and Carlson or to show Brooks' motive or intent. The error in admitting the life insurance policy was not harmless beyond a reasonable doubt in light of the absence of direct evidence of Brooks' culpability and the dubious credibility of the State's key witness.

To place this issue in context, the evidence in this case was wholly circumstantial, focusing on the proximity of Davis and Brooks to the murder scene, Brooks' false statements as to his whereabouts on the night of the murders, and the testimony

of convicted perjurer Mark Gilliam, who testified that Davis promised to pay Brooks $10,000 for participating in the killing. [20] In contrast to Brooks' first trial, the jury did not hear Davis's statements attempting to shift investigators' focus to Brooks, which we subsequently held inadmissible, *see Brooks v. State,* 787 So.2d 765, 777 (Fla.2001), and there was no testimony that Brooks discussed his role in the killings with a jailhouse informant. Lacking direct evidence or an admission of guilt, the State introduced evidence of the life insurance policy on Stuart, although we had held Davis's statements in applying for the policy inadmissible in Brooks' first trial. *See id.* at 773. [21] The trial court admitted the life insurance policy solely to show the source of the payment of the $10,000, but the State clearly used the policy as evidence of Brooks' motive to kill Carlson and Stuart, despite the complete absence of evidence that Brooks knew of the existence of the policy.

***212** As in the first appeal, in which we held that statements regarding the policy taken out by Davis were inadmissible to establish Brooks' motive, the policy itself was inadmissible in Brooks' second trial to either supply a motive for Brooks or establish the source of payment. Although the trial court admitted the life insurance policy for the limited purpose of showing the source of payment, as the majority correctly points out, the two factual issues were intertwined in that Brooks would have had a motive to kill Stuart if he had known that the life insurance proceeds would provide the source of the promised payment for the murder of Carlson. In this regard, knowledge of the life insurance policy is the predicate to admissibility for either motive or source of payment.

The State not only failed to present evidence that Brooks knew of the policy but also failed to show that Davis acquired the policy in furtherance of a conspiracy to commit murder. The evidence shows that Davis obtained the policy on Stuart two months before the killings, prior to the inception of any murder conspiracy. There was no evidence that Brooks was present during any discussion about the life insurance policy. In fact, there was no testimony that Stuart was even an intended victim of the conspiracy to kill her mother. The immunized coconspirator, Gilliam, testified that he was to have been paid $500 each by Brooks and Davis to drive a car as part of the plot to kill Carlson. Gilliam also testified that in all the discussions he had with Davis and Brooks about killing Carlson, there was no mention of killing Stuart and no mention of an insurance policy on her life.

The majority correctly observes that there must be a nexus between the life insurance policy and the crime, citing the Georgia Supreme Court decisions in *Stoudemire v. State,* 261 Ga. 49, 401 S.E.2d 482, 484 (1991), and *Givens v. State,* 273 Ga. 818, 546 S.E.2d 509, 513 (2001). However, these cases hinged on the linchpin of knowledge. Where knowledge of the policy was shown, admission was approved; where the prosecution did not present evidence that the defendant knew of the policy, its admission was in error. *See id.* at 513 (stating that witness's testimony that defendant "promised to give him money for killing the victim from the insurance proceeds satisfies the nexus requirement"); *Stoudemire,* 401 S.E.2d at 484 (ruling inadmissible an insurance policy that was introduced "with absolutely no showing whatsoever of a nexus between the existence of the policy and the commission of the crime").

Courts in other states have found reversible error in the admission of evidence of life insurance policies under similar circumstances. For example, in *Smallwood v. Commonwealth,* 36 Va.App. 483, 553 S.E.2d 140, 145–46 (2001), the appellate court reversed a murder conviction in part because the trial court erroneously admitted a statement that one week before the murder, the victim had submitted a form requesting to make the defendant the beneficiary of her life insurance policy. There was no evidence that the defendant knew that his wife was making him the beneficiary of her policy, and thus no proper foundation was laid for the policy's admissibility. *See id.* at 146. Significantly, the court rejected the argument that the marital bond between the defendant and victim was sufficient alone to establish that the defendant knew of the existence of the insurance policy and the change in beneficiaries:

> [The State] produced no evidence, direct or circumstantial, to establish appellant knew about the proposed change [of beneficiary]. Although [the wife] submitted the form less than a week prior ***213** to the murder, that circumstance allows only for idle speculation that appellant knew about the submission.

Id. The court explained that where motive is a material issue, any fact or circumstance establishing a party's motive must be shown to have probably been known by the party, "[f]or a man cannot be influenced or moved to act by a fact or circumstance of which he is ignorant." *Id.* at 145 (quoting

Mullins v. Commonwealth, 113 Va. 787, 75 S.E. 193, 195 (1912)).

The holding in *Smallwood* is in accord with the law in other jurisdictions. *See Hutchins v. State,* 171 Ga.App. 309, 319 S.E.2d 130, 131 (1984) (holding that it was error to admit life insurance policy on victim where there was no showing that defendant knew she was the beneficiary named in the policy); *People v. Gougas,* 410 Ill. 235, 102 N.E.2d 152, 154 (1951) (holding life insurance policy on deceased of which accused was a partial beneficiary inadmissible in murder prosecution to show motive, where accused was without knowledge of policy's existence); *State v. Haley,* 39 Wash.App. 164, 692 P.2d 858, 862 (1984) (holding that life insurance policy was erroneously admitted where defendant, victim's divorced spouse, testified she was unaware she remained beneficiary of policy); *State v. Leuch,* 198 Wash. 331, 88 P.2d 440, 442–43 (1939) (holding, in case in which evidence showed that defendant directed agent to write life insurance policy on the victim, that question of whether defendant knew the policy was in force was for the jury).

As stated in *Hutchins,* "[w]hile evidence tending to show a motive for commission of the crime charged is admissible in a prosecution for homicide, it is essential that the facts on which the motive is assigned shall be within the knowledge of the person accused." 319 S.E.2d at 131. This rule is consistent with the principle providing that "an inference may be admissible into evidence, even though it is based upon another inference, if the other inference has been shown to exist beyond a reasonable doubt." *Benson v. State,* 526 So.2d 948, 953 (Fla. 2d DCA 1988); *see also Voelker v. Combined Ins. Co. of Am.,* 73 So.2d 403, 407 (Fla.1954) (stating that rule in criminal cases is that one inference may be deduced from another to establish an ultimate fact "only if the prior or basic inference is established to the exclusion of any other reasonable theory should another be drawn from it"). Here, the initial inference, that Brooks knew of the existence of the life insurance policy, was not established to the exclusion of a reasonable theory that Davis never made Brooks aware of the policy.

In comparison, courts approving admission of life insurance policies against defendants who were not beneficiaries of the policies have relied on evidence showing that the defendants were aware of the policies. *See Whittington v. State,* 252 Ga. 168, 313 S.E.2d 73, 79 (1984) (determining that evidence of insurance policy was relevant to motive in prosecution of defendant who was not beneficiary where victim's husband informed defendant "there was a lot of insurance" on the victim); *State v. Bird,* 238 Kan. 160, 708 P.2d 946, 961 (1985) (holding life insurance policy admissible in prosecution for solicitation to commit murder on behalf of victim's wife where defendant told another person that victim had large life insurance policy); *Tidrow v. State,* 916 S.W.2d 623, 630 (Tex.App.1996) (finding evidence of insurance policy relevant in contract killing where statements of principals made clear that "remuneration to [the defendant] for his role in the murder was to come from insurance proceeds").

Either when the defendant is a beneficiary of the policy or is alleged to have ***214** committed the murder on behalf of a beneficiary, the prosecution must at a minimum present evidence from which a jury could find that the accused probably knew of the policy's existence. *See Smallwood,* 553 S.E.2d at 145. For example, the North Carolina Supreme Court held a life insurance policy on the defendant's stepchild admissible where the defendant's husband was a life insurance agent and it could reasonably be inferred that the defendant knew that family members were insured and that her husband would tell her she was named co-beneficiary of the policy. *See State v. White,* 340 N.C. 264, 457 S.E.2d 841, 858 (1995).

The facts of this case are not analogous. Brooks was merely Davis's cousin and he was neither named as a beneficiary nor otherwise involved in procuring the policy. The majority permits an inference of Brooks' knowledge of the policy based on a determination that "it strains credulity to conclude that Brooks and Davis would not have considered the source from which Davis planned to obtain the $10,000." The inference rests on nothing more than speculation.

The trial court correctly determined that the life insurance policy taken out by Davis in which he was a named beneficiary was inadmissible to prove Brooks' motive. However, the trial court erred when it decided that the policy could be admitted to show the source of the payment to Brooks. There was no evidence that Brooks received any payment after the murders. Further, Brooks never made the source of the payment an issue at trial; his defense was that he was never involved in the murders. Thus, the relevance of the policy to show that Davis would be able to pay Brooks the price allegedly promised for killing Carlson was minimal at best.

In addition, the credibility of Gilliam, the only witness to testify that Brooks was to be paid, was so tenuous that the jury may have rejected his testimony about the

promise of payment to Brooks. This is significant in that the promise of payment was used as the evidentiary bridge to the life insurance policy. If Gilliam had not testified that Davis promised to pay Brooks a large sum of money, the policy would have been inadmissible against Brooks. And if the promised payment had been smaller, as Gilliam had previously testified, the majority might have discounted the relevance of the source of the payment. Despite the weakness of this evidentiary bridge, the assertion that a three-month-old infant was killed as part of an insurance scam perpetrated by Davis was so inflammatory that jurors could not possibly ignore it. Because Davis was not on trial, the jury had only its verdict on Brooks in which to express outrage at the cold-blooded murder committed with such a sinister motive. Thus, any probative value in admitting a life insurance policy that was not linked to Brooks in any way was outweighed by the potential for unfair prejudice, requiring its exclusion under section 90.403, Florida Statutes (2004).

The other decisions relied upon by the majority for admission of the policy are distinguishable. In *Dyas v. State,* 260 Ark. 303, 539 S.W.2d 251, 261 (1976), the appellate court held that life insurance policies on the victim were relevant for the limited purpose of explaining the ability of the victim's wife to pay the defendant and an accomplice twice as much after the murder as the original contract had stipulated would be paid in advance of the killing. Here, in contrast, the State presented no testimony of a renegotiation of either the fee or the timing of payment. Further, the defense made no issue of the source of the payment.

The majority also relies on *Strickland v. State,* 122 Fla. 384, 165 So. 289 (1936), in which this Court stated:

> ***215** A material fact to the issue in this case was motive, not only motive of the accused which was shown to be that of pecuniary gain, but also in establishing the fact that McCall was the actor in hiring the accused to commit the act which caused the death of Spear it was material to show that there was a motive for McCall to hire Strickland to perform that act. The motive which actuated McCall was material because that motive would show, or tend to show, a reason why he would be willing to pay Strickland to commit the murder.

Id. at 290. Here, unlike *Strickland,* there was no question that if Brooks was involved in the killings, he was acting on Davis's behalf. Further, *Strickland* does not mention a life insurance policy or otherwise reveal the specific evidence allegedly motivating the coconspirator, McCall, and does not reveal whether the evidence supporting McCall's motive had any bearing on Strickland's agreement to commit the murder for hire.

The error in admitting the evidence of the policy without a showing that Brooks knew of its existence was not harmless beyond a reasonable doubt. As in Brooks' first trial, "no physical or direct evidence linked him to the crimes." *Brooks,* 787 So.2d at 769. Defense counsel never argued either in opening or closing that Brooks lacked a motive for the killings. In contrast, several times during closing argument, the prosecutor drew the jury's attention to the life insurance policy as a significant motivating factor both for Davis, who was not on trial, and for Brooks. The State pointed to the life insurance policy in opening statement to connect Brooks to Davis's "sinister motive" in orchestrating the murders, and asserted in closing argument that Brooks committed the killing for "his share of that [life insurance] money." The use of the policy in the State's guilt-phase closing argument was pervasive:

> This was a planned, premeditated, thought-out execution to help Walker Davis, Jr., avoid the responsibilities of a child that he signed an insurance and bought an insurance policy claiming he was the father of.
>
> ....
>
> That life insurance policy bought by Walker Davis, Jr., in the amount of one hundred thousand dollars for an infant that he told Lamar Brooks was not even his, for an infant he couldn't afford to have in his life because he was already married, he already had two children, he already had a third child. His wife had just given birth. That's evidence of premeditation.
>
> ....
>
> What was Walker Davis, Jr.'s motivation? He was married. He's got three children. He's got a brand new baby by his wife. Rachel Carlson wanted child support from him.

> Rachel Carlson was constantly coming over to his house crying and upset. He was going to have to deal with that for seventeen years and nine months if he didn't do something about it, and he admitted paternity of that child on the insurance application, and that's really the true evidence of motive, isn't it? He bought a hundred thousand dollar insurance policy on a baby that he told this defendant wasn't even his. That's what Lamar Brooks told Bettis and Hollinshead during his interview on Friday, April 26th. [22] He ***216** bought a hundred thousand dollars worth of insurance, not a burial policy. That's not any kind of burial anybody's ever heard about, not two thousand, not three thousand, not five thousand, not even ten thousand. One hundred thousand dollars. Perhaps Mr. Funk, like Mr. Scachacz, will tell you that doesn't mean anything. You know it does. It speaks volumes about what happened to Alexis Stuart. Who else stood to benefit under the evidence from the death of this child? Who else, besides Walker Davis, Jr., and his cousin, Lamar Brooks? No one. No one else would benefit from the heinous murder of this child. What about Lamar Brooks' motive? Well it's clear. His share of that money. He didn't have any money, couldn't even afford to fly home.... Had no car. Ten thousand dollars for him to commit the murders of two innocent people. His cousin was the person whose problem Rachel Carlson and Alexis Stuart created, his cousin, Walker Davis, Jr. Money and family, that was Lamar Brooks' motive.
>
> ....
>
> Well, the money had to come from somewhere, ladies and gentleman, didn't it? Didn't it have to come from somewhere? He was to get ten thousand dollars, thousands of dollars.... Now Walker Davis was just an airman, he had no car, he had no phone, he had no money in the bank.... Ladies and gentlemen, it's a reasonable inference that he had to tell Lamar Brooks where he was going to come up with the money to pay him to help commit this murder. [23]

Under these circumstances, the unproven implication that Brooks knew of the insurance policy and was therefore more strongly motivated to commit the murders most certainly could have affected the verdict.

I acknowledge that the State presented a tremendous amount of evidence circumstantially incriminating Brooks and Davis, including their presence near the murder scene. However, the test for harmlessness

> is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986). In light of the absence of direct or compelling forensic evidence of Brooks' complicity in these murders as well as the dubious credibility of the State's key witness, I cannot conclude beyond a reasonable doubt that the errors in admitting the life insurance policy, combined with the erroneous admission of the evidence from the child support caseworker on which Brooks also was not shown to ***217** have any knowledge, did not affect the verdict. Accordingly, I would again reverse Brooks' convictions and remand for a new trial.

Finally, I concur in the majority's determination that the underlying felony of aggravated child abuse merges with the homicide for the killing of Stuart with a single stab wound, invalidating the "murder in the course of a felony" aggravator found by the trial court as to both victims. If both murder convictions were reversed, as I believe they should be, this issue would become relevant only in the event of a capital penalty phase after retrial. However, given the majority's affirmance of the convictions, the determination that the aggravator should be stricken necessitates a harmless error analysis. In light of the alternative aggravating factor for a victim under twelve, rejected because it would have been improperly doubled with the murder in the course of a felony aggravator, I agree with the majority that the error is harmless as to the sentence for the murder of Stuart. The error is also

harmless on the sentence for the murder of Carlson, on which, unlike the murder of Stuart, the trial court found the additional aggravating factor that the murder was especially heinous, atrocious, or cruel.

ANSTEAD, J., concurs.

LEWIS, J., concurring in part and dissenting in part.

I fully concur with the majority's decision to affirm Brooks' convictions and sentences for the murders of Rachel Carlson and her infant daughter, Alexis Stuart. I also concur with the reasoning employed by the majority in addressing each claim of error asserted by Brooks with one exception. I cannot agree with the majority's determination that aggravated child abuse was not available for consideration in the instant matter because Brooks inflicted only one lethal stabbing blow on the infant's body. In so doing, the majority has, in my view, misapplied judicial precedent to void aggravated child abuse as an aggravating circumstance for sentencing *and* also eliminated aggravated child abuse as a felony underlying application of the felony murder doctrine in any case involving the perpetration of a single act of violence on a child. I believe the result in this case contravenes the plain language of the felony murder statute and is directly contrary to the Legislature's intent in amending that statute to include the felony of aggravated child abuse as a basis for application of the doctrine of felony murder and as a factor to be weighed in aggravation in the sentencing determination. With this severely limiting decision, it is now necessary that the Florida Legislature reexamine and reevaluate this issue to determine if its intent has now been frustrated and whether any modifications are appropriate.

Brooks was charged with two counts of first-degree murder on the alternative theories of premeditated murder and felony murder with a weapon for the murders of Rachel Carlson and Alexis Stuart. Brooks *was not* independently charged with nor was he convicted of the felony of aggravated child abuse. Brooks was convicted by a general jury verdict of two counts of first-degree murder.

On appeal to this Court, Brooks has argued that the trial court erred by finding that he committed the murders during the course of aggravated child abuse and then also invoking the aggravated child abuse aggravator, as set forth in section 921.141(5)(d) of the Florida Statutes, during sentencing. Brooks contends that because Alexis Stuart was slain with a single stabbing blow, the trial court should have found that the child abuse allegation totally merged with the more serious homicide charges. Ultimately, under Brooks' interpretation ***218** of the law, the State should have been limited to proving first-degree murder *exclusively* on the theory of premeditation and should have been absolutely precluded from applying the aggravated child abuse aggravating circumstance in sentencing under these facts, a principle of law accepted and advanced by the majority today.

The majority opinion adopts and endorses Brooks' view and applies the rule of law established in *Mills v. State,* 476 So.2d 172 (Fla.1985), to totally void aggravated child abuse as both a basis for any felony murder conviction and as a statutory aggravator in sentencing under these circumstances. However, there are salient differences between *Mills* and the present case which, in my view, render the rule established in *Mills* entirely inapposite to resolution of the matters now before the Court.

In *Mills,* the indictment charged the defendant with one count of felony murder with burglary as the underlying felony, one count of burglary while armed with a firearm, and one count of aggravated battery with a firearm. *See id.* at 177.[24] The defendant in *Mills* had broken into the victim's home with an intent to steal, and when discovered, killed the victim with a single shotgun blast. *See id.* at 174. The defendant was convicted on all counts. *See id.* As noted, in the case we consider today no separate felony was charged, unlike *Mills.*

On appeal, Mills argued that his aggravated battery conviction was invalid because aggravated battery is a lesser included offense of first-degree murder. *See id.* at 177. After reviewing the statutory elements of felony murder and aggravated battery, this Court concluded that aggravated battery was not a lesser included offense of felony murder because "[i]t is possible to commit each of these crimes without committing the other, and each contains elements which the other does not." *Id.* The Court then explained,

> Even so, we do not believe it proper *to convict a person for aggravated battery and simultaneously for homicide as a result of one shotgun blast.* In this limited context the felonious conduct merged into one criminal act. We do not believe that the legislature intended *dual convictions* for both homicide and the lethal

> act that caused the homicide without causing additional injury to another person or property.

Id. (emphasis supplied). Based on this reasoning, this Court vacated Mills' aggravated battery conviction. *See id.*

However, as succinctly stated by this Court in *Lukehart v. State,* 776 So.2d 906 (Fla.2000), the issue resolved in *Mills* was whether convictions of both first-degree murder and aggravated battery could both stand when arising out of the same act. *See id.* at 923. The present case does not involve the imposition of multiple convictions and punishments for the same act. Thus, in my view, *Mills* has no application to the instant factual scenario, where Brooks was not separately charged with and convicted of felony murder and aggravated child abuse, but where aggravated child abuse simply formed the basis of the alternative felony murder charge and was applied as an aggravating circumstance in sentencing.[25] Instead, this case requires this Court to determine whether the felony ***219** murder doctrine can be invoked when the same act of violence constitutes the act of aggravated child abuse and also results in the death of the child. This is a different question than that presented in *Mills,* and one, I suggest, the majority misapprehends.

Prior to 1984, the felony murder rule was triggered in Florida when a homicide was committed during the perpetration of certain enumerated acts that were separate and independent from the unlawful killing itself. For example, the felony murder statute provided that first-degree murder occurred when a person committed a homicide during the perpetration of crimes such as arson, sexual battery, robbery, burglary, and kidnapping. *See* § 782.04(1)(a) 2., Fla. Stat. (1983). Florida's felony murder statute did not include the felonies of aggravated assault or aggravated battery—acts which accompany most any homicide. This distinction set Florida law apart from that in other states, such as New York, where courts applied the merger doctrine to reign in broadly worded felony murder statutes that included all felonies, even aggravated assault and battery, and thereby transformed every homicide into first-degree murder. *See Robles v. State,* 188 So.2d 789, 792 (Fla.1966).

In 1984, the Florida Legislature amended the felony murder statute to specifically include "aggravated child abuse" among the felonies that would invoke the felony murder rule. *See* 782.04(1)(a)2. h., Fla. Stat. (Supp.1984). As noted by the majority, "aggravated child abuse" was defined, in part, as the commission of an aggravated battery on a child.[26] The plain text of the statute then, as now, affords no indication that the Legislature intended to exclude application of the felony murder doctrine in those instances of aggravated battery on a child that involve a solitary stab wound, a lone blow to the head, one gunshot wound, or any other single act of violence. *See Holly v. Auld,* 450 So.2d 217, 219 (Fla.1984) ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, ... the statute must be given its plain and obvious meaning."). Thus, in my view, the felony murder statute clearly captures all instances of aggravated child abuse, regardless of whether a single violent act constitutes the abuse and simultaneously causes the child's death in this context. In these circumstances the statutes and the law do not limit the State to only premeditation.

The plain statutory language reflects a policy decision to protect the children of this state by subjecting those whose acts of child abuse produce death to the highest possible penalty.[27] The Legislature has ***220** made the same determination with regard to other classes of our most vulnerable citizens—the elderly and persons with disabilities.[28] Application of *Mills* to the facts presently before the Court would graft limitations based on the nature of the crime in contravention of the plain text of the felony murder statute. *See Mapps v. State,* 520 So.2d 92, 93 (Fla. 4th DCA 1988) ("It is obvious that our legislature did not intend that the felonies specified in the felony-murder statute merge with the homicide to prevent conviction of the more serious charge of first-degree murder.").

At the time of our decision in *Mills,* as well as currently, aggravated battery of an adult cannot serve as the basis for a felony murder conviction or be applied as an aggravating factor during the course of a sentencing determination. Application of the felony murder rule in cases where a homicide is committed during the course of an aggravated battery of an adult may, indeed, present constitutional concerns that would justify imposition of the merger doctrine to void the felony murder conviction. By law, however, aggravated battery of a child can serve as the basis for a felony murder conviction, and can support application of the murder in the course of a felony aggravator in sentencing, regardless of whether a single act of violence constituted both the abuse and resulted in the death of the child. Nothing in *Mills,* other existing jurisprudence, or the felony murder statute itself compels or permits an alternative conclusion.

In my view, there is no question that Brooks engaged in aggravated child abuse when he inflicted a single, lethal stab wound on Alexis Stuart. Save the interpretive gloss applied to the felony murder statute by the majority, this act of aggravated child abuse can serve as a basis for the murder convictions under the felony murder rule and support application of the murder in commission of a felony aggravating circumstance in sentencing. This Court should not proceed to effectively amend or invalidate the felony murder statute by holding that aggravated child abuse is unavailable as a basis for felony murder in the absence of multiple acts of abuse. It certainly should not do so under the auspices of inapplicable judicial precedent. The reasoning undertaken by the majority in this regard is fatally flawed. For these reasons, I respectfully dissent from the portion of the majority opinion that voids felony murder as a potential theory underlying Brooks' convictions and invalidates the use of aggravated child abuse pursuant to the Florida Statutes as a statutory aggravating circumstance.

WELLS and BELL, JJ., concur.

PARIENTE, C.J., dissenting from denial of rehearing.
Although I dissented in part from the majority opinion and would have reversed Brooks' convictions because of the admission of the life insurance policy, I concurred in the majority's determination that ***221** the aggravated child abuse merged into the felony murder and therefore did not support a separate aggravating circumstance. Having reached that conclusion, I must now concur with Justice Lewis that Brooks' convictions should be reversed and the case remanded for a new trial. Under the United States Supreme Court decision in *Yates v. United States,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), and this Court's decision in *Fitzpatrick v. State,* 859 So.2d 486 (Fla.2003), reversal is required because the general verdict of guilt precludes us from determining whether the jury relied upon the valid premeditated murder theory or the legally invalid felony murder theory.

ANSTEAD, J., concurs.

LEWIS, J., dissenting.
Although I continue to disagree with the original majority's holding that aggravated child abuse was not available as a matter of law for consideration as the felony underlying a felony murder theory of guilt because at all times it has been undisputed that only one lethal stabbing blow was inflicted to the infant's body for the reasons I set forth in my separate opinion in this case, *see Brooks v. State,* 30 Fla. L. Weekly S481, S493 (Fla. June 23, 2005) (Lewis, J., concurring in part and dissenting in part), in my view, the Court majority having reached the conclusion that no underlying felony existed as a matter of law, we must grant Brooks's motion for rehearing, reverse his convictions, and remand this case for a new trial. The majority's decision has been based upon the theory of merger because it would be unconstitutional and illegal to predicate two convictions on the single act. As more fully explained below, pursuant to our previous opinion in *Fitzpatrick v. State,* 859 So.2d 486 (Fla.2003), which was required by the United States Supreme Court's decision in *Yates v. United States,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), the majority's conclusion that a single stabbing blow cannot constitutionally, as a matter of law, constitute an underlying felony for the purpose of application of the felony murder doctrine requires this Court to reverse Brooks's convictions. *See also Mackerley v. State,* 777 So.2d 969 (Fla.2001) (holding that it is reversible error to sustain a conviction based on a general jury verdict for first degree-murder on dual theories of premeditation and felony murder where the felony underlying the felony murder charge is based on a legally unsupportable theory even when there is evidence to support premeditation); *Valentine v. State,* 688 So.2d 313 (Fla.1996) (holding that a conviction for attempted first-degree murder must be reversed where the jury was instructed on dual theories of attempted first-degree premeditated murder and attempted first-degree felony murder when this Court later determined that attempted first-degree felony murder does not exist in Florida).

In *Fitzpatrick,* the trial judge instructed the jury with regard to both premeditated murder and felony murder with robbery and burglary as the underlying felonies. *See id.* at 490. The jury returned a nonspecific general verdict finding Fitzpatrick guilty of first-degree murder. *See id.* On appeal, Fitzpatrick asserted that reversal was required because the jury may have relied upon an erroneous and illegal definition of the underlying felony of burglary as the basis for a felony murder conviction. *See id.* In our opinion, we noted that the jury was instructed with regard to the statutory definition of burglary at the time but that definition did not accommodate the limitation on burglary as announced by this Court in *Delgado v. State,* 776 So.2d 233 (Fla.2000). Based on this conclusion, the Court, upon application of the United ***222** States Supreme Court's decision in *Yates v. United States,* 354

U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), reversed Fitzpatrick's conviction, holding "that a general jury verdict cannot stand where one of the theories of prosecution is legally inadequate." *Fitzpatrick,* 859 So.2d at 490. We noted that we were compelled to reverse Fitzpatrick's conviction because a general jury verdict based on multiple theories of prosecution, one of which is felony murder based on an underlying felony later determined to be legally insufficient, cannot be upheld due to the fact that it is impossible to "discern whether the jury convicted Fitzpatrick based on the legally sufficient grounds ..., or the inadequate charge of felony murder based on burglary." *Id.* at 491.

In my view, our decision in *Fitzpatrick* and that in *Yates* are directly applicable in the instant matter and require the reversal of Brooks's convictions. Initially, it is clear that the jury here, as in *Fitzpatrick,* was instructed by the trial court on dual theories of guilt—premeditated first-degree murder and also first-degree felony murder. Additionally, as was the verdict in *Fitzpatrick,* the jury in the instant matter entered only a general verdict finding Brooks guilty of first-degree murder after being instructed on both theories. Moreover, similar to our holding in *Fitzpatrick* that the crime of burglary could not legally serve as the felony underlying the felony murder charge, the original majority in this case has determined that the jury was erroneously instructed that the aggravated child abuse charge could serve as the underlying felony in a felony murder theory of guilt because the undisputed single stabbing blow alleged to support the charge of aggravated child abuse does not exist as a matter of law on these undisputed facts and would be unconstitutional and illegal, thereby barring the existence of aggravated child abuse as the underlying felony.[1] *See Brooks,* 30 Fla. L. Weekly at S485–86. Given the general jury verdict entered in the instant matter, similar to the situation the Court faced in *Fitzpatrick,* it is impossible to discern whether the jury here convicted him on the legally sufficient basis of premeditated murder or the legally invalid charge of felony murder based on an invalid underlying aggravated child abuse felony which the original majority in this case determined did not and could not constitutionally exist as a matter of law. Based on the foregoing, in my view, it is clear that this Court's decision in *Fitzpatrick,* which applied the United States Supreme Court's holding in *Yates* that a general jury verdict is invalid when it rests on multiple theories of liability, one of which is legally inadequate, *see Yates,* 354 U.S. at 312–13, requires that the conviction here be overturned and his case remanded with instructions for a new trial to be conducted. The failure to do so is in direct conflict with *Yates* and refuses to follow its clear mandate.

The State attempts to transform the original majority's decision in the instant matter into a factual dispute and argues that the majority merely established that there was a simple failure of proof in the State's case and that cases involving factual or evidentiary insufficiency are governed by the United States Supreme Court's opinion in *Griffin v. United States,* 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), not by *Yates* which, the State contends, ***223** only applies to legal insufficiencies. A full reading of the High Court's opinion in *Griffin* in proper context reveals that the State incorrectly contends that *Griffin* has application here. In *Griffin,* the defendant was charged with and found guilty by general verdict of unlawful conspiracy with two alternative objects: "(1) impairing the efforts of the Internal Revenue Service (IRS) to ascertain income taxes; and (2) impairing the efforts of the Drug Enforcement Administration (DEA) to ascertain forfeitable assets." 502 U.S. at 47. The defendant appealed, asserting that the decision in *Yates* required reversal because "the general verdict could not stand because it left in doubt whether the jury had convicted her of conspiring to defraud the IRS, for which there was sufficient proof, or of conspiring to defraud the DEA, for which (as the Government concedes) there was not." *Id.* at 48. The High Court rejected the defendant's argument, distinguishing the facts of *Yates,* and held that it was unwilling to extend *Yates* to the facts of *Griffin* to "set aside a general verdict because one of the possible bases of conviction was neither unconstitutional ..., nor even illegal ..., but *merely unsupported by sufficient evidence.*" *Id.* at 56 (emphasis supplied). Isolated sentences taken out of proper context cannot alter the fundamental difference.

In my view, the issue now presented in the instant matter is entirely distinct from the issue addressed in *Griffin* and, therefore, the outcome of the present case is not controlled by that decision. In *Griffin,* the High Court was assessing whether it was error to allow a theory of responsibility to be submitted to the jury when there was only *insufficient evidence* to support one theory of responsibility, whereas the issue presented here, as directly presented in *Yates,* involves a *legally invalid* theory of responsibility being submitted to the jury due to the underlying felony presented as the only basis for the felony murder charge being nonexistent as a matter of law under the undisputed facts—creating a *legal bar* to a felony murder conviction or a nonexistent underlying felony as a matter of law. As we made clear in *Fitzpatrick,* in cases

such as this, the uncertainty is created because it is impossible to discern whether the jury in the instant matter convicted Brooks of the legally valid charge of premeditated murder, or the *legally invalid* charge of felony murder based on aggravated child abuse as the underlying felony that requires the reversal of Brooks's conviction. *See Fitzpatrick,* 859 So.2d at 491; *see also Yates v. United States,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957). The U.S. Supreme Court in *Griffin* even recognized this clear distinction and provided further explanation:

> That surely establishes a clear line that will separate *Turner* from *Yates,* and it happens to be a line that makes good sense. 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, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Griffin, 502 U.S. at 59–60.

In a similar manner, our decision in *San Martin v. State,* 717 So.2d 462 (Fla.1998), ***224** is also clearly inapposite. First, the defendant in *San Martin* asserted that in the capital punishment context a general verdict form is itself unconstitutional which is not the issue here. Secondly, in *San Martin,* the defendant asserted that because the *evidence* was insufficient to support premeditation, it was reversible error for the trial court to instruct the jury on both premeditated and felony murder. *See id.* at 469. Although we agreed with San Martin that there was insufficient evidence to support premeditation, we held that any error was harmless because the evidence clearly supported a conviction for felony murder. *See id.* Relying on the decision in *Griffin,* we affirmed the defendant's conviction for first-degree murder, noting that "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." *See San Martin,* 717 So.2d at 470 (emphasis supplied). However, unlike the circumstance presented in *San Martin,* the issue presented here is whether a general verdict can stand when it may have rested on a *legally* invalid or unavailable theory of guilt—we have undoubtedly held that it cannot. In *San Martin,* we specifically recognized that "a general guilty verdict must be set aside where the conviction may have rested on a ... legally inadequate theory." *Id.* Therefore, because the issue in *San Martin* clearly addressed a *factually* unsupported theory being submitted to the jury, whereas the issue in the instant matter addresses the issue of a *legally* invalid theory of liability being submitted to the jury, our decision in *San Martin* is also of no application in consideration of this motion for rehearing.

Based on the above analysis and distinction, in my view, it is clear that the majority, by denying the motion for rehearing, has affirmed an unconstitutional imposition of the death penalty contrary to both applicable Florida and United States Supreme Court authority. The majority's denial of Brooks's motion for rehearing has rendered him without the means or a forum in which he can obtain relief except federal intervention to prevent the unconstitutional imposition of the death penalty. Accordingly, I dissent.

All Citations

918 So.2d 181, 30 Fla. L. Weekly S481

Footnotes

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

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

3 As discussed in greater detail within, Gilliam's reports about the failed murder attempts are corroborated by the testimony of several law enforcement officers and government records.

4 The trial court's limitation on the use of the insurance policy to establish the source of funding, but not Brooks' motive, is internally inconsistent because it draws an artificial distinction between these convergent concepts. However, the trial court's caution and limitation is certainly understandable with reference to some of the general language in *Brooks I.*

5 The nexus requirement articulated in *Stoudemire* and *Givens* apparently supersedes other cases from the State of Georgia cited by the partially dissenting opinion of Chief Justice Pariente for the proposition that the prosecution must show that the defendant knew of an insurance policy prior to its introduction into evidence. *See* concurring in part and dissenting in part op. of Pariente, C.J., at 5, 7 (citing *Hutchins v. State,* 171 Ga.App. 309, 319 S.E.2d 130 (1984); *Whittington v. State,* 252 Ga. 168, 313 S.E.2d 73 (1984)).

6 Indeed, the relevance and highly probative nature of the policy to Brooks' motive is born out by the scenario that would have likely emerged in its absence. Under such circumstances, the defense would have certainly impeached Gilliam's testimony with regard to the $10,000 Davis promised to pay Brooks with evidence of Davis's modest means.

7 These statements included those of a car salesman who testified that Davis inquired about a $32,000 automobile and stated that he was coming into some money, and Anthony Sievers, a friend who testified that Davis told him about procuring a new car with “no payments involved.” *See Brooks I,* 787 So.2d at 772.

8 In the initial trial, Brooks challenged the admissibility of the hearsay testimony of Steve Mantheny regarding statements made by Davis in obtaining the insurance policy. *See Brooks I,* 787 So.2d at 772. We noted that Brooks had objected at trial to both Mantheny's testimony and introduction of the actual life insurance policy. *See id.* Our holding with respect to the admissibility of the challenged evidence, however, focused solely on Davis's hearsay statements, and did not expressly address the insurance policy. *See Brooks I,* 787 So.2d at 773 & n. 4 (holding that “the trial court abused its discretion in admitting *Davis's numerous statements* to Samms, Johnson, Sievers, *and Mantheny,* and Brooks was substantially prejudiced as a result”) (emphasis supplied). There is no indication that this Court treated the insurance policy, itself, as a hearsay statement, or in any way held that the insurance policy itself was not admissible.

9 According to the testimony of an officer from the Crestview Police Department, Thomas's apartment is located 0.38 miles from where Carlson's car with the bodies was found.

10 The presence of Brooks in the apartment was corroborated by the DNA found on a cigarette butt recovered from Thomas's ashtray which matched Brooks' DNA.

11 Trial testimony established that the credit union is located 0.65 miles from Thomas's apartment.

12 Bank records show that Rushing did indeed make a withdrawal from her account at 9:53 p.m. on the night of the murders.

13 This evidence included nondescript contact blood stains found on the exterior of the vehicle on the driver's-side front and rear doors; contact blood stains on the interior rear driver's-side door that were consistent with someone with blood on their hands attempting to exit the vehicle; contact stains on the driver's headrest consistent with placement of a bloody hand; and medium-velocity blood spatter and arterial spurting on the front passenger's door panel. Based on this evidence, the crime scene analyst concluded that Carlson was behind the steering wheel when the attack began, that the attack continued as she moved to the front passenger's side of the vehicle, and that her attacker was seated in the driver's-side back seat. Another forensic expert concurred with this conclusion.

14 The crime scene and forensic experts concluded that the blood spatter pattern on the inside of the front passenger door precluded the possibility of someone occupying that seat at the time the stabbing occurred.

15 The trial court refused to consider that Stuart was less than twelve years of age in aggravation, finding that consideration of that factor would constitute improper doubling with the factor of murder in the course of a felony predicated on aggravated child abuse.

16 Davis's dog was named “Heavy.”

17 We reject, however, the State's contention that Brooks' statements also formed an inseparable part of the crime charged and were necessary to explain the entire context of the criminal episode. The case law cited by the State is distinguishable from the instant case because the testimony regarding Brooks' statements could have been easily excised from the explanation of the two attempts on Carlson's life. *See Zack,* 753 So.2d at 17 (concluding that evidence of earlier crimes is admissible where it casts light on perpetrator's motive, intent, and timing of the crime charged); *Coolen v. State,* 696 So.2d 738, 742–43 (Fla.1997).

18 The other examples of demonstrable prejudice cited by Brooks are meritless and will not be discussed in detail herein. According to Brooks, prejudice meriting a change of venue was evident in (i) the existence of a large number of for-cause challenges to which the State did not object; (ii) defense counsel's renewal of the motion for change of venue during voir dire; (iii) the size of the community where the crimes took place; (iv) the notoriety resulting from a black male being accused of killing a white woman and her baby; and (v) the weakness of the State's case. Factors (ii) and (v) are notably self-serving and unsuitable for making a venue change determination. Factor (i) is equally unsuitable for judging when a change in venue is warranted because of the wide range of reasons for-cause challenges are made. Factors (iii) and (iv) are premised on the notion that the facts of the case would inflame public opinion. However, in the instant case, six years passed between the crimes and Brooks' second trial. Therefore, any impact an inflammatory factual scenario may have had would have been substantially mitigated.

19 A forensic expert testified that Stuart's wounds were consistent with the perpetrator stabbing her in the heart and then returning to inflict other stab wounds.

20 Gilliam was convicted of perjury for giving conflicting testimony in previous proceedings in this case.

21 I regret that we did not provide clearer guidance regarding this issue on retrial. However, it stands to reason that our holding that evidence of Davis's desire to purchase the life insurance policy was not relevant to

prove Brooks' motive or intent absent proof that Brooks possessed knowledge of the policy would extend to evidence of the life insurance policy itself.

22 From the cold transcript, this comment can be read to suggest that Brooks told detectives that Davis informed him of the policy, which would be contrary to the detectives' testimony. Defense counsel did not object to this remark, suggesting it was delivered in such a manner as to indicate that Brooks said Davis told him only that he was not the father of Carlson's infant daughter.

23 Brooks' counsel objected to the prosecutor's references to the policy in closing argument and moved for mistrial on grounds that the argument highlighted evidence that tended to prove Davis's motive but not that of Brooks. The objection was overruled and the motion for mistrial denied.

24 Aggravated battery was not then, and is not now, an enumerated felony under the felony murder statute. *See* § 782.04(1)(a) 2., Fla. Stat. (2004).

25 Indeed, the merger of charges and convictions contemplated by this Court's decision in *Mills* would be impossible in the instant case where there are not two charges or convictions to merge.

26 The statute in effect in 1984 provided:

> “Aggravated child abuse” is defined as one or more acts committed by a person who:
>
> (a) Commits aggravated battery on a child;
>
> (b) Willfully tortures a child;
>
> (c) Maliciously punishes a child; or (d) Willfully and unlawfully cages a child.

§ 827.03(1)(a)-(d), Fla. Stat. (Supp.1984).

The current statute provides:

> “Aggravated child abuse” occurs when a person:
>
> (a) Commits aggravated battery on a child;
>
> (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
>
> (c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.

§ 827.03(2)(a)-(c), Fla. Stat. (2004).

27 Although extrinsic aids need not be invoked to divine legislative intent where the statutory text is plain and clear, *see Holly,* 450 So.2d at 219, the legislative history of the 1984 amendment incorporating aggravated child abuse to the felony murder statute further demonstrates the divergence between the majority's opinion and the Legislature's intent. According to the staff summary and analysis at the time the statute was amended, aggravated child abuse was added to the statute to remedy the then-current situation in which, “If a child is killed as a result of aggravated child abuse, and no premeditation is proved, under the present murder statute, the maximum murder charge would be second or third degree murder.” Fla. H.R. Comm. on Judiciary–Crim., HB 135 (1983) Staff Analysis 1–2 (final June 13, 1984) (on file with Fla. State Archives).

28 Aggravated abuse of an elderly person or disabled adult can also serve as the felony underlying felony murder and as an aggravating circumstance during sentencing. *See* §§ 782.04(1)(a) 2. i., 921.141(5)(d), Fla. Stat. (2004).

1 It must be clear that the issue presented by Brooks in his motion for rehearing does not involve a disputed issue of fact. The fact that Alexis Stuart suffered only a single stabbing blow was never in dispute at any time. During the trial, neither party contended that multiple wounds were inflicted upon Alexis Stuart. Therefore, the issue presented in this motion for rehearing is strictly an issue of law.

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