Electronically Filed 08/26/2013 02:30:07 PM ET

RECEIVED, 8/26/2013 14:33:32, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-629

LOWER COURT CASE NO. 96-CF-735 B

LAMAR Z. BROOKS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASELAW

ARGUMENT IN REPLY

ARGUMENT I

MR. BROOKS WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL AND/OR THE STATE'S FAILURE TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE AND/OR THE STATE'S PRESENTATION OF FALSE OR MISLEADING EVIDENCE, ALL IN VIOLATION OF MR. BROOKS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS. AS A RESULT, CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S VERDICT.

In its Answer Brief, Appellee reframes Mr. Brooks' issue as asserting that trial counsel should have presented an affirmative defense (See Answer at 46)("Brooks asserts that his trial attorneys, Mr. Funk and Mr. Szachacz, were ineffective for relying on reasonable doubt rather than presenting an affirmative defense case.").

Appellee's characterization of Mr. Brooks' claim is grossly inaccurate. Mr. Brooks in no way has faulted trial counsel for failing to raise an affirmative defense. See Wright v. State, 920 So. 2d 21, 24 (Fla. 4th DCA 2005)("An affirmative defense does not concern itself with the elements of the offense at all; it concedes them" and "asserts a good excuse or reason."). Rather, Mr. Brooks has consistently maintained his innocence. His complaint is, and always has been, that the jury did not hear critical, exculpatory evidence due to the ineffective assistance of counsel and/or the State's failure to disclose.

While emphasizing trial counsels' self-serving statements that their main focus was on reasonable doubt due to the lack of scientific evidence directly linking Mr. Brooks to the murders

(Answer at 46), Appellee ignores the fact that as a result of trial counsels' deficient performance, the jury did not hear available evidence that goes directly to this very point. For instance, the jury did not hear available testimony that extensive hair examination was conducted by the Florida Department of Law Enforcement (FDLE), that hairs found at the scene were compared to Mr. Brooks' known hair samples, and that no hairs were microscopically consistent with Mr. Brooks (D-Ex. 56, 57). Moreover, the jury did not hear testimony that FDLE received debris from numerous items belonging to Mr. Brooks, including his sweat pants, tee shirt, sun visor, boots, socks, sweatshirt and gloves, and was unable to locate any hairs that were consistent with the victims (D-Ex. 56, 57, 58). Additionally, the jury did not hear available testimony that an FDLE expert examined multiple items belonging to Mr. Brooks, and that none of them tested positive for blood (D-Ex. 73, 90).

Appellee also proceeds to address several of counsels' other alleged failures. As to the Caucasian hair found in the victim's palm, Appellee claims that there was no deficient performance because trial counsel Funk testified that the hair was similar in color and length to the victim's hair, and a hair analyst was called at the first trial and stated that the hair was similar in appearance to the adult victim's hair (Answer at 49). According to Appellee, "It is not deficient not to present evidence regarding a hair that is found in the victim's palm that you have reason to think is just the victim's own hair." (Answer at 49).

While relying on trial counsel's statements, Appellee

provides no record citation to the first trial regarding the hair analyst's testimony as to this point. An examination of the analyst's actual testimony, rather than trial counsel's supposed recollection of that testimony, indicates that there was no such testimony.[1] In the first trial, Robert Hursey, a forensic hair examiner with FDLE (R. 3911), testified as to the relevant hair analysis as follows:

> Q Debris from the bags covering the hands of Rachel Carlson?
>
> A One Caucasian head hair, no Negroid hairs present.
>
> Q Did you note the character of that Caucasian head hair?
>
> A No, sir, I did not.
>
> Q So you don't know if it was red/blonde or wavy?
>
> A No, sir, I did not make a note.
>
> Q Trace material from the right hand of Rachel Carlson?
>
> A On Caucasian head hair fragment, no Negroid hairs present.
>
> Q If you come to another Caucasian hair that you characterize as red/blonde wavy, will you just let me know?
>
> A Yes, sir, I'm reading straight out of the notes.
>
> Q I thought you were, and I just wanted to make sure. That way I won't have to keep asking. Your

[1]Because Appellee has failed to provide a proper record citation, Mr. Brooks is in the difficult position of having to scour an extensive record to prove that something didn't occur. Perhaps Appellee knows where this alleged testimony is located, but Mr. Brooks has been unable to find it.

Exhibit 36 identified as hair from the left hand plam area of Rachel Carlson.

A Yes, there's one Caucaian hair, no Negroid hairs present.

Q Trace material from the right palm of Rachel Carlson?

A There were no hairs present.

Q And from the left palm?

A No hairs present.

(R. 3950-51). Contrary to Appellee's assertion, there is no indication that the hair analyst testified at the first trial that the hair in question was similar in appearance to the adult victim's hair.

Appellee contends that in any event, no prejudice was established. In what Appellee deems an "unfortunate new trend in capital litigation", collateral counsel was granted an evidentiary hearing on a claim and then failed to prove the underlying factual basis for the claim (Answer at 49). Appellee posits that, "Post-conviction counsel needed to call a hair expert to establish that the Caucasian hair was not that of the victim or her infant." (Answer at 49). As support for these assertions, Appellee relies on this Court's decision in Reed v. State, 875 So. 2d 415, 423-427 (Fla. 2004).

Mr. Brooks submits that Appellee's reliance on Reed is mistaken. In Reed, collateral counsel asserted that trial counsel should have hired various experts to challenge the State's case. 875 So. 2d at 423-27. This Court subsequently affirmed the denial of relief on the basis that Reed failed to

present evidence indicating that that the findings of the State's experts were in error. Id. at 427. Yet here, unlike in Reed, Mr. Brooks is not challenging the finding of the State's expert that there was a Caucasian hair found in the victim's palm. Rather, he is faulting trial counsel for failing to bring this undisputed fact to the jury's attention, which would have enhanced trial counsel's theory of reasonable doubt. See e.g., Hoffman v. State, 800 So. 2d 174, 180 (Fla. 2001)("With the evidence excluding Hoffman as the source of the clutched hair, defense counsel could have strenuously argued that the victim was clutching the hair of her assailant, *but* that assailant was not Hoffman.").

As to evidence of another suspect, Appellee asserts that there was no deficient performance (Answer at 50). Appellee relies on trial counsels' statements that they could not prove that Gundy was the actual perpetrator; that they "could not prosecute Gundy"; and that counsel felt that reasonable doubt based on a lack of evidence linking Mr. Brooks to the murders was the better defense (Answer at 50).

Appellee's argument ignores the fact that trial counsel clearly intended to focus on Gundy as an alternative suspect in order to raise reasonable doubt. Appellee does not dispute that trial counsel told the jury that it would learn about the cigarette outside the door of the victim's car and that the same brand was outside Gundy's residence; that it would learn all about Gundy and that witnesses told the police that they saw Gundy with the victim on the night that she was murdered; and that it would learn about the K-9 tracking dog that was brought

to the scene and led the police officers to Gundy's residence (T. 1101-05).

Appellee alternatively claims that "[d]efense counsel did point to Gundy", (Answer at 51), thus there was no deficient performance. While making this assertion, Appellee offers no examples during the trial where defense counsel pointed to Gundy. The reality is that when trial counsel was unable to "point to Gundy" during cross-examination of the State's witnesses because it was outside the scope of the direct examination, counsel did nothing more than proffer the evidence in the event the issue was raised on direct appeal. Thus, to Mr. Brooks' detriment, the jury did not hear this evidence.

As to prejudice, Appellee claims that there was none because postconviction counsel did not call and attempt to prove that Gundy was the actual perpetrator (Answer at 51-52). In support of this notion, that in order to demonstrate prejudice the defendant must catch the real killer, Appellee relies on this Court's decision in Bell v. State, 965 So. 2d 48, 64 (Fla. 2007) and Ferrell v. State, 29 So. 3d 959, 975 (Fla. 2010)(Answer at 52-53).

Mr. Brooks submits that any fair reading of these cases demonstrates that they do not even remotely stand for the proposition of which Appellee claims. In Bell, which concerned an affirmative defense, trial counsel was found not deficient for failing to present a self-defense case because no defense had been demonstrated to have been available. 965 So. 2d at 64. Further, as to a lack of prejudice, this Court found that "[a]t

the hearing, Bell presented no witnesses who could testify that West had a gun, reached for a gun, or in any way committed an overt act that would have caused Bell to react in self-defense." Id. at 64.

In Ferrell, the defendant argued in his postconviction motion that counsel rendered ineffective assistance when he informed the jury during opening statements that he would present an alibi defense and then failed to present alibi testimony at trial. 29 So. 3d at 975. Following an evidentiary hearing, the trial court determined that Ferrell failed to establish the deficiency and prejudice prongs of *Strickland* as to this claim. Id. In short, as the Florida Supreme Court found, the two witnesses that Ferrell claims were alibi witnesses only provided testimony as to Ferrell's whereabouts on the night before the murder as opposed to the night of the murder. Id.

Here, unlike in Bell and Ferrell, Mr. Brooks presented ample evidence pointing to Gundy as an alternative suspect. Contrary to Appellee's assertion, there is no requirement that in order to demonstrate prejudice, the defendant must prove that someone else committed the crime. Bell and Ferrell simply do not stand for this proposition. Rather, as the United States Supreme Court has explained, Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). Mr. Brooks submits that the requisite prejudice has been established in this case.

Regarding Laconya Orr, Appellee claims that there was no deficient performance because her statement conflicted with her husband, Antonio Orr, who placed the time of Davis and Mr. Brooks' presence at their residence around 8:00 p.m., not at 8:30 or 9:00 as Mrs. Orr did, which left Davis and Mr. Brooks more than sufficient time to drive to Crestview (Answer at 53).

Other than relying on trial counsel's recall, Appellee again provides no record citation demonstrating a conflict between the Orrs. According to Antonio Orr's statement to the police: "Orr advised his wife told him Davis and another black male stopped by his house while he was not home on the evening of the 24th." (D-Ex. 105 at 2185). And in Laconya Orr's statement, she related that her husband was not home when Davis and a "skinny, shorter black male rang her doorbell." (D-Ex. 54).

Even if there was a conflict as Appellee contends, this does not explain why trial counsel failed to present Laconya Orr's testimony. There is no indication as to why Antonio Orr's statement would be accepted over that of Laconya Orr. Nor is there any indication that Laconya Orr was biased in any way. In fact, it was Antonio Orr who was friends with Walker Davis. However, due to trial counsel's failure to present the evidence, the jury was not given the opportunity to resolve any alleged conflict as the trier of fact.

Appellee further asserts that as to Laconya Orr, and Tim Clark as well, these subclaims should be deemed abandoned because "[p]ostconviction counsel was required to present these witnesses in support of this claim and he did not." (Answer at 55).

Appellee's assertion, which was not a basis of denial by the circuit court, is erroneous. This Court has never required that a postconviction defendant must present a live witness rather than a statement for a court to assess the importance or credibility of the testimony. See Floyd v. State, 902 So. 2d 775, 781-85 (Fla. 2005)(assessing prejudice of statements contained in police report made by a witness to law enforcement); Young v. State, 739 So. 2d 553 (Fla. 1999)(same); see also Kyles v. Whitley, 514 U.S. 419 (1995)(assessing prejudice of police memorandum and interview notes with witness).

With regard to the stolen green Nissan truck, Appellee relies on trial counsel's statement that this information was "worthless" (Answer at 55). Appellee's argument ignores the fact that trial counsel actually wanted to get this information into evidence at trial. Unable to do so during cross-examination, counsel proffered this evidence:

> Q Okay. Also as part of our investigation, did you learn of a green Nissan truck that was stolen from Crestview on Sunday, the Sunday before the crime?
>
> A I'd have to refresh my memory on that too because I don't recall that.
>
> * * * *
>
> Q You had learned that a green pickup truck had been stolen and had blood in it, right?
>
> A According to this, yeah.
>
> Q Did you investigate that?
>
> A Yeah, someone did, not necessarily me, but it was investigated.
>
> Q I need to be more specific with the proffer. This green pickup truck was reported stolen from

Crestview on Sunday, and that Sunday would be before April 24th, correct?

MR. ELMORE: April 29th was Monday if that helps.

A Right, but I'm -- the 29th or 28th, I'm not sure.

Q Do you know whether the blood that was in that truck was ever compared to the blood of Rachel Carlson and/or her baby?

A No, I don't.

(T. 2244-46). Thus, at the time of trial, counsel presumably recognized that the efficacy of the police investigation was certainly information that was relevant to Mr. Brooks' defense. This fact does not change simply because of counsels' subsequent excuses for their deficient performance.

Finally, Appellee disagrees with Mr. Brooks' argument that this Court should consider his Strickland, Brady and Giglio claims cumulatively (Answer at 61). According to Appellee, this type of cumulative analysis is improper (Answer at 62). "It is mix and match law." (Answer at 62). Cumulative error claims should not be entertained (Answer at 63).[2]

Appellee's argument amounts to nothing more than a disagreement with this Court's established precedent. As this Court recently reiterated in Simmons v. State, 105 So. 3d 475, 502 (2012), "Where multiple errors are discovered in the jury

[2]Appellee also objects to this argument being made in a footnote (Answer at 61). Appellee's assertion here is meritless. Mr. Brooks asserted numerous times throughout his brief, in both its body and in footnotes, that the evidence that the jury did not hear should be considered cumulatively (See e.g., Initial Brief at 53, 73, 75 fn 68, 78, 78 fn 71, 79, 89, 100).

trial, a review of the cumulative effect of those errors is appropriate because '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 error [may be] such as to deny defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.'" Citing to Troy v. State, 57 So. 3d 828 (Fla. 2011).

Contrary to Appellee's assertion, Mr. Brooks submits that when the evidence presented throughout his capital postconviction proceedings is considered cumulatively, confidence in the outcome is undermined.

ARGUMENT II

MR. BROOKS WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS CAPITAL TRIAL WHEN TRIAL COUNSEL FAILED TO PRESENT AVAILABLE EVIDENCE TO THE JURY DESPITE HAVING PROMISED TO DO SO IN HIS OPENING STATEMENT.

In its Answer Brief, Appellee quibbles over whether defense counsel promised to present evidence, or whether he told the jury that it would learn of the evidence (Answer at 64). Such an argument is a distinction without out a difference. This is evident by the fact that Appellee does not dispute that the jury did not hear this evidence, despite being told that it would, either through the defense's case or through the cross-examination of State witnesses.

Appellee proceeds to argue that "it is a very common trial tactic among the defense bar not to present any witnesses and to rely on reasonable doubt, especially in a case with no

scientific evidence directly connecting the client to the murders." (Answer at 66). Noticeably, however, Appellee does not even attempt to apply this argument to the facts of the present case. Surely, even Appellee would concede that it is not a very common trial tactic for defense counsel to inform the jury that it will learn of critical evidence, and then never present that evidence despite its availability. This is not a common trial tactic, it is deficient performance. See e.g., Hill v. Lockhart, 28 F.3d 832, 837 (8th Cir. 1994)(quoting Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993)).

Appellee next claims that this Court in Beasley v. State, 18 So. 3d 473 (Fla. 2009), "rejected a similar claim of ineffectiveness." (Answer at 67). Yet a review of Beasley demonstrates no similarities to the present circumstances. In Beasley, the defendant's complaint focused on trial counsel's failure to investigate his alibi timeline in a prompt manner, which had he done so, could have theoretically resulted in obtaining documentation of Beasley's alibi. 18 So. 3d at 488. Beasley contended that because of the delay in investigating the case, this resulted in the destruction of records that would have validated and confirmed his travel itinerary. Id. at 489.

This Court rejected Beasley's claim for several reasons. For instance, Beasley failed to demonstrate that these records existed prior to when he claimed counsel was dilatory. Id. Additionally, the postconviction evidentiary hearing evidence disclosed that a tremendous amount of time was invested in investigating Beasley's alibi. Id. Counsel attempted to

retrieve motel and bus company records to no avail. Id. at 490. Further, Beasley was not very cooperative. Id. at 490-91. Thus, this Court determined, "The evidence presented during the evidentiary hearing demonstrated that counsel reasonably investigated all leads provided by Beasley, including questioning for additional information when encountering a dead end in the investigation, only to be met with Beasley's reluctance to provide anything more than vague details. Id. at 491.

Here, unlike in Beasley, the evidence did exist. Unlike in Beasley, trial counsel had the evidence at their disposal. And unlike in Beasley, trial counsel told the jury that it would learn of the evidence. Yet, the jury never heard this information.[3] Thus, in addition to the jury being deprived of this critical evidence, trial counsel shifted the burden to their client by promising to prove things to the jury, and then counsel failed to meet this burden.

Appellee also relies on this Court's decision in Mendoza v. State, 87 So. 3d 644, 655 (Fla. 2011), where this Court rejected a claim of ineffectiveness for not presenting a witness when defense counsel had stated that he was going to present that witness during opening statement (Answer at 68). As with Beasley, the decision in Mendoza is readily distinguishable from the instant case. In Mendoza, trial counsel testified that they

[3]Instead, trial counsel ended up proffering this evidence to the judge outside the jury's presence (T. 1908-16, 2060-64, 2210-14, 2237-50).

had concerns that the witness could be trusted to testify consistent with his deposition since his brother was a co-defendant. 87 So. 3d at 655. Further, the circuit court found that the witness had no credibility and he stated that he would not have testified during the trial. Id. at 655-56. As this Court found, "Mendoza has not demonstrated that that Lazaro could have been compelled to testify on Mendoza's behalf at the time of trial." Id. at 656.

These facts are simply not present in Mr. Brooks' case. The evidence was available and counsel wanted to get it before the jury. Yet, while the evidence was important enough for counsel to proffer into the record to preserve the issue for appeal, counsel inexplicably failed to present it to the jury. Thus, as a result of trial counsels' deficient performance, the jury never heard evidence which counsel seemingly believed to be critical.

As to prejudice, Appellee asserts that "Brooks would have been convicted of these two murders regardless of defense counsel's opening statement." (Answer at 70). Appellee's argument misses the point, as it does not address whether Mr. Brooks would have been convicted had trial counsel presented the available evidence that the jury was told it would hear. This is a case in which a multitude of evidence has been thrown out as inadmissible by this Court and in which there is no longer a "confession" in evidence as to the guilt phase. As Appellee concedes at another point in its brief, "*Brooks II* was truly a close case." (Answer at 22, fn 9). Mr. Brooks submits that when

the evidence presented throughout his capital postconviction proceedings is considered cumulatively, it is clear that confidence is undermined in the outcome.

ARGUMENT III

TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE AT THE PENALTY PHASE BY FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, AND THIS FAILURE RENDERED MR. BROOKS' DECISION TO WAIVE PRESENTATION OF MITIGATING EVIDENCE INVOLUNTARY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Prior to addressing the merits, Appellee claims that "Brooks has waived any claim of ineffectiveness involving mental mitigation by his conduct of refusing to allow the State's expert Dr. McClaren, to examine him during the post-conviction proceedings." (Answer at 72). In making this argument, Appellee fails to mention that the circuit court did not deny relief on this basis, and instead addressed Mr. Brooks' claim on the merits. Appellee did not seek rehearing or file a cross-appeal of the circuit's consideration of this issue. Appellee has waived any such argument.

As to the merits, Appellee grossly misstates this Court's jurisprudence when it claims that "[t]he Florida Supreme Court has also held that counsel is not ineffective for failing to investigate mitigation where a defendant waived presentation of

mitigation." (Answer at 74).[4] While Appellee cites to a number of cases in support of this proposition, these cases say no such thing. For instance, the first case cited by Appellee is Reynolds v. State, 99 So. 3d 459 (Fla. 2012). However, Reynolds does not hold that trial counsel need not investigate mitigation where a defendant seeks to waive the presentation of mitigation. Rather it states just the opposite:

> Reynolds next contends that his waiver of mitigation evidence was not voluntary because the trial record demonstrates that his attorneys failed to investigate any mitigation evidence or to prepare for the penalty phase in general. **Indeed, this Court has held that "[a]lthough a defendant may waive mitigation, he cannot do so blindly...." *See Lewis,* 838 So.2d at 1113. Counsel must "investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision."** *Id.* (citing *Koon v. Dugger,* 619 So.2d 246, 249 (Fla.1993)); *see also Ferrell v. State,* 29 So.3d 959, 983 (Fla.2010).

Reynolds, 99 So. 3d at 494-95 (emphasis added).

Additionally, in finding that trial counsel was not ineffective in Reynolds, this Court detailed the extensive investigation that trial counsel conducted in preparation for the penalty phase:

> We conclude that competent, substantial evidence supports the finding of the postconviction court that counsel spent sufficient time investigating mitigation

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[4]Similarly, Appellee subsequently asserts that "[t]here is no requirement that Brooks had to be fully informed of all possible mitigation for his waiver of the presentation of mitigation to be valid. Of course, counsel can make a reasonable decision not to investigate mitigation if he knows that his client will not cooperate despite his repeatedly discussing the importance of mitigation with his clients." (Answer at 78).

prior to the signing of a written waiver of rights to present evidence and the oral acknowledgement before the trial court that Reynolds waived his right to its presentation.[13] The trial record reflects that a presentence investigation report was prepared and reviewed by all. Specifically, during the evidentiary hearing, trial counsel testified that he hired a mitigation specialist to assist in the development of evidence for the penalty phase of the underlying trial. Counsel stated that he and the mitigation specialist worked together to develop mitigation evidence, and that a "big part of [their work] was just trying to convince Michael to let us do anything mitigation-wise." Trial counsel stated that he and the specialist obtained school records, medical records, records from Arizona and Florida prisons, criminal records from prior criminal cases, and family photographs. Trial counsel also testified that he hired a psychologist to interview and evaluate Reynolds. Counsel stated that Reynolds "had made it perfectly clear he had no interest in presenting mental mitigation or any mitigation," and that he met with a psychologist "as more or less a favor to [the mitigation specialist] and I, to make our jobs easier and so that we could do one of the things that we're required to do." Counsel explained that he asked the psychologist not to record in writing any of his findings because he was concerned that if they were memorialized, he would have to provide a copy to the State. Counsel testified that he decided not to have the psychologist testify because the psychologist concluded that Reynolds suffered from antisocial personality disorder — a diagnosis that some courts have regarded as detrimental to a defendant's case for mitigation. Further, counsel testified that he was informed by the psychologist that he would be a better witness for the State than for the defense. Trial counsel reviewed the psychologist's diagnosis against the DSM-IV, a manual providing standard criteria for the classification of mental disorders. Trial counsel testified that he agreed with the diagnosis of antisocial personality disorder.

Trial counsel also spoke with Reynolds' two sisters, both of whom were available to testify during the penalty phase. He explained that much of the information he gathered concerning Reynolds' past came from his conversations with one sister. Trial counsel engaged in a lengthy conversation with the sister at her home, and later obtained her testimony by deposition. He spoke with the sister "behind [Reynolds'] back" because he had determined that Reynolds would not have allowed him to speak with her.

Counsel stated that Reynolds "did not want his sisters and family involved." The sister confirmed that she had been served with a subpoena to testify during the penalty phase and was ready to do so but, during trial, counsel stated, without further explanation, that she was no longer needed to testify.

Based on his investigations, trial counsel was aware that Reynolds: (1) had an alcoholic father who was extremely abusive; (2) lived in poverty during most of his life; (3) had a father who worked sporadically and was absent for long periods of time; (4) was very devoted to his mother as a child; (5) had a sister who was severely disabled; (6) together with his non-disabled sister, took the brunt of his father's abuse; (7) would be awakened by his father pouring ice cold water on him and his siblings in the middle of the night; (8) was forced to dig a grave for the family's horse in middle of the night after his father killed it; (9) lost his mother when his father "pulled the plug" on her when she became very ill during the holiday season when Reynolds was a child; and (10) had left home to escape the abuse and was already involved in drugs and alcohol at that time.

* * * *

Prior to the *Spencer* hearing, defense counsel filed documents with the trial court to be considered when sentencing Reynolds. The trial court found the following nonstatutory mitigating circumstances and gave each little weight: (1) Reynolds was gainfully employed at the time of the crimes; (2) he manifested appropriate courtroom behavior throughout the proceedings; (3) he cooperated with law enforcement; and (4) he had a difficult childhood.[14] With regard to his childhood, the court found the following mitigating circumstances: (1) Reynolds suffered from an upbringing marked by physical and psychological abuse; (2) his father was a chronic alcoholic; (3) his mother was chronically ill and often hospitalized during his childhood; (4) he was regularly hit, slapped, and kicked by his drunken father, without warning; (5) during the school week, he would sometimes be kept awake all night by his father and would sometimes be awakened by having ice water poured on him; (6) he regularly cared for his disabled, wheelchair-bound sister because his mother was unable to do so; (7) he helped run household affairs by cooking, cleaning, and doing yard work; (8) he was very close to his mother who died on Christmas day when Reynolds was seventeen; (9) despite his father's abuse, he still showed his father respect and assisted him around the house; (10)

> he was a hard worker, beginning employment at an early age by working around the home and mowing lawns in the neighborhood; (11) he attended church as a child, even though his parents did not; (12) his education was limited to the tenth grade; (13) he began using alcohol at an early age; and (14) he essentially had no adult supervision as a child due to his mother's chronic illness and his father's habitual drunkenness. The trial court did not find that Reynolds could easily adjust to prison life.

Id. at 495-95 (footnotes omitted). Here, unlike in Reynolds, trial counsel failed to develop any mitigation whatsoever. Trial counsel apparently spoke to no one other than Mr. Brooks and his parents (PC-R. 6925-26), nor did counsel consult with a mental health expert (PC-R. 6925). Thus, trial counsels' ignorance of valid mitigation, such as Mr. Brooks' lengthy battle with alcohol, was a direct result of the failure to investigate. Trial counsels' deficient performance prejudiced Mr. Brooks.

ARGUMENT IV

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. BROOKS IS INNOCENT OF THE MURDERS AND THAT HIS CONVICTIONS AND SENTENCES VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its Answer Brief, Appellee takes issue with Mr. Brooks' claim that the circuit court erred in its credibility determination. First, Appellee argues that Charles Tucker's statement as to seeing Gundy at Club Rachel's on the evening of the murders is irrelevant because it doesn't "say anything about Rachel Carlson or her whereabouts on the night of the murder." (Answer at 87).

Appellee's argument misses the point. At the postconviction evidentiary hearing, Gundy denied going to Club Rachel's on the evening of the murders (PC-R. 7467), while Ferguson insisted that

he was there (PC-R. 7298-7300). As Gundy's testimony was contradicted by an impartial witness whose statement was made close in time to the crimes in question, the circuit court clearly erred in finding him to be the credible witness.

Second, as to Gundy also having felony convictions, Appellee argues that fact-finders are often faced with two witnesses, both of whom have criminal records (Answer at 87). According to Appellee, fact-finders are still entitled to make credibility determinations in such situations and their credibility determinations are still entitled to deference (Answer at 87).

Again, Appellee fails to recognize Mr. Brooks' actual argument. The circuit court made specific reference to Ferguson being a convicted felon (PC-R. 1284), yet there is no indication in its order that the court considered Gundy's eight felony convictions, including a crime involving dishonesty (PC-R. 7462). Thus, the circuit court's determination that Gundy was a credible witness, without factoring in his felony convictions, is inherently flawed.

Finally, Appellee asserts, contrary to Mr. Brooks' assertion, that "Gundy has no real reason to lie either." (Answer at 87-88). This is simply not the case. Gundy had every reason to lie. Ferguson's testimony places him, a previous suspect in the case, with the victim on the night of the murders. Moreover, Gundy did in fact lie, as he denied being at Club Rachel's on the night of the crime.

As to the merits, Appellee claims that Ferguson's testimony does not create a reasonable doubt as to Mr. Brooks' culpability (Answer at 89). Mr. Brooks disagrees with this assertion. From the outset, Mr. Brooks' case was one based entirely on circumstantial evidence. There were no eyewitnesses to the murders nor was there any physical evidence tying Mr. Brooks to the crime scene. The circuit court itself recognized the value of Ferguson's testimony, on its face, towards producing an acquittal on retrial:

> Mr. Ferguson testified at the evidentiary hearing held by the Court in March 2012. Mr. Ferguson's testimony is that he saw Rachel Carlson alive with Jerrold Gundy between 10:30 p.m. and 11:00 p.m. on the night of the murder. Such testimony, on its face, is beneficial to the Defense, in that it was established at trial that by 10:20 p.m., the Defendant and Walker Davis were in a car detained by law enforcement on State Road 123, away from the crime scene.

(PC-R. 1283). And, as Appellee has recognized, "*Brooks II* was truly a close case." (Answer at 22, fn 9). Mr. Brooks submits that under the standard set forth in Jones v. State, 591 So. 2d 911 (1991), he is entitled to a new trial because the evidence presented would probably produce an acquittal upon retrial.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, Appellant, LAMAR Z. BROOKS, urges this Court to reverse the lower court's order and grant him relief in the form of a new trial and/or a new sentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply

Brief has been furnished by electronic service to Charmaine Millsaps, Assistant Attorney General, on this 26th day of August, 2013.

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CERTIFICATION OF TYPE SIZE AND STYLE

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