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IN THE SUPREME COURT OF FLORIDA

NO.________________________

LAMAR Z. BROOKS,

Petitioner,

v.

MICHAEL D. CREWS,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Petitioner's first habeas corpus petition in this Court. Article 1, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed to address substantial claims of error, which demonstrate Mr. Brooks was deprived of fair and reliable trial and sentencing proceedings.

Citations shall be as follows: The record on appeal is referred to as "R." followed by the appropriate page number. The transcripts from trial are referred to as "T." followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Mr. Brooks respectfully requests oral argument.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the constitutionality of Mr. Brooks' conviction and sentence of death.

Jurisdiction in this action lies in the Court, see e.g.,

Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Brooks' direct appeal. See Wilson v. Wainwright, 474 So. 2d 1162, 1163 (1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Brooks asserts that his capital conviction and sentence of death were obtained and then affirmed, by this Court, in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

THE STATE VIOLATED MR. BROOKS' RIGHT TO DUE PROCESS BY UTILIZING INCONSISTENT THEORIES OF THE ROLES OF THE CO-DEFENDANTS IN THE CRIME FOR WHICH MR. BROOKS WAS CONVICTED AND SENTENCED TO DEATH. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY LITIGATE THE ISSUE OF PROPORTIONALITY AS TO MR. BROOKS' DEATH SENTENCE.

A. The Facts.

During Mr. Brooks' co-defendant's, Walker Davis, trial and penalty phase the State's theory was that Davis was equally, if not more culpable than Mr. Brooks in planning the murder of

Rachel Carlson and Alexis Stuart. Throughout Davis' trial, the prosecutor elicited testimony that, at a minimum, it was unclear as to who was the actual killer, or as this Court characterized it, the "knifeman". That ambiguity vanished, however, at Mr. Brooks' trial. There, the prosecutor elicited testimony and argued that the individual in the backseat was the "knifeman" and that individual was Mr. Brooks. But, as to who was the "knifeman" the prosecutor told Davis' jury during his closing argument at the guilt phase that: "the evidence shows [Davis is] not only a principal, but that he was there, he was in the car, he participated." (Davis ROA T. 2877).

And, during the penalty phase of Davis' case, the prosecutor maintained that Davis was a major participant, indeed the ringleader in the murders of Carlson and Stuart. The prosecutor told the jury that Davis deserved "society's ultimate punishment" for his role in the murders (Davis ROA T. 1480). As to whether Davis had established that he was an accomplice to the offense, but that his participation was relatively minor, the prosecutor argued:

> That does not apply to this case. He is the only reason we are here. Lamar Brooks didn't come down from Philadelphia and say, let's find one of your girlfriends and her baby to murder. The reason we are here is because of his evil plan. The reason we are here is because he planned to murder this beautiful young lady and her beautiful baby. So that mitigating circumstance does not apply. His participation was not minor. It was major participation, the sole proximate reason that we ever came here. **He was not the**

> **accomplice. Lamar Brooks was the accomplice in this murder.**

(Davis ROA T. 1473)(emphasis added).

The prosecutor also urged the jury to recommend a death sentence for Davis even if he was not the "knifeman":

> It might be argued to you, as it was attempted during the cross-examination of the state's witnesses, to depict that perhaps only one assailant was in the car, perhaps only one person caused all these injuries. Well, Ladies and gentleman, I don't care. You shouldn't care. We can't be there, we're never going to be there. All we can do is try to figure it out. You heard Dr. Wood trying to tell you what she believed it could have been. You heard Jan Johnson try to tell you what the bloodstain patterns show. It doesn't matter, it doesn't matter in the least, because if Walker Davis, Jr. struck not one blow, what he did was, he got out of that car and said, go ahead, Lamar, do what we planned. Every stab wound is on him. Every bruise, the brutal choking of Rachel Carlson, the post-mortem wounds to Alexis Stuart, is all on him, because as I already said, he is the reason we are here. It does not, it cannot mitigate in any way whatever you believe about who struck what blows.

(Davis ROA T. 1474-5).

Furthermore, following Davis' penalty phase, the State continued to advance its position that: "[j]ustice can only be served ... if Walker Davis, Jr., is sentenced to death ...". (Davis ROA R. 1338). The prosecutor stated that the evidence established that Davis "personally participated in the murders", despite the fact that "only Walker Davis, Jr., and Lamar Brooks can say who administered the choke hold to Rachel, who beat Rachel in the face, and who, Davis, Brooks or both, administered each of the scores of wounds." (Davis ROA R. 1343-4). Yet, as

the prosecutor characterized it, Davis "was the leader in an evil plan of murder for profit. But not for Walker Davis, Jr., both victims would still be alive. He was the primary motivating force behind their murder; his was the motive and the murders were for his benefit." (Davis ROA R. 1344).

Walker Davis' trial, for the first degree murders of Carlson and Stuart, occurred before Mr. Brooks' original trial and years before Mr. Brooks' re-trial. Indeed, at the time of Mr. Brooks' re-trial, Davis' record on appeal had been compiled by the clerk and his conviction had been affirmed by the district court on direct appeal. Davis v. State, 728 So. 2d 341 (Fla. 1st DCA 1999).

B. Bradshaw v. Stumpf.

The State's use of inconsistent theories at Mr. Brooks and his co-defendant's trials violated Mr. Brooks' right to due process. See Bradshaw v. Stumpf, 545 U.S. 175, 187-88 (2005). And, the due process claim arising under Bradshaw v. Stumpf is not just about the State taking inconsistent positions as to the triggerman status of two co-defendants. As Justice Souter explained in his concurring opinion in that decision:

> Stumpf's claim as I understand it **is not a challenge to the evidentiary basis for arguing for the death penalty in either case; nor is it a claim that the prosecution deliberately deceived or attempted to deceive either trial court**, as in Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (per curiam); nor does it implicate the rule that inconsistent jury verdicts may be enforced, United States v. Powell, 469 U.S. 57,

105 S.Ct. 471, 83 L.Ed.2d 461 (1984); Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932). As I see it, **Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant.** Stumpf's position was anticipated by Justice STEVENS's observation 10 years ago that "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens," and that "[t]he heightened need for reliability in capital cases only underscores the gravity of those questions ... ." Jacobs v. Scott, 513 U.S. 1067, 1070, 115 S.Ct. 711, 130 L.Ed.2d 618 (1995) (citations and internal quotation marks omitted). Justice STEVENS's statement in turn echoed the more general one expressed by Justice Sutherland in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), that **the State's interest in winning some point in a given case is transcended by its interest "that justice shall be done.**" Ultimately, **Stumpf's argument appears to be that sustaining a death sentence in circumstances like those here results in a sentencing system that invites the death penalty "to be ... wantonly and ... freakishly imposed.**" Lewis v. Jeffers, 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (quoting Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); internal quotation marks omitted).

Bradshaw v. Stumpf, 545 U.S. 175, 189-90 (2005)(Souter, J. concurring, joined by Ginsburg, J.)(emphasis added).

Thus, the issue is not simply whether the State took inconsistent position's as to the "knifeman" status of the two co-defendants, but, also whether a death sentence violates due process when it rests on factual findings "necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant." Bradshaw v. Stumpf, 545 U.S. at 189.

Here, that is clearly what occurred. The factual findings made by the sentencing judge and accepted by this Court in

affirming Mr. Brooks' sentence of death were contradicted by the testimony and argument presented to the jury and sentencing judge in Davis' case. This violated Mr. Brooks' due process rights.

Without any reasonable strategy, appellate counsel failed to raise this issue on direct appeal. Appellate counsel was ineffective. Habeas relief is warranted.

C. APPELLATE COUNSEL WAS INEFFECTIVE DURING THE DIRECT APPEAL PROCESS FOR FAILING TO ADEQUATELY PRESENT MR. BROOKS' CLAIM THAT HIS DEATH SENTENCE WAS NOT PROPORTIONAL IN LIGHT OF DAVIS' LIFE SENTENCE. PREJUDICE RESULTED WHEN THIS COURT AFFIRMED MR. BROOKS' DEATH SENTENCE THOUGH VIOLATIVE OF THE EIGHTH AMENDMENT.

On direct appeal, appellate counsel raised a claim that Mr. Brooks' sentence of death was "proportionately unwarranted". (Brooks' Initial Brief on Direct Appeal, Claim X, p. 68)(hereinafter "IB at __"). Nowhere in Mr. Brooks' initial brief did appellate counsel reference Davis' record on appeal or the evidence and argument presented in support of the death penalty. See IB at 68-77. However, Davis' record was readily available for review at the time of Mr. Brooks' direct appeal and should have been made part of Mr. Brooks' record as it establishes that Mr. Brooks' sentence of death is not proportionate or constitutional in light of Davis' life sentence.

In affirming Mr. Brooks' sentence of death this Court found that: "[t]he trial court's findings regarding relative culpability of Davis and Brooks are supported by competent and substantial evidence." Brooks v. State, 918 So. 2d 181, 209 (Fla.

2005). The finding made by the trial court, upon which this Court relied, was that Mr. Brooks was the "knifeman" "who carried out the plan to murder both the victims." Id. However, according to the State's evidence presented at Davis' trial, the identity of the "knifeman" was ambiguous, at best: "only Walker Davis, Jr., and Lamar Brooks can say who administered the choke hold to Rachel, who beat Rachel in the face, and who, Davis, Brooks or both, administered each of the scores of wounds." (Davis ROA R. 1343-4). Thus, the evidence presented at Davis' trial refutes the finding made by the trial court and relied on by this Court in affirming Mr. Brooks' sentence of death.

Likewise, according to the State, at Davis' trial, the evidence established that Davis "was the leader in an evil plan of murder for profit. But not for Walker Davis, Jr., both victims would still be alive. He was the primary motivating force behind their murder ..." (Davis ROA R. 1344).

This Court has established that "equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment." Shere v. Moore, 830 So. 2d 56, 60 (Fla. 2002); see also Wade v. State, 41 So. 3d 857, 867-8 (Fla. 2010).

Furthermore, even if the finding that Mr. Brooks' was the "knifeman" was supported by competent and substantial evidence, this Court has held that the triggerman is not more culpable

where the non-triggerman co-defendant is "the dominating force" behind the murder. See Larzelere v. State, 676 So. 2d 394, 407 (Fla. 1996) (finding death sentence for non-triggerman defendant proportional despite triggerman's life sentence because non-triggerman defendant planned, instigated, and was the "mastermind" behind the murder). Here, the State presented Davis as the "leader" and the "primary motivating force behind the murder", as such his sentence of life precludes Mr. Brooks' sentence of death.

Likewise, the Eighth and Fourteenth Amendments to the United States Constitution preclude a death sentence for a co-defendant when an equally culpable co-defendant received a life sentence. In Parker v. Dugger, 408 U.S. 308, 321 (1991), the United States Supreme Court stated:

> "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way **that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.**" *Spaziano v. Florida, 468 U.S. 447, 460, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984).* The Constitution prohibits the arbitrary or irrational imposition of the death penalty. *Id., at 466-467.* We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, *e. g., Clemons, supra, at 749* (citing cases); *Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976).*

(Emphasis added). In light of the State's theory and evidence in Davis' case, Mr. Brooks' sentence of death violates the eighth amendment.

Without any reasonable strategy, appellate counsel failed to discover and present the evidence and argument from Davis' trial. Davis' record on appeal was readily available and the evidence and argument undermines the findings made by the trial court and relied on by this Court in Mr. Brooks' case. Appellate counsel was ineffective. Habeas relief is warranted.

CLAIM II

MR. BROOKS WAS DENIED A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE STATE VIOLATED HIS RIGHTS TO CONFRONTATION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE DURING MR. BROOKS' DIRECT APPEAL PROCEEDINGS.

A. Introduction.

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. Maryland v. Craig, 497 U.S. 836, 845 (1990); Ohio v. Roberts, 448 U.S. 56, 63-64 (1980).[1] The Clause ensures the requisite "rigorous testing" by the "combined effect of these elements of confrontation--physical presence, oath, cross-examination, and observation of demeanor by the trier of fact ... ." Craig, 497 U.S. at 845-46. The defendant must be permitted to cross-examine the declarant "face to face with the jury in order that they may look at him, and

[1] Mr. Brooks addresses this issue in accordance with the legal landscape which existed at the time of his re-trial.

judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895), quoted in Craig, 497 U.S. at 845, and Roberts, 448 U.S. at 64.

The admission of hearsay evidence against a defendant is limited by the Confrontation Clause because the defendant cannot confront or cross-examine the out-of-court declarant. Roberts, 448 U.S. at 63, 66. Hearsay statements that do not fall within a "firmly rooted" exception to the hearsay rule are "presumptively unreliable" and "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." Idaho v. Wright, 497 U.S. 805, 818 (1990). It is the burden of the State "as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause" to show that the statements bear "sufficient indicia of reliability to withstand scrutiny under the Clause." Wright, 497 U.S. at 816.

The concern for reliability is heightened when the evidence is being used to obtain a sentence of death. The Eighth Amendment "imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'" Simmons v. South Carolina, 114 S.Ct. 2187, 2198 (1994) (Souter, J., concurring, joined by Stevens, J., concurring)(quoting Woodson v. North Carolina, 428 U.S. 208, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Due

process also requires that the evidence used to obtain a death sentence be reliable. See Gardner v. Florida, 430 U.S. 349, 357-59 (1976). The use of presumptively unreliable evidence--such as hearsay that is not shown to have the requisite indicia of reliability--violates the defendant's right to confront adverse witnesses, his right to due process, and his right to a reliable sentencing determination.

At Mr. Brooks' trial the State objected to Mr. Brooks' attempts to cross examine the State's witnesses to demonstrate that the investigation of the crimes with which Mr. Brooks was convicted and sentenced to death was inadequate and indicated that someone other than Mr. Brooks' committed the crimes. The trial court's preclusion of the evidence violated Mr. Brooks' right to due process of law and confrontation of his accusers.

In addition, and the State presented hearsay testimony of Dr. Michael Berkland that was not subject to any proper exception to the rule. The State's introduction of hearsay testimony also violated Mr. Brooks' right to due process of law and confrontation.

These errors individually and combined require this Court to grant habeas relief.

B. Mr. Brooks' Right To Confront His Accusers Was Violated When The Trial Court Refused to Allow Him To Cross Examine Witnesses About Evidence Demonstrating That The State Had Not Sufficiently Investigated The Crimes And That Evidence Existed That Undermined the Case Against Mr. Brooks.

In Mr. Brooks' case, trial counsel informed the jury during his opening statement that extensive evidence beneficial to Mr. Brooks would be presented:

> Mr. Elmore came up for quite some time and he told you some things that he thinks the evidence is going to show. He didn't tell you everything. He won't be able to overcome their burden and here's why. You're going to hear from one of the state's witnesses who'll be presented to you as an expert witness.
>
> This expert witness will tell you that the person that committed this crime would have been very bloody. That's an expert witness that's going to tell you that. You're going to learn that there was no blood on Mr. Brooks, none, not a drop, not a speck, none any where, not on his shoes, not on his clothes, not on his face, none.
>
> There's more. You're going to learn that there was a cigarette found outside of Rachel Carlson's car, outside of the driver's side front door. There was a cigarette on the ground. We know that because at the time there was an officer named Malcolm Harrison.
>
> This officer, when he approached the scene made some very detailed notes. One of the details that he noticed was a used and extinguished cigarette right outside the door to her car. **You're also going to learn that that cigarette was tested for DNA and it excluded Mr. Brooks, excluded him as the person who had that cigarette in their mouth outside that door of Rachel Carlson's car. It wasn't him.**
>
> You're also going to learn some more about cigarettes. **Because the same brand of cigarette that was found outside that door of Rachel Carlson's car that night, that same brand was found at a residence less than or approximately about a half a mile away.**

That residence is 201 Grimes Avenue. The same brand of cigarette was found outside that residence at the gate.

Now, you haven't heard of another name yet. This gentleman's name is Jerold Gundy. You haven't heard about him. **Jerold Gundy lived at that time at 201 Grimes Avenue. You will learn that Jerold Gundy smokes that type of cigarette that was found outside of Rachel Carlsons's car. You will learn that the police officers in this case investigated. And when they investigated they were told that Jerold Gundy {sic} new Rachel Carlson and that Jerold Gundy –**

* * *

MR. SZACHACZ: Ladies and gentlemen, you're going to learn that the person that lived at that time at 201 Grimes Avenue who **used the same brand of cigarette that was found outside that car is Jerold Gundy. During the investigation Major Worley learned that witnesses told him that they saw Jerold Gundy with Rachel Carlson that night and that he knew Rachel Carlson.**

There's still more about cigarettes because Rachel Carlson smoked cigarettes. She smoked Marlboro Lights. During the investigation they found a pack of Marlboro Lights cigarettes in Rachel Carlson's car on the driver's door handle area next to a cigarette lighter. **A Marlboro Lights cigarette was also found in front of 201 Grimes Avenue at the gate to that residence.** The same brand of cigarette that Rachel Carlson smoked, approximately a half mile a way from the scene where she was found.

You're also going to learn that a dog, a K-9 dog was brought to the scene, a dog that tracks suspects and that this K-9 dog near the scene of the crime, near that car, tracked from a spot near that car to 201 Grimes Avenue.

You will also learn about a shoe imprint or a shoe impression that was seen and examined near that car on a dirt road, Railroad Avenue, thirty yards or so from the car. **They examined that impression and they took an impression and they seized this man's shoes. They didn't match. There was no match.**

You're going to learn all about South Booker Avenue in between Martin Luther King Boulevard and Railroad Avenue. It's a short section of road, a short section of paved road approximately the size of a football field, a hundred yards or so. Maybe a little bit longer, maybe a little bit shorter. You're going to learn about that road. That's where the car was found.

* * *

You're also going to learn during this investigation that the police investigated a taxi cab company called City Taxi or City Cab, because somebody was picked up around 9:15 at night that looked suspicious and was brought to a residence on Lakeview Drive. Officer Selvage investigated that. He checked into numerous taxi cab companies before he found out that, yeah, there was somebody around that area that was picked up in a cab and driven to this residence on Lakeview Drive.

So, what did he do? Well, he went to Lakeview Drive and inquired. The person that lived there denied it and said, I was never in a cab. Nobody ever was dropped off at my house.

Mr. Elmore said that Rachel Carlson fought for her life. They examined, the investigators in this case and the experts examined her fingernails. They took her fingernails and looked at them for any shred of evidence. They didn't find anything to connect to Mr. Brooks, no skin, none of his blood, none of his hair, no clothing that could be connected to Mr. Brooks, nothing.

Ladies and gentlemen, you're going to hear about the physical evidence or the lack of physical evidence in this case. You'll hear a lot about physical evidence. Physical evidence is unbiased, objective and trustworthy evidence. Physical evidence is more than mere words.

You're going to hear words from Mark Gilliam, a person who changes his story at least three times, a person who lies to cover himself, a person who threatened and pressured and even arrested and charged

> with perjury and put in jail for it. You're going to hear his words. His word is no good. His word is no good.
>
> Let's get back to the physical evidence, the objective, unbiased, trustworthy evidence. **You're going to learn that at Melsssa Thomas' house they took cuttings from a couch because that's where Mr. Brooks sat. They tested for blood.**
>
> **They used a chemical called Luminol that detects the presence of blood. They didn't find any. They didn't find anything from the couch.** They didn't find any blood. They didn't find anything to connect Mr. Brooks to Rachel Carlson. Nothing. The objective, unbiased, trustworthy evidence.
>
> They searched Rochelle Jones' car. They tested her car. Remember Mr. Brooks was in her car at 10:23 that night. No blood was found in her car, no blood from Rachel Carslon, none, nothing to connect Mr. Brooks to Rachel Carlson.

(T. 1101-8)(emphasis added).

However, when trial counsel attempted to question the State's witnesses relating to the evidence about the investigation and implicating Gundy or some other unknown individual, the State objected and the trial court precluded the testimony. Thus, the jury never heard this information.[2] The trial court's ruling violated Mr. Brooks' right to due process and to confront his accusers. During one of the arguments, Mr. Brooks' trial counsel explained:

> MR. FUNK: Judge, I made my proffer and I wanted to ask the Court to allow me to question, not having the ability to is a confrontation clause violation,

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[2]Trial counsel proffered this evidence that he wanted to present (1908-16, 2060-4, 2210-4, 2237-50).

> both state and federal constitutions; the 6th Amendment through the 14th; as well as Article 1, Section 9 and 16. In addition, part of our defense includes lack of evidence as well as casting doubt on another as the actual perpetrator of this crime. We believe it's important that I be able to cross-examine. I want to make that record. I understand the Court's ruling.
>
> THE COURT: Okay. Objection is noted. Anything further?

(T. 1916-7).

Thus, each time trial counsel attempted to cross examine a witness about law enforcement's investigation or evidence that was collected that did not implicate Mr. Brooks, the State objected and the trial court refused to permit the cross examination.

For example, one of the witnesses trial counsel attempted to cross examine about the investigation by law enforcement was Melissa Thomas. Trial counsel attempted to ask Thomas if, after Mr. Brooks had been to her house on the night of the crimes, cuttings had been removed from her couch by law enforcement (T. 1535). The State objected, and after initially overruling the objection, the trial court heard further argument:

> MR. ELMORE: If he wants to put on a defense case like the one he explained in opening, then he should have to put it on through his witnesses, not through mine, especially when I stayed away from it on my direct examination.
>
> COURT: Sitting on the couch opened up doors there as far as I was concerned, so I let it in for that reason. What else have y'all got?
>
> MR. ELMORE: Judge, that doesn't open the door to

the lab personnel coming and --

COURT: It really doesn't. If you want to call her back as your witness --

MR. SZACHACZ: I've got two people talking to me, I'm sorry, Judge.

COURT: The cuttings, that really would be outside the scope of direct as far as I'm concerned. The rest of it is okay. I mean it's the same problem he's got from time to time, to try to get the witness through without bringing her back.

MR. SZACHACZ: Mr. Elmore, through her testimony, puts Mr. Brooks in her home. I should be allowed to confront her with what happened after that.

COURT: I don't have any problem with that, but the cuttings is kind of what I'm talking about.

MR. SZACHACZ: Whether police came in and took a cutting from a couch?

COURT: That doesn't have anything to do with that night.

MR. SZACHACZ: Sure it did. There was only one reason they were there, to see if they could find evidence.

COURT: I don't have any problem with you bringing it up, but it basically exceeds the scope, and I've ruled on that. What do you want to do about it next? Come on, guys, we can't have it both ways. I mean I'm with y'all. If we can get some of this stuff out of the way without bringing them back, fine, but you both are objecting on exceeding the scope, and if you want me to rule on that, I am, and definitely, without equivocation, the cuttings exceeded the scope.

MR. SZACHACZ: I understand.

COURT: Now, the objection is sustained at this point.

MR. SZACHACZ: Regarding the cuttings.

COURT: Cuttings.

(T. 1535-7).

Later, when counsel attempted to question an FDLE crime scene technician regarding his investigation at Thomas' house and the surrounding area, the prosecutor objected as beyond the scope and the court sustained the objection:

> MR. ELMORE: I object to anything other than the investigation of Ms. Thomas' house, Judge. That's all I limited my questions to.
>
> THE COURT: I think the question was of Ms. Thomas' house; wasn't it?
>
> MR. FUNK: Can I be heard, Judge?
>
> THE COURT: Yes.
>
> (WHEREUPON, a sidebar was held.)
>
> MR. FUNK: He asked the question did you get involved in the investigation of Ms. Thomas' house.
>
> THE COURT: I'm sorry.
>
> MR. FUNK: He asked the question, did you get involved in the investigation of these homicides. I need to have the right -- **I have the right to ask him about his involvement, not to let this jury think that's all he did. He put him on the stand.**
>
> THE COURT: Here's what he put him on the stand for. He put him on the stand that he went in Melissa Thomas' house and looked at certain things. Yeah, that's fine.
>
> MR. FUNK: But he did other things, Judge, and I have to cross-examine him. He's available to be called as a defense witness.
>
> THE COURT: That's right. I'm just trying to be square with you. The only thing he testified to was what he did to Melissa Thomas' house, the cuttings and

things like that. That’s okay.

MR. FUNK: What that does is shift the burden to me to call a witness. Mr. Elmore put this person on the stand who has told us that he’s involved in the investigation.

THE COURT: Mr. Funk, let me put it this way.

MR. FUNK: I understand.

THE COURT: I’m trying to be as fair to each of you as I possibly can.

MR. FUNK: I understand.

THE COURT: If you go outside of his direct, I’m going to sustain the objection. And you’re getting ready to unless you talk about just what was in Ms. Thomas’ house.

(T. 1905-6)(emphasis addeed).

Furthermore, trial counsel attempted to cross examine Mike Bettis, the witness who seized Mr. Brooks’ backpack and nylon pants, to show that the items had no blood on them and that there was nothing suspicious about the fact that he was carrying a backpack the night of the crimes. See T. 2210-4. The trial court prevented trial counsel from cross examining Bettis despite the fact that the State had elicited testimony from Thomas that Brooks changed clothes at her home and carried a back pack.

So, despite the fact that the State used Thomas and evidence from Thomas’ home to establish its theory that Mr. Brooks’ was in Crestview shortly after the crimes were committed, indeed, only .38 miles away from the crime scene,

that Mr. Brooks wore nylon pants and carried a back pack and that physical evidence linked Mr. Brooks' to Thomas' home, Mr. Brooks was not permitted to cross examine Thomas, the crime scene technician or Bettis about the lack of blood evidence at Thomas' home, i.e., the cuttings that were removed from the couch where Mr. Brooks sat, or Mr. Brooks' possessions. Likewise, Mr. Brooks was not permitted to cross examine the crime scene technician about the evidence found in the area that undermined law enforcement's investigation. The trial court's preclusion of the evidence violated Mr. Brooks' right to confrontation because he was not permitted to show the jury that the evidence from Thomas and her home did not support the theory that Mr. Brooks had just committed a brutal and bloody double homicide and that other evidence found near the crime scene implicated someone other than Mr. Brooks.

And, when trial counsel attempted to cross examine Steve Whatmough, a law enforcement officer, regarding another suspect in the investigation, Gerrold Gundy, the following occurred:

> Q: As part of your investigation in this case, did you come to know the name Jerold Gundy?
>
> A: Is that how I came to know the name of --
>
> MR. ELMORE: **I object, far outside the scope.**
>
> COURT: **It is, sustained.**

(T. 1606)(emphasis added). The trial court explained to counsel that he could present this evidence in his own case:

So more than likely depending on the questions, of course, that are asked, **I'll let you get into that in your case in chief if you want to**.

MR. SZACHACZ: Get into what?

COURT: The areas that you just talked about.

MR. ELMORE: All the extra stuff you wanted.

COURT: Yeah, the Gundy stuff that you're talking about.

MR. SZACHACZ: You're going to let me get into that?

COURT: No, no.

MR. ELMORE: Not in the case in chief.

COURT: In your case.

MR. SZACHACZ: I hear him.

MR. ELMORE: That's what he said. I just wanted you to know.

COURT: **In other words you can put on your own witnesses in the case that you put on, let's put it that way, and I'm comfortable with that**. That's probably what I'd do. Now, of course, if Bobby says something that does open the

-- starts talking about Gundy or something like that, then that's different, but I mean if he's going to do what he says he's going to do, **then if you have a case that you want to put on, you'd have to put your witnesses on then, but I won't let you put in on to -- exceeding what I consider the scope of direct.**

(T. 2206-7)(emphasis added).

Likewise, a similar situation occurred when trial counsel attempted to cross examine FDLE Analyst Jack Remus about FDLE's analysis of evidence:

Q: Okay. Robert Hursey, he's the -- is he a microanalyst with Florida Department of Law Enforcement?

A: I believe so, yes. I believe out of the Tallahassee laboratory.

Q: And he had sent you three rooted hairs for your analysis.

MR. ELMORE: Judge, I object, this is beyond the scope.

THE COURT: I'm not sure if it is yet.

MR. ELMORE: May we approach?

SIDE BAR CONFERENCE:

MR. ELMORE: Judge, I limited my examination to specific exhibits. Mr. Funk wants now to get into other exhibits --

THE COURT: **It's the same thing we were doing yesterday If that's where you're going, I'm going to let you call him as a witness, regardless of the fact that you might think I'm keeping you from calling a witness, but I'm keeping the cross and also the redirect based on the previous testimony. In other words, I don't want you to exceed direct.**

MR. FUNK: Yes, sir.

* * *

A: There were some hairs forwarded and I did attempt a DNA analysis on them, yes.

Q: Okay, you attempted and you could not, right?

A: I could not get a type.

Q: Okay. There were also some items submitted to you that you typed, and there's a laundry list that gave -- of items coming from Mr. Brooks right? September 30, '96 report might help you, if you get that.

A: Would you know my submission number? I've got about fourteen submissions.

MR. ELMORE: **Judge, I'm going to object. This is beyond scope.**

THE COURT: **It is. Sustained.**

Q: When you answered yes to the question that you were able to type other things submitted to you that had not been asked of you, is that what you were talking about?

MR. ELMORE: Judge --

MR. FUNK: He answered yes to that, Judge. He answered yes, without objection.

THE COURT: **The objection, I let you go with one question that seemed to be innocuous to me at that time about the hairs, but I don't want you to exceed direct, because that's where you're going. I'm not going to let you do it.**

MR. FUNK: It's the same objections, Judge, my inability to cross-examine this guy on things that he's already told him he did.

THE COURT: Okay. So we got that straight? You know that, where we are? Okay.

MR. ELMORE: Thank you, Judge.

(T. 2053-7)(emphasis added).

Finally, trial counsel informed the trial court that he intended to cross examine the lead law enforcement investigator, Jerome Worley, about the investigation: "I know the Court's ruled, but we need to make the same confrontation clause violation objection so the record's clear with regard to cross-examining Worley as we did those other witnesses". (T. 2209).

During the proffer of Worley, he testified about the

investigation of Gundy, including information that he had been provided that Gundy had been seen with Carlson in her vehicle hours before the crimes occurred and about the cigarette and boot track that were located near victim's vehicle (T. 2237-50). In addition, the K-9 had alerted and led the police to Gundy's residence.

This Court has stated that the prosecution's case against Mr. Brooks was circumstantial. Brooks v. State, 918 So. 2d 181, 187 (Fla. 2005). Because the State presented evidence through direct testimony that it believed linked Mr. Brooks to the crimes, Mr. Brooks was entitled to confront those witnesses with evidence that undermined the State's theory and evidence and demonstrated that the investigation of Mr. Brooks was not adequate. The trial court's rulings denied Mr. Brooks' constitutional rights.

Without any reasonable strategy, appellate counsel failed to raise this issue on direct appeal. Appellate counsel was ineffective. Habeas relief is warranted.

C. Dr. Michael Berkland's Hearsay Testimony.

At Mr. Brooks' trial, the State presented the testimony of Dr. Jody Nielson who performed the autopsy on the victims. See 1187-1246. Nielson provided testimony about the victims' injuries and the causes of death for each victim (T. 1187-1224). Over the defense's objection, Nielson referred to photos that

she had taken to show the jury the injuries to the victims'.

Thereafter, Dr. Michael Berkland testified as to the autopsies performed by Dr. Joan Wood which were conducted almost a week after Nielson's autopsies (T. 2074-2140). The State made no effort to show that Wood was unavailable. Berkland's testimony was largely based on Wood's autopsy protocols, diagrams and photos as well as Nielson's work product (T. 2077). As such it violated Mr. Brooks' right of confrontation.

Berkland testified as to additional injuries that were not identified in Nielson's report (T. 2085, 2089-90, 2093-4, 2097-8), as well as to the causes of death (T. 2087-8, 2091-2, 2096, 2110), how the wounds were inflicted (2097-8, 2109), the depth of the wounds (T. 2104), and the order of wounds (T. 2089, 2109-10). Berkland also explained why Wood's conclusions differed from Nielson's (T. 2092-3). Berkland then repeated some of his testimony and referred to the photographs taken by Wood at the second autopsy (T. 2100, see State's Exs. 12A, 12B, 14A, 14C).

Berkland also testified about the crime scene and though never being qualified as a crime scene analyst, opined as to how the crimes occurred by reviewing blood spatter, the injuries to Carlson and a shoe print (see T. 2108-11, 2112, 2125-6).

For Confrontation Clause purposes, a witness is not unavailable unless the prosecution makes a good faith effort to obtain his presence. Roberts, 448 U.S. at 74. Here, the State

did not indicate what efforts, if any, it had made to obtain the presence of Wood at Mr. Brooks' re-trial.

Instead, Berkland relied on Wood's work product and the conclusions she drew from conducting the second autopsy, but Mr. Brooks was not provided an opportunity to confront Wood and her conclusions. Berkland's testimony regarding Wood's autopsy and Wood's conclusions violated Mr. Brooks' right of confrontation.

Trial counsel's failure to object to Berkland's testimony was ineffective and appellate counsel's failure to raise this issue on direct appeal constitutes fundamental error as Mr. Brooks' constitutional rights to due process and confrontation were denied. Habeas relief is warranted.

CLAIM III

MR. BROOKS WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S COMMENTS AND ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE DURING MR. BROOKS' DIRECT APPEAL PROCEEDINGS.

A. Introduction.

> A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence:
>
>> A criminal trial provides a neutral arena for the presentation of evidence upon which alone the jury must base its determination of a

> defendant's innocence or guilt. Attorneys for both sides, following rules of evidence and procedure designed to protect the neutrality and fairness of the trial, must stage their versions of the truth within that arena. That which has gone before cannot be considered by the jury except to the extent it can be properly presented at the trial and those things that cannot properly be presented must not be considered at all.
>
> The role of the attorney in closing argument is "to assist the jury in analyzing, evaluating and applying *the evidence.* It is not for the purpose of permitting counsel to 'testify' as an 'expert witness.' The assistance permitted includes counsel's right to state his contention as to the conclusions that the jury should draw from the evidence." *United States v. Morris,* 568 F.2d 396, 401 (5th Cir.1978) (emphasis in original). To the extent an attorney's closing argument ranges beyond these boundaries it is improper. Except to the extent he bases any opinion on the evidence in the case, he may not express his personal opinion on the merits of the case or the credibility of witnesses. Furthermore, he may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty.
>
> It is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant.

Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999), quoting United States v. Garza, 608 F.2d 659, 662-62 (5th Cir. 1979)(citations and footnote omitted). In Mr. Brooks' case, the prosecutor repeatedly obscured the jury's view with personal opinion and emotion. Mr. Brooks' conviction and sentence were obtained in violation of due process.

B. The Prosecutor Shifted The Burden To Mr. Brooks To Prove That He Was Innocent Of The Crimes Charged.

The prosecutor made improper comments and arguments throughout Mr. Brooks' trial. These comments tainted the jury's deliberations from the very outset. During voir dire, after reading the standard reasonable doubt jury instruction, the prosecutor told the jury: "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." (T. 460). Moments later, while continuing to discuss how reasonable doubt is established, the prosecutor stated: "Every coin has two sides, and every trial has two sides." (T. 463).

Defense counsel objected to the second comment and moved for a mistrial based on the fact that the prosecutor had shifted the burden to Mr. Brooks to prove his innocence (T. 465-68).

First, the prosecutor's comment that he was "not required to prove its case one hundred percent", minimized the certitude that was required by the United States Constitution, as well as the Florida Constitution, to prove a criminal defendant guilty of a crime. See Cage v. Louisiana, 498 U.S. 39 (1990). In In re Winship, the United States Supreme Court held that the reasonable-doubt standard "plays a vital role in the American scheme of criminal procedure" because, among other things, "[i]t is a prime instrument for reducing the risk of convictions

resting on factual error." 397 U.S. 358, 363 (1970). Here, the prosecutor's remark may have reasonably caused the jury to convict Mr. Brooks while using a standard that did not comport with due process. The prosecutor's comment was error.

Furthermore, the prosecutor exacerbated the error created by his argument that it was Mr. Brooks' burden to prove his innocence by improperly arguing that there was no evidence that connected Gerald Gundy to the crimes and that Gundy was not the father of Alexis Stuart (T. 2427). The prosecutor went so far as to tell the jury:

> Gerald Gundy was checked out, his DNA was sent in, his fingerprints were sent in, it was checked on with every bit of evidence that was checked against Mr. Brooks, and no evidence of any kind connected him to Rachel Carlson or the murders ...

(T. 2485-6).

First, the prosecutor's statement was false. Not only did the tracking K-9 lead law enforcement to Gundy's residence, a CI placed Gundy and Carlson together, arguing, on the day of the crimes.

Second, the prosecutor's argument shifted the burden to Mr. Brooks to establish that he was innocent of the crimes. The prosecutor's argument was improper because "the state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of

introducing evidence." Jackson v. State, 575 So. 2d 181, 188 (Fla. 1991).

Here, the State bolstered its case and shifted the burden to Mr. Brooks to present evidence to prove his innocence by suggesting that there was no evidence implicating Gundy. The argument concerning the lack of evidence implicating Gundy invited "the jury to convict [Mr. Brooks] for some reason other than that the State ha[d] proved its case beyond a reasonable doubt." Gore v. State, 719 So. 2d 1197, 1200-1 (Fla. 1998).

Without any reasonable strategy, appellate counsel failed to raise this issue on direct appeal. Appellate counsel was ineffective.

C. The Prosecutor Attempted To Inflame The Jury By Making A Stabbing Motion.

The prosecutor misrepresented the evidence and attempted to inflame the jury during his closing argument at the guilt phase of Mr. Brooks' trial. During the prosecutor's closing argument the following occurred:

> Her blood was spattering and spurting against that passenger door during that part of the attack, but when she fell over and her back was exposed upward, that's when these wounds were put in her. One, two, three, four five, six --
>
> MR. FUNK: Judge, may we approach?
>
> MR. ELMORE: -- like a domino shape.
>
> MR. FUNK: May we approach?
>
> SIDE BAR CONFERENCE

> MR. FUNK: Judge, the cold record doesn’t reflect the volume at which Mr. Elmore was counting out one through six. It also doesn’t reflect that Mr. Elmore was holding his right hand over his head and bringing it down as he was counting out loud slowly, and I need an acknowledgment from Your Honor that that’s what happened so I don’t have to call a witness to establish that’s what happened, because the record doesn’t show that.

(T. 2410). The court overruled trial counsel’s objection and denied his motion for mistrial as to the prosecutor’s attempt to inflame the passions of the jury (T. 2411-2).

Following the jury instructions, trial counsel asked the prosecutor to concede that he had raised his arm in a stabbing motion and voice while making his argument (T. 2587). The prosecutor admitted that he had “made a stabbing motion, demonstrating what I believe was done to the victims in my closing argument.” (T. 2587-8). Further, the prosecutor admitted that he had raised his voice (T. 2587).

In Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), this Court emphasized that, “[closing argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.”

Here, the prosecutor’s argument, stabbing gestures and raised voice went beyond a review of the evidence and permissible inferences. There is no doubt that he intended his

argument to overshadow any logical analysis of the evidence and to generate an emotional response. See Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987). As such, the prosecutor's argument violated Mr. Brooks' constitutional rights.

Without any reasonable strategy, appellate counsel failed to raise this issue on direct appeal. Appellate counsel was ineffective. Habeas relief is warranted.

D. The Prosecutor Shifted The Burden To Mr. Brooks To Prove That Life Was The Appropriate Sentence.

It is well-established that:

> the state must establish the existence of one or more aggravating circumstances before the death peanlty [can] be imposed ...
>
> [S]uch a sentence could be given if the State showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). However, at Mr. Brooks' penalty phase, the prosecutor shifted the burden to Mr. Brooks to prove whether he should live or die.

During voir dire, the prosecutor told the jury that the mitigation must outweigh the aggravation in order for the jury to recommend life (T. 581-2, 586). And, in his closing argument at the penalty phase, the prosecutor stated:

> Then 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.

(T. 2700). Later, when specifically requesting that the jury impose the death penalty, the prosecutor argued that the mitigators in Mr. Brooks' case "could not possible outweigh the numerous aggravating circumstances ...". (T. 2717).

It is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 68 (1975). Thus, the prosecutor injected misleading and irrelevant factors into the sentencing determination. Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988).

Prosecutorial argument at Mr. Brooks' penalty phase required imposition of the death sentence unless Mr. Brooks not only produced mitigation, but also established that the mitigation outweighed the aggravating circumstances (T. 2700, 2717). It is clear that the burden was on Mr. Brooks to show that life imprisonment was the appropriate sentence.

Without any reasonable strategy, appellate counsel failed to raise this issue on direct appeal. Appellate counsel was ineffective. Habeas relief is warranted.

E. Conclusion.

Throughout Mr. Brooks' trial and sentencing proceedings, the prosecutor was allowed to argue impermissible factors, misstate the law, and attempt to inflame the passions of the

jury. The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974). Habeas relief is warranted.

CLAIM IV

APPELLATE COUNSEL FAILED TO RAISE THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF GRUESOME AND UNFAIRLY PREJUDICIAL PHOTOGRAPHS THAT VIOLATED MR. BROOKS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Throughout Mr. Brooks' trial, the State utilized a strategy of trying to evoke an emotional response to gruesome, cumulative evidence with photographs of the crime scene and autopsy.

Prior to trial, trial counsel filed a motion in limine to preclude introduction of the photographs that the State intended to present at Mr. Brooks' trial (R. 4811-3). In the motion trial counsel offered to stipulate to cause of death, identity and the number of wounds (R. 4811-3). Trial counsel also offered to stipulate to other evidence the State wanted to establish from the photographs rather than have the jury view the "bloody and gory" photos (R. 4811). Trial counsel maintained that the photographs were "highly prejudicial and inflammatory" (R. 4811). The trial court deferred ruling on the

motion (R. 5318-20).

At trial a series of photographs was introduced that had not been introduced at Mr. Brooks' original trial.[3] When Carlson's co-worker, Paula Freeman, testified, the State showed her a series of seven photographs (State's Exhibit 7) on a foam board. The photographs were from the crime scene and depicted Carlson's vehicle, and Carlson and Stuart as they were found after the crimes. See T. 1116. Despite the fact that Freeman could not identify Carlson or Stuart from the photographs (T. 1116) they were published to the jury over trial counsel's objection (T. 1121-2).

Freeman did identify Carlson from an autopsy photograph taken by Dr. Jody Nielson – State's exhibit 6K (T. 1116). Trial

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[3]During the direct appeal from Mr. Brooks' original trial, this Court addressed five photographs to which trial counsel had objected because their probative value was substantially outweighed by their prejudice. Brooks v. State, 787 So. 2d 765, 781 (Fla. 2001). In its opinion, this Court described the photographs, all of which were taken at Joan Wood's second autopsy and found that the five photographs were relevant:

> 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.

Id.

counsel objected to that photograph, too (T. 1121-2).

Then, during Nielson's testimony, after she testified about all of the wounds to both Carlson and Stuart, the State introduced a series of fifteen photographs, over trial counsel's objection (1215-6), and asked her to describe the photos (T. 1215-23). As Nielson described the photographs it is clear that several were duplicative of each other. For example, State's exhibit 6A depicted the left side of Carlson's neck and 6B depicted the right side of her neck (T. 1217-8). Then 6D depicted "the back of Rachel Carlson with stab wounds on the right side and the left side. These are some of the wounds of the neck that we've already viewed." (T. 1219). Likewise, State's exhibits 6E and 6C both depicted Carlson's left hand, though 6E depicted her left hand "before we cleaned it up". (T. 1220).

Also, State's exhibit 6H and 6O both depicted the wound to Stuart's face; the only difference was that in 6O a measuring scale was inserted. Further, State's exhibit 6I depicted the stab wound made to Stuart's diaper and 6J depicted the stab wound with the diaper pulled down.

During the testimony of FDLE blood spatter expert Jan Johnson, a videotape was introduced that Johnson had recorded at the crime scene. See T. 1928, State's Ex. 8. Johnson "recorded the exterior location of the vehicle, the vehicle itself and the

two individuals within the vehicle and also any evidence that may be on the outside." (T. 1928). During the publication of the video, Johnson narrated what the jury was seeing, including "the body of Rachel Carlson" and "the baby still positioned in the back seat" (T. 1930-3). Despite the admission of the videotape from the scene, the State also sought to introduce seven photographs taken by Johnson at the crime scene.[4] See State's Ex. 7. Before the photographs were introduced Johnson described them to the jury:

> Beginning with the center, again, this would be the vehicle of Rachel Carlson, the position of the vehicle when I arrived at the scene. The photo marker, which is Number 1, would be a cigarette butt that was located just outside the area of the driver's door.
>
> In the upper left hand corner or right hand corner, this would be the position of Rachel Carlson's body strapped within the vehicle. Her feet and purse on the floor.
>
> The next photograph beneath that would be a view of her body from the front passenger door, her head located on the passenger seat and the camouflaged cap clearly on the passenger floorboard.
>
> The third photograph on the right hand side would be a close-up photograph --
>
> Q: Do you mean the left hand side?
>
> A: Left hand side, excuse me. This would be a close-up photograph of her head positioned on the passenger seat. You can see the stab wounds to the neck area. Also, this is a close-up photograph of the camouflaged cap positioned on the passenger floor.
>
> The upper photograph on the right hand side would be the position of the baby still in the child restraint seat. This would be a view of the baby from

[4]These were the photographs that had been previously shown to Freeman (T. 1116).

> the passenger's side of the vehicle.
> The second photograph down would be another overall photograph of the baby and also the items of evidence that was located on the rear passenger floor.
> The last and final photograph on this chart would be a close-up of the baby's face and the clothing and what she's wearing.

(T. 1934-5).

Then, after publishing the videotape of the crime scene (State's Ex. 8) and the foam board of seven photographs from the crime scene (State's Ex. 7), which was never moved into evidence, the State handed Johnson a stack of twenty photos, State's 1A through 1T and moved to introduce the photographs (T. 1935). Trial counsel objected to State's exhibit 1C, noting that it was particularly gruesome, and that the jury had already seen a similar depiction in the video and in a photograph contained in State's exhibit 7 (T. 1936). However, the trial court overruled the objection because of the State's misleading and incorrect argument that "every photograph has been considered by the Supreme Court and no error was found." (T. 1936-7). In fact, during Mr. Brook's initial direct appeal, appellate counsel raised a claim as to two series of photographs (State's Exs. 12A-E and 14A-D). All of these photographs were taken at the second autopsy, performed by Dr. Joan Wood. See Brooks' Initial Brief at 71-2; Brooks v. State, 787 So. 2d 765, 781 (Fla. 2001)(ruling on five photographs from the second autopsy).

State’s exhibits 1A-1T again depicted the crime scene, including the position of Carlson and Stuart’s bodies (see State’s Ex. 1B, 1J and 1K), close-ups of Carlson’s head (State’s Ex. 1C), and the baby (State’s Ex 1E, 1F and 1I).

Finally, the State sought to introduce State’s exhibits 12A-E and 14A-D, which were photographs taken during the second autopsy by Wood (T. 1945).[5] Trial counsel objected as to the introduction through Johnson since this Court had determined that the photographs were admissible to assist the medical examiner and because the photographs were not relevant and would only inflame the passions of the jury (T. 1946-8). Trial counsel renewed his objection when Dr. Michael Berkland testified about the photographs (T. 2080-2).

First, it is indisputable that contrary to the State’s patently incorrect and misleading argument, State’s exhibits 1A-T, 6A-O and 7 were not the subject of the issue in Mr. Brook’s initial direct appeal. Further, as to State’s exhibits 12A-F and 14A-D, this Court previously held that five of the exhibits were properly admitted through Wood because they were relevant to her testimony regarding cause of death. Brooks v. State, 787 So. 2d 765, 781 (Fla. 2001). That ruling was based on the circumstances presented on appeal. Here, the circumstances were

[5]State’s exhibits 12A-E were considered by this Court at Mr. Brooks’ initial direct appeal. See Brooks v. State, 787 So. 2d 765, 781 (Fla. 2001)

not the same and thus, they were not automatically admissible.

Second, there were no less than thirty-five photographs of Carlson and Stuart at the crime scene, autopsy or second autopsy that were shown to the jury along with a videotape from the crime scene which also showed both victims from various angles, close-ups of their positions and injuries. Many of the photographs were duplicative of each other and the video and not relevant.

Third, Nielson initially identified the victims' injuries and cause of death without the use of photographs. Yet, she was then asked to repeat her testimony using the photographs. Likewise, the State presented the testimony of two medical examiners and a crime scene technician, all of whom identified many of the same injuries using similar photographs and the video, so the jury repeatedly heard testimony and viewed photographs and a videotape depicting the victims' injuries.

In addition, State's exhibit 7 was never even introduced to the jury, yet it was published to them through a witness (Freeman), who admitted that she could not identify Carlson from the photos. Therefore, the photos were clearly irrelevant to her testimony and should not have been shown to the jury.

This Court has held that photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-2 (Fla. 1975), cert. denied, 428 U.S. 912

(1976). Although relevancy is a key to admissibility of such photographs, under Adams v. State, 412 So. 2d 850 (Fla. 1982), limits must be placed on "admission of photographs which prove, or show, nothing more than a gory scene." Thomas v. State, 59 So. 2d 517 (Fla. 1952).

Furthermore, a photograph's admissibility is based on relevancy, not necessity. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). And, while relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990).

Here, the intent of the State was clear: show the jury multiple irrelevant and gory images of the victims to inflame the jury so that the jury would be distracted from the circumstantial evidence and convict Mr. Brooks and sentence him to death. The prejudice substantially outweighed any probative value. Mr. Brooks was denied a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States constitution.

Without any reasonable strategy, appellate counsel failed to raise this issue on direct appeal. Appellate counsel was ineffective. Habeas relief is warranted.

CONCLUSION

For all the reasons discussed herein, Mr. Brooks respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, on this 12th day of April, 2013.

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

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