Electronically Filed 08/26/2013 02:27:48 PM ET

RECEIVED, 8/26/2013 14:28:41, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

NO. SC13-706

LAMAR Z. BROOKS,

Petitioner,

v.

MICHAEL D. CREWS,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

LINDA MCDERMOTT
Florida Bar No. 102857
McClain & McDermott
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, FL 33928
Telephone (850) 322-2172
Facsimile (954) 564-5412
lindammcdermott@msn.com

COUNSEL FOR PETITIONER

PRELIMINARY MATTERS

Initially, Mr. Brooks asserts that Respondent has improperly relied on non-record materials throughout his response. For example, Respondent outlines direct appeal counsel's alleged experience before this Court, relying on information on the Florida Bar's website. Response at 2. Without any authority, Respondent informs this Court that it can take judicial notice of the information because the Florida Bar is supervised by this Court. Response at 2, n.1. Mr. Brooks knows of no rule of evidence or appellate procedure allowing for admission of non-record facts at this juncture of the proceeding. Likewise, Mr. Brooks knows of no rule of evidence or appellate procedure that allows for judicial notice of information contained on the web.

Mr. Brooks is not opposed to remanding his petition for an evidentiary hearing at which time he would be able to confront the information that Respondent has suggested has some bearing on his case. However, unless and until Mr. Brooks has reasonable notice and opportunity to be heard and question this information and present evidence of his own, Respondent's reliance on non-record evidence must be disregarded.

As to how this Court should review Mr. Brooks' case, Respondent suggests that Mr. Brooks' appellate counsel cannot be ineffective because, after rehearing was filed, this Court was sharply divided as to whether Mr. Brooks should receive a new

trial. Response at 8. This is not the standard for determining whether appellate counsel was ineffective.

Further, Respondent argues that because Mr. Brooks' brief on direct appeal was 99 pages, "appellate counsel probably would have had to delete four issues to make room for the four additional issues ..." Response at 8. Respondent's argument is frivolous and ignores the realities of appellate practice.[1]

Florida Rule of Appellate Procedure 9.210(a)(5) specifically authorizes a request for an extension of the page limitation. Fla. R. App. P. 9.210(a)(5) ("Longer briefs may be permitted by the court"). Finally, there is no doubt that in drafting a brief, particularly in a capital case, all potentially meritorious issues must be included. If upon drafting Mr. Brooks' brief, appellate counsel found that he had exceeded the page limitation, surely he could have requested additional pages, or condensed the issues, deleted words, sentences, or even paragraphs that may not have been absolutely necessary in

[1]Respondent ignores the possibility that appellate counsel may request an extension of page limitation. Further, and more importantly, Respondent appears to believe that when writing an appellate brief, counsel writes issues until there are no more pages to use and then stops writing whether there are issues that should be included in the brief or not. However, in reality, competent appellate attorneys identify issues, draft a brief and if at that point the brief exceeds the page limitation, then appellate counsel re-drafts and condenses portions of the brief in order to meet the page limitation. Surely, competent counsel would not just excise issues that were believed to be meritorious simply because they happened to be on page 99.

presenting an issue to this Court. Respondent is incorrect to suggest that we simply look to how many pages were remaining in Mr. Brooks' brief on direct appeal to determine if appellate counsel was ineffective.

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.

In it's Response to Mr. Brooks' petition for writ of habeas corpus the State argues that the United States Supreme Court has never held that the State cannot present inconsistent positions as to the culpability of co-defendant's in a capital case. The State's position in flatly wrong.

In Bradshaw v. Stumpf, 545 U.S. 175, 187 (2005), the Supreme Court remanded the case to the circuit court specifically because the "prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence ...". Furthermore, as Justice Souter explained in his concurring opinion, this type of due process violation was not new but was based upon the Court's line of cases concerning the need for reliability in capital cases, see Lewis v. Jeffers, 497 U.S. 764, 774 (1990), and requirement that prosecutor's fulfill their obligation to do justice, see Berger v. United States, 295 U.S. 78, 88 (1935).

Contrary to the State's argument, Mr. Brooks' did not rely

on a concurring opinion to support his claim, see Respones at 14, but rather merely pointed out, as Justice Souter did, that this type of error had previously been recognized by the Supreme Court when addressing both capital sentencing procedures and the obligations of the prosecutor.

However, despite the Supreme Court's long line of cases renouncing the type of behavior that occurred in Mr. Brooks' case, the State urges this Court to ignore it. Indeed, the State submits that logic defies a rule preventing the presentation of inconsistent theories. See Response at 11-12. The State's argument is based on a hypothetical in which a defendant, who is charged with a crime is later exonerated. Thereafter, another defendant is charged with the same crime. Thus, a rule such as the one the Supreme Court has adopted would prevent the State from prosecuting the subsequent defendant. See Response at 11-12.

But, the critical fact that the State either ignores or overlooks is that in his hypothetical, the defendants are unrelated. In Stumpf, and here, the defendants are co-defendants. It is that fact that creates the claims that Mr. Brooks and those before him have asserted: that the death penalty must be administered in a fair and reliable manner; that equally culpable co-defendants must be treated the same; and that a prosecutor has a duty to do justice, not distort evidence to obtain convictions and death sentences.

And, in attempting to further his position, the State misleads the Court by suggesting that "federal circuits have taken various positions on the issue." In fact, the two cases cited by the State permitting inconsistent theories, United States v. Frye, 489 F.3d 201 (5th Cir. 2007), and United States v. Presbitero, 569 F.3d 691 (7th Cir. 2009), are entirely consistent with Stumpf, and do not support the State's argument here because the cases concerned the prosecutor's inconsistent position as to the convictions of the defendants, not the sentences (which were not death sentences).

Furthermore, though the Sixth Circuit has rejected the due process claim in Stumpf, the Sixth Circuit held that the prosecutor had not presented an incomplete set of facts in its case against Stumpf. Stumpf v. Robinson, __ F.3d __; 2013 WL 3336739, *7. Here, Mr. Brooks submits that the prosecutor presented evidence at the trials that was inconsistent. Indeed, throughout Davis' trial, the prosecutor elicited testimony that, at a minimum, it was unclear as to who was the actual killer. But, at Mr. Brooks' trial, the prosecutor elicited testimony and argued that the individual in the backseat was the "knifeman" and that individual was Mr. Brooks.

The State also argues that any claim of ineffectiveness of appellate counsel is meritless because the Stumpf opinion issued after Mr. Brooks' direct appeal. See Response at 14. However, as

the Court pointed out in Stumpf, the State raised no Teague-bar to the claim. 545 U.S. at 182. This was so, because as Justice Souter stated, in his concurring opinion, Stumpf's position was anticipated and supported by cases that had existed long before Mr. Brooks' direct appeal. See 545 U.S. at 189-90. Therefore, appellate counsel was ineffective in failing to raise Mr. Brooks' claim.

The State also suggests that any error did not prejudice Mr. Brooks. See Response at 15-16. However, a review of Davis' record on appeal demonstrates the prejudice that could have been established by appellate counsel. There, the prosecutor was not simply "neutral", and he was not "neutral" in Mr. Brooks' case. In Davis' case the prosecutor, at a minimum, suggested that Davis participated in the assault of Carlson and Stuart. However, at Mr. Brooks' trial the prosecutor elicited testimony and argued that the individual in the backseat was the "knifeman" and that individual was Mr. Brooks.

As to the portion of Mr. Brooks' claim concerning appellate counsel's failure to supplement and rely on Davis' record on appeal to support his claim that Davis was equally culpable, the State refers to the argument made in Mr. Brooks' briefs. See Response at 16-17. Therefore, according to the State, appellate counsel cannot be deficient. See Response at 17-18.

First, Mr. Brooks is not re-fashioning a previously raised

claim – the claim presented here is that appellate counsel failed to adequately represent Mr. Brooks by overlooking the evidence presented in Davis' trial and the arguments made which were critical to establish his claim that Davis was an equally culpable co-defendant. Mr. Brooks' claim is no different than an ineffective assistance of trial counsel claim, where trial counsel presented some mitigation, but failed to present a complete and accurate picture of the mitigation that was available. Here, appellate counsel failed to present the evidence of what occurred at Davis' trial – which was necessarily more critical to Mr. Brooks' claim than what was presented at his own trial as the prosecutor who presented evidence and argued the cases told Davis' jury that Davis was "the only reason" that Carlson and Stuart had been killed. See Davis ROA T. 1473.

Finally, the State proclaims that the United States Supreme Court does not require either a proportionality or culpability analysis in reviewing a death sentence. Of course, the State ignores the law of the State of Florida which requires both of those analyses be performed. See Anderson v. State, 841 So. 2d 390, 407-08 (Fla. 2003). Indeed, 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) . Indeed, disparate sentencing is only

permissible when one of the co-defendants is more culpable than the other or others. Jennings v. State, 718 So. 2d 144, 153 (Fla. 1998).

And, contrary to the State's argument, the United States Supreme Court has 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).

Parker v. Dugger, 408 U.S. 308, 321 (1991)(emphasis added).

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.

The State incorrectly argues that appellate counsel was not

ineffective for failing to raise a "*Crawford*/Confrontation Clause challenge" because Crawford had was not issued unil two years after Mr. Brooks' direct appeal. However, what the state misunderstands is that before Crawford, the Confrontation Clause still existed. It is, in fact, a part of the Sixth Amendment to the United States Constitution. Therefore, Mr. Brooks' right to confrontation existed long before his direct appeal in 2002 and long before the United States Supreme Court issued its decision in Crawford v. Washington, 541 U.S. 36 (2004). The State's reliance on Crawford to analyze Mr. Brooks' claim is in error and therefore Mr. Brooks will not address it.[2] See Response at 22.

The State's interpretation of Delaware v. Van Arsdall, 475 U.S. 673 (1986), is also in error. Indeed, in Van Arsdall, the United States Supreme Court held that the limitation of the trial court's cross examination of a witness violated the confrontation clause. Van Arsdall, 475 U.S. at 674. Thus, contrary to the State's position, the Confrontation Clause it not satisfied by simply making the witnesses available. See Response at 23-24.

Here, the trial court's limitation of cross-examination went to the core of Mr. Brooks' defense and entirely cut-off his opportunity to impeach the witnesses and the State's case. Therefore, the limitations placed upon Mr. Brooks violated his

---

[2]Mr. Brooks' did not cite to Crawford in his petition and instead addressed the issue in accordance with the legal landscape which existed at the time of Mr. Brooks' trials.

right to confrontation.

Furthermore, there is no doubt that the State failed to produce Dr. Joan Wood and permitted Dr. Michael Berkland to testify as to Nielson and Woods' examination of the victims. Contrary to the State's position, the United States Supreme Court law was clear at the time of Mr. Brooks' re-trial: For Confrontation Clause purposes, a witness is not unavailable unless the prosecution makes a good faith effort to obtain his presence. Ohio v. Roberts, 448 U.S. 56, 74 (1980). The State made no such effort. And, since Roberts had been decided in 1980, appellate counsel did not need to anticipate a change in the law to raise the issue, as the State suggests. See Response at 25.

Additionally, the State's reliance on Williams v. Illinois, 132 S.Ct 2221 (2012), is misplaced. In Williams, the United States Supreme Court stated: "Under settled evidence law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true. **It is then up to the party who calls the expert to introduce other evidence establishing the facts assumed by the expert**." (Emphasis added). Here, the State never presented the testimony of Dr. Wood, so the evidence upon which Dr. Berkland relied was never established as fact and his opinions should have been stricken. So, while it may have been permissible for the State to present the opinions

of Dr. Berkland, it was impermissible for the State to do so without ever supporting his opinions with evidence. The evidence would have come from Dr. Wood, but the State failed to call her at trial and failed to make a showing of her unavailabilty and the reliability of her work product.

Without any reasonable strategy, appellate counsel failed to discover and present this issue. Appellate counsel was ineffective. 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.

As to Mr. Brooks' claim that the State shifted the burden to Mr. Brooks to prove his innocence, the State argues that the State is permitted to comment on the reasonable doubt standard and here, the comments did not rise to burden shifting. Response at 33-34. However, the State ignores the specific comments by the prosecutor and the theme of the prosecution throughout Mr. Brooks' trial. The comments made by the prosecutor, during voir dire and throughout the trial clearly communicated that it was not the prosecution's responsibility to prove Mr. Brooks' guilt, but his burden to prove that someone else committed the crime. These comments were improper and relief is appropriate.

In addition, the prosecutor's stabbing gestures were highly

improper and prejudicial. Without any authority the State proclaims that a prosecutor "may make hand gestures demonstrating the manner in which the victims were killed in closing argument." Response at 36. However, it is clear that the prosecutor's hand gestures during closing argument were designed 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." See Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). This behavior was improper and relief is appropriate.

Without any reasonable strategy, appellate counsel failed to present this issue. Appellate counsel was ineffective. 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.

The State, as before, attempts to mislead this Court by arguing that this Court had previously permitted the admissibility of the photos at issue during Mr. Brooks' original direct appeal. See Response at 38. The State's assertion is false. As identified in Mr. Brooks' petition the photos that were previously ruled admissible were photos from Joan Wood's second autopsy. However, at Mr. Brooks' re-trial numerous other photographs and a video were admitted – from the crime scene and

autopsies (not including Wood's second autopsy).

Indeed, in apparent criticism of Mr. Brooks' registry counsel, the State asserts: "habeas counsel harps on the prosecution being mistaken regarding the number of photographs that were introduced at the first trial." See Response at 41. Perhaps, registry counsel "harps" on the argument made by the prosecutor because it was false and misleading and a simple reading of this Court's original opinion makes that clear. Further, the State, like the trial prosecutor makes the same false and misleading argument now.

Furthermore, the State's position also ignores the fact that the five photos deemed admissible by this Court during Mr. Brooks' original direct appeal were found to be 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 not the same and thus, they were not automatically admissible.

And, contrary to the State's assertion, these were more than simply "additional" photographs – they were extremely gruesome and irrelevant photographs and a video that the jury was repeatedly shown. The State simply ignores the fact that photos were shown to the jury that were never even introduced into evidence. A review of the photographs and video clearly

demonstrates that they were more prejudicial than probative and, but for the prosecution's false and misleading argument at trial, would have been excluded.

Without any reasonable strategy, appellate counsel failed to present this issue. Appellate counsel was ineffective. Habeas relief is warranted.

CONCLUSION AND RELIEF SOUGHT

Mr. Brooks requests habeas corpus relief.

CERTIFICATION OF TYPE SIZE AND STYLE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by electronic mail to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, this 26th day of August, 2013.

Respectfully submitted,

/s/. Linda McDermott
LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
20301 Grande Oak Blvd.
Suite 118 - 61
Estero, Florida 33928
(850) 322-2171
lindammcdermott@msn.com

COUNSEL FOR MR. BROOKS