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In the Supreme Court of Florida

CASE NO. SC13-706

LAMAR Z. BROOKS, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Brooks filed a petition for writ of habeas corpus in this Court raising four claims of ineffective assistance of appellate counsel. For the reasons discussed below, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief.

Brooks was represented in the direct appeal following the retrial by Assistant Public Defender David A. Davis. *Brooks v. State*, 918 So.2d 181 (Fla. 2005)(No. SC02-538). Assistant Public Defender Davis was admitted to the Florida Bar in 1979.[1] He has been board certified in criminal appellate practice since 1987. According to this Court's docketing, he is counsel of record in scores of capital cases and has been representing capital defendants in this Court since 1981.

In the direct appeal, Assistant Public Defender Davis raised fourteen issues in his initial brief. Nine of those fourteen issues were guilt-phase issues and five were penalty-phase issues. The initial brief was 99 pages long and included nine pages of facts. He then filed a 31 page reply brief addressing all fourteen of the original issues raised.

After this court affirmed the convictions and death sentences, A.P.D. Davis filed a motion for rehearing arguing four grounds. The first ground of the rehearing was a claim that a new trial was required because this Court had concluded that the merger doctrine precluded aggravated child abuse from serving as the underlying

[1] This information is available on the Florida Bar's website which this Court can take judicial notice of because the Florida Bar is supervised by this Court.

felony for first-degree felony murder. *Brooks v. State*, 918 So.2d 181, 197-199 (Fla. 2005). He argued that the conviction could not be affirmed because State's felony murder theory was legally invalid and, pursuant to *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) and *Fitzpatrick v. State*, 859 So.2d 486 (Fla. 2003), a new trial was required when a general verdict is supported, in part, by a legally invalid theory. The State filed a 21 page response to the motion for rehearing asserting that legally invalid theories are subject to harmless error analysis, like other jury instruction errors, and that the error was harmless. Three Justices agreed with his position and believed that a new trial was required. *Brooks*, 918 So.2d at 220 (Pariente, C.J., dissenting on denial of rehearing)(stating: "[u]nder the United States Supreme Court decision in *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), and this Court's decision in *Fitzpatrick v. State*, 859 So.2d 486 (Fla. 2003), reversal is required because the general verdict of guilt precludes us from determining whether the jury relied upon the valid premeditated murder theory or the legally invalid felony murder theory."); *Brooks*, 918 So.2d at 221 (Lewis, J., dissenting on denial of rehearing)(stating: "our previous opinion in *Fitzpatrick v. State*, 859 So.2d 486 (Fla. 2003), which was required by the United States Supreme Court's decision in *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957), the

majority's conclusion that a single stabbing blow cannot constitutionally, as a matter of law, constitute an underlying felony for the purpose of application of the felony murder doctrine requires this Court to reverse Brooks's convictions.”). Assistant Public Defender Davis was one Justice away from gaining his client another retrial.[2]

Assistant Public Defender Davis then filed a petition for writ of certiorari in the United States Supreme Court raising the *Yates* issue. *Brooks v. Florida*, 547 U.S. 1151, 126 S.Ct. 2294, 164 L.Ed.2d 820 (2006)(No. 05-9813). The United States Supreme Court denied the petition.[3]

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[2] This Court later receded from its decision in *Brooks II* that the merger doctrine precluded aggravated child abuse serving as the underlying felony for felony murder. *State v. Sturdivant*, 94 So.3d 434 (Fla. 2012).

[3] The United States Supreme Court later receded from *Yates* in *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008). *Yates* errors are now subject to harmless error analysis. *Skilling v. United States*, 130 S.Ct. 2896, 2934 (2010)(stating that “errors of the *Yates* variety are subject to harmless-error analysis.”); *United States v. Jefferson*, 674 F.3d 332, 361 (4th Cir. 2012)(observing that “a *Yates* alternative-theory error is subject to ordinary harmlessness review” citing *Pulido*)

Standard of review

The standard of review of an ineffectiveness claim is *de novo. Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000). This standard of review applies to claims of ineffective assistance of appellate counsel as well as claims of ineffective assistance of trial counsel. *Wickham v. State*, - So.3d -, -, 2013 WL 1830950, 14 (Fla. May 2, 2013)(stating that the standard of review for ineffective appellate counsel claims mirrors the *Strickland* standard for ineffective assistance of trial counsel); *State v. Riechmann*, 777 So.2d 342, 364 (Fla. 2000)(explaining that the standard for proving ineffective assistance of appellate counsel parallels the standard used for establishing ineffective assistance of trial counsel).

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court has explained that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *Wickham v. State*, - So.3d -, -, 2013 WL 1830950, 14 (Fla. May 2, 2013)(citing *Valle v. Moore*, 837 So.2d 905, 907 (Fla. 2002)); *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) and *Thompson v. State*, 759 So.2d 650, 660 (Fla. 2000)). "Claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus addressed to the appellate court that

heard the direct appeal.” *Connor v. State*, 979 So.2d 852, 868-869 (Fla. 2007).

In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must resolve the two issues: 1) whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and 2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Bradley v. State*, 33 So.3d 664, 684 (Fla. 2010). In the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. Petitioner must show that he would have won a reversal from this Court had the issue been raised. This Court has explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643.

Appellate counsel’s performance will not be deficient if the

legal issue that appellate counsel failed to raise was meritless. *Wyatt v. State*, 71 So.3d 86, 112-113 (Fla. 2011)(explaining that the failure of appellate counsel to raise a meritless issue will not render appellate counsel's performance ineffective citing *Walls v. State*, 926 So.2d 1156, 1175–76 (Fla. 2006)(quoting *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000)); *Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.) Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n.1 (Fla. 1985)). Appellate counsel is not required to raise every claim that might have had some possibility of success; effective appellate counsel need not raise *every conceivable* nonfrivolous issue. *Zack v. State*, 911 So.2d 1190, 1204 (Fla. 2005)(emphasis in original).

Furthermore, appellate counsel is not ineffective for failing to raise claims that were not preserved in the trial court, in the absence of fundamental error. *Lowe v. State*, 2 So.3d 21, 45 (Fla. 2008)(explaining that appellate counsel cannot be deemed ineffective for failing to present a claim that was not preserved citing *Davis v. State*, 928 So.2d 1089, 1132-1133 (Fla. 2005)); *Morton v. State*, 995 So.2d 233, 247 (Fla. 2008)(noting that

appellate counsel is not ineffective for failing to raise an issue that was not preserved at trial unless the claim rises to the level of fundamental error citing *Rodriguez v. State*, 919 So.2d 1252, 1281-1282 (Fla. 2005)).

Proper analysis of any claim of ineffectiveness should consider not merely what counsel failed to do but what counsel did do. Any claim of ineffective assistance of appellate counsel in this case is particularly meritless in light of this Court's decision on rehearing. *Brooks*, 918 So.2d at 220 (Pariente, C.J., dissenting on denial of rehearing); *Brooks*, 918 So.2d at 221 (Lewis, J., dissenting on denial of rehearing). Assistant Public Defender Davis was one Justice away from gaining his client another retrial. Furthermore, this Court later receded from its decision in *Brooks II* that the merger doctrine precluded aggravated child abuse serving as the underlying felony for felony murder. *State v. Sturdivant*, 94 So.3d 434 (Fla. 2012). Assistant Public Defender Davis managed to convince this Court of a position that it later abandoned. Any claim of appellate counsel's inadequacies is especially unwarranted in light of those events.

Furthermore, because the initial brief was 99 pages and raised fourteen issues, appellate counsel probably would have had to delete four issues to make room for the four additional issues that habeas counsel now asserts he should have raised instead. Habeas counsel does not identify which of the fourteen issue that were

raised should have been deleted to make room for these four additional issues.

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE STATE TOOK INCONSISTENT POSITIONS AND FOR FAILING TO ARGUE PROPORTIONALITY ADEQUATELY?

Brooks asserts that his appellate counsel, Assistant Public Defender Davis, was ineffective for not raising a claim that the State took inconsistent positions regarding who stabbed the victims at Brooks' trial from the position taken during the co-perpetrator's trial. Brooks also claims that appellate counsel failed to "adequately" argue that his death sentences are relatively disproportionate due to his co-perpetrator receiving a life sentence.

Inconsistent positions

The United States Supreme Court has never held that due process prohibits the State from presenting inconsistent theories of prosecution. In *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005), the Supreme Court held that the allegedly inconsistent prosecution theories could not have affected Stumpf's conviction and declined to address whether the allegedly inconsistent theories affected sentencing. *See also Bradshaw v. Stumpf*, 545 U.S. 175, 190, 125 S.Ct. 2398, 2409–10, 162 L.Ed.2d 143 (2005)(Thomas, J., concurring)(observing that the "Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent

theories."); *United States v. Hill*, 643 F.3d 807, 832 (11th Cir. 2011)(observing that "it is not at all plain that a defendant has a right to prevent the prosecution from using inconsistent theories to prosecute two separately tried defendants charged with the same crime").

Habeas counsel's reliance on the concurring opinion in *Stumpf* is misplaced. That view of due process was adopted by only two Justices - Justice Souter and Justice Ginsburg. It is not the view of the majority of the United States Supreme Court. The majority opinion, written by Justice O'Connor, was unanimous with all of the Justices joining. It is only that opinion that is binding precedent. A concurring opinion, that was not written by a necessary fifth Justice, is of no precedential value. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977)(explaining that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds").

The United States Supreme Court is never going to hold that the State can never present inconsistent theories of prosecution and a simple example will illustrate why. Suppose, in the era prior to the advent of DNA testing, the state prosecuted defendant A for rape based on the positive eyewitness identification of

defendant A by the rape victim. The first jury convicts defendant A. After the advent of STR DNA testing, however, it was conclusively, scientifically established that defendant A was not the rapist. In other words, the jury convicted the wrong guy in the first trial. The State releases defendant A based on the DNA results. The DNA results, however, also reveal the identity of the real rapist. The DNA database CODIS identifies defendant B as the real rapist and the State then seeks to try the second defendant for the same rape in a second trial. The State's theories are as inconsistent as it is possible to be - at the first trial, the prosecution said defendant A was the rapist but at the second trial, the prosecution seeks to say defendant B is the actual rapist. A total ban on the State taking inconsistent theories of prosecution would prevent the State from ever prosecuting the real rapist. A clearly guilty rapist would get off scot-free if the Supreme Court ever held that due process prohibits the State from presenting inconsistent theories of prosecution under any circumstances. This result hardly accords with any possible reasonable view of due process. The most the United States Supreme Court is ever going to require is that the defense be allowed to inform the second jury that the State took a different position in front of the first jury.

The Florida Supreme Court has declined to address the issue. *Marek v. State*, 8 So.3d 1123, 1128 (Fla. 2009)(noting the court in

Raleigh v. State, 932 So.2d 1054 (Fla. 2006), rejected an inconsistent-theories claim on the basis that the State's theories were not inconsistent, without addressing whether such a due process right was established); *see also Parker v. State*, 542 So.2d 356 (Fla. 1989)(holding that the State did not have a duty to tell the jury that it was taking an inconsistent position).

The federal circuits have taken various positions on the issue. *United States v. Frye*, 489 F.3d 201, 214 (5th Cir. 2007)(stating that a "prosecutor can make inconsistent arguments at the separate trials of codefendants without violating the due process clause."); *United States v. Presbitero*, 569 F.3d 691, 702 (7th Cir. 2009)(noting the circuit split and observing that: "[n]ot everyone agrees that the due process clause prevents the government from arguing inconsistent theories" but declining to address the issue because there were two different crimes and because "the government did not take fundamentally opposite positions in its two prosecutions"); *but see Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000)(holding the "use of inherently factually contradictory theories violates the principles of due process" but to "violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime"); *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997)(en banc)(stating "when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate

trials, offer inconsistent theories and facts regarding the same crime"). The issue is currently pending en banc review in the Sixth Circuit in the case that was remanded by the United States Supreme Court in 2005. *Stumpf v. Houk*, 653 F.3d 426 (6th Cir. 2011)(holding the State taking inconsistent positions regarding which of the two defendants was the actual killer was a violation of due process), *vacated pending rehearing en banc* (Oct. 26, 2011).

Appellate counsel's performance was not deficient for not raising an inconsistent position claim on appeal. The initial brief in this case was filed in September of 2002, over two years before *Stumpf* was decided in June of 2005. Appellate counsel is not ineffective for not foreseeing the *Stumpf* decision. *Taylor v. State*, 62 So.3d 1101, 1111 (Fla. 2011)(explaining that trial counsel "cannot be held ineffective for failing to anticipate the change in the law" citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992) and *Stevens v. State*, 552 So.2d 1082, 1085 (Fla. 1989)); *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001)(noting the circuit's "wall of binding precedent that shuts out any contention that an attorney's failure to anticipate a change in the law constitutes ineffective assistance of counsel" citing numerous cases).[4]

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[4] And even if appellate counsel had a crystal ball with which to foresee the *Stumpf* decision it would not have helped much because *Stumpf* was really a non-decision. Habeas counsel was forced to rely on the non-binding concurring opinion in *Stumpf* to support her argument. Indeed, habeas counsel is relying on an

Nor was there any prejudice. Even under Justice Ginsburg's view or in those jurisdictions where the due process clause prohibits the state from taking inconsistent positions, such as the Eighth Circuit, the claim is meritless. The State did not take inconsistent positions regarding who the actual "knifeman" was. The State did NOT assert that Davis was the actual stabber in the first trial and then turn around and assert that Brooks was the actual stabber in the second trial. Indeed, habeas counsel quotes the prosecutor at the first trial as saying that even if only one person caused all the injuries, "I don't care" and the jury should not either. Pet. at 4. The prosecutor in Davis' trial argued it "doesn't matter in the least" if Davis did not strike even one blow because he told Davis to do "what we planned" and Davis should still be sentenced to death regardless of what the jury believed "about who struck what blows." *Id.* This is not inconsistent with the position taken at Brooks' trial. *Raleigh v. State*, 932 So.2d 1054, 1065-1067 (Fla. 2006)(finding the state did not take inconsistent position during the defendant's and coperpetrator's

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expansive reading of the concurring opinion because that concurring opinion may well be limited to inconsistent positions regarding who the actual triggerman was, not to other types of inconsistencies, as habeas counsel would have it. It probably does not extend to all inconsistencies regardless of how minor. Moreover, the *Stumpf* concurring opinion did not say that the prosecution could not leave the issue of who was the actual stabber in defendant A's trial to the first jury and then argue that defendant B was the actual stabber to the second jury. Nothing in the *Stumpf* concurring opinion addresses such a situation, which is the situation here.

murder trials because the "essence" of the prosecutor's "argument was that Figueroa was no less culpable for the murder of Eberlin than Raleigh."). Neutrality at the first trial cannot support an inconsistent position claim. The State's theory was consistently that both Brooks and his cousin Davis were "guilty to the gills" of both premeditated and felony murder. *United States v. Hill*, 643 F.3d 807, 834 (11th Cir. 2011)(rejecting a claim of prosecutorial inconsistency because the "government's consistent theory was that both Alcindor and Graham were guilty to the gills of the Centrum Bank fraud charges"). There was no violation of the due process clause under any of the various views of due process taken by the various Justices or courts including, most importantly, this Court's view in *Raleigh*. There was no inconsistency at the "core" of the two trials, in the Eighth Circuit word's. *Smith*, 205 F.3d at 1052. Appellate counsel would not have prevailed on appeal if he had raised such an issue.

Relative culpability

Appellate counsel raised a claim of relative culpability in the direct appeal. IB in DA at 68; RB at 24. Appellate counsel argued in the initial brief that Davis "instigated, planned and helped carry out" the murders yet Davis was sentenced to life. IB at 69. He pointed out that the "prosecutor repeatedly hammered

that Walker Davis was the driving force behind the murders." IB at 69 citing T. Vol 32 999). Appellate counsel attacked the conclusion that "only Brooks killed" and then, alternatively, argued that, even if Brooks was the actual stabber, in "most other aspects," Davis "exhibited a greater blameworthiness." Appellate counsel argued in the reply brief that all the aggravating circumstances applied equally to both Brooks and Davis. RB at 24. Furthermore, appellate counsel reasserted the relative culpability argument in his motion for rehearing arguing that there is "simply no equal justice when a man more obviously culpable is spared a death sentence when his co-defendant receives" a death sentence. Motion for rehearing at 7-9. Appellate counsel argued that "Walker Davis was the dominant, driving force behind these murders" and was solely the one with a $90,000 motive. MforR at 8. He also argued that Brooks may not have been exclusively the actual stabber because there was a possibility that both Brooks and Davis stabbed Rachel. MforR at 8-9.

Appellate counsel's performance was not deficient. This Court does not consider claims of ineffectiveness of appellate counsel for not "adequately" arguing an issue. *Lawrence v. State*, 969 So.2d 294, 315 (Fla. 2007)(rejecting a claim of ineffective assistance of appellate counsel for not presenting additional argument in support of an proportionality claim as being procedurally barred where "appellate counsel presented substantial proportionality arguments,

both in its initial brief, during oral argument, and in a motion for rehearing"); *Zack v. State*, 911 So.2d 1190, 1210 (Fla. 2005)(rejecting a claim of ineffective assistance of appellate counsel because the "claim simply refashions a claim that was unsuccessfully raised on direct appeal."). Once appellate counsel sufficiently pleads and coherently argues an issue, appellate counsel's performance is necessarily adequate. This Court should refuse to address this claim of ineffectiveness.

Habeas counsel does not even identify what "better" arguments appellate counsel should have made regarding the relative culpability issue. Rather, habeas counsel complains that appellate counsel did not make the entire Davis record part of the record on appeal in this case. Instead, appellate counsel A.P.D. Davis used the evidence in this trial and the prosecutor's own words that Davis was the one with a "sinister motive" used in this trial to establish that it was Davis who had the motive to kill the mother and infant for the insurance money, not Brooks, as support for his arguments. DA IB at 69. Habeas counsel does not point to any part of the Davis record that was absolutely critical to a claim of relative culpability. And, while supplementing the record on appeal with the co-defendant's record on appeal may be the better practice when dealing with this type of issue, it is not always necessary and it was not in this case. Appellate counsel's performance was not subpar.

Furthermore, there was no prejudice. This Court affirmed the death sentence on direct appeal of the resentencing. *Brooks*, 918 So.2d at 208-210 (rejecting a claim that Brooks death sentences are disproportionate because Davis instigated, planned, and helped carry out the murders of Carlson and Stuart, yet received life sentences). Habeas counsel points to nothing substantial in the Davis record that undermines this Court's analysis.

Contrary to habeas counsel assertions, the Eighth Amendment does not require either proportionality review or relative culpability analysis. Pet. at 9. The United States Supreme Court has repeatedly held to the contrary. *Pulley v. Harris*, 465 U.S. 37, 42-44 & 54, 104 S.Ct. 871, 875-76 & 881, 79 L.Ed.2d 29 (1984)(holding the Eighth Amendment does require proportionality review and observing that "Any capital sentencing scheme may occasionally produce aberrational outcomes"); *McCleskey v. Kemp*, 481 U.S. 279, 305, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)(stating "where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required"); *see also Ritter v. Smith*, 726 F.2d 1505, 1508, n.8 (11th Cir. 1984)(rejecting a claim that Alabama's death penalty statute violates the Eighth Amendment because it does not require proportionality review has being foreclosed by *Pulley*). Appellate counsel is not required to make false assertions regarding Eighth Amendment jurisprudence to be effective. Actually, such incorrect

assertions regarding the caselaw undermine an attorney’s effectiveness.

Accordingly, this claim of ineffective assistance of appellate counsel should be denied.

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CONFRONTATION CLAUSE CLAIM?

Brooks asserts that his appellate counsel, Assistant Public Defender Davis, was ineffective for not raising a Confrontation Clause claim based on 1) the trial court limiting the scope of cross-examination to that of the direct examination; and 2) one medical examiner testifying based on another medical examiner's autopsy reports. Pet. at 10.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), The United States Supreme Court dramatically changed Confrontation Clause jurisprudence. The *Crawford* Court held that testimonial statements against a defendant are inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 54, 124 S.Ct. at 1365; *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S.Ct. 2527, 2531, 174 L.Ed.2d 314 (2009)(describing the holding of *Crawford*).

Appellate counsel's performance was not deficient for not raising a *Crawford*/Confrontation Clause challenge on appeal. The initial brief in this case was filed in September of 2002, over a year before *Crawford* was decided in March of 2004. Appellate counsel is not ineffective for not foreseeing the *Crawford*

decision. *Taylor v. State*, 62 So.3d 1101, 1111 (Fla. 2011) (explaining that trial counsel "cannot be held ineffective for failing to anticipate the change in the law" citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992) and *Stevens v. State*, 552 So.2d 1082, 1085 (Fla. 1989)); *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001)(noting the circuit's "wall of binding precedent that shuts out any contention that an attorney's failure to anticipate a change in the law constitutes ineffective assistance of counsel" citing numerous cases).

Nor was there any prejudice. Even under the current caselaw regarding the Confrontation Clause, both issues are meritless. Appellate counsel would not have prevailed on appeal if he had raised either issue.

Crawford and the scope of cross-examination

Crawford does not extend to issues regarding the scope of cross-examination. All that *Crawford* requires is that the "witness appears at trial." *Crawford*, 541 U.S. at 54, 124 S.Ct. at 1365; *Melendez-Diaz*, 557 U.S. at 309, 129 S.Ct. at 2531. Melissa Thomas, the FDLE crime scene technician, Mike Bettis, and Steve Whatmough all appeared at trial. They all testified. There can be no violation of *Crawford* on such facts.

It is *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), not *Crawford*, that governs the scope of

cross-examination. Under *Van Arsdall*, trial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *Van Arsdall*, 475 U.S. at 679. *Van Arsdall* did not change the traditional rule that a witness may not be questioned regarding matters outside the scope of the direct examination and if a party wishes to do so, he must call the witness as his own witness to delve into those areas. See e.g. Fed.R.Evid. 611(b)(providing: "Cross examination should be limited to the subject matter of direct examination and matters affecting the credibility of the witness."); § 90.612(2), Fla. Stat. (2013)(providing: "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness" but a "court may, in its discretion, permit inquiry into additional matters."); *Chandler v. State*, 702 So.2d 186, 195-96 (Fla. 1997)(observing that although "cross-examination is generally limited to the scope of the direct examination, the credibility of the witness is always a proper subject of cross-examination quoting Charles W. Ehrhardt, *Florida Evidence* § 608.1 at 385 (1997 ed.)). A trial court may limit cross-examination to matters explored in the direct examination without violating the Confrontation Clause. *Baxter v. Conway*, 2011 WL 5881846, 15 (S.D.N.Y. 2011)(limiting cross-examination on

matters that were outside the scope of direct examination does not violate Confrontation Clause citing *United States v. Adeniyi*, 2004 WL 1077963, *2-*4 (S.D.N.Y. May 12, 2004)). Melissa Thomas, the FDLE crime scene technician, Mike Bettis, and Steve Whatmough all could have been recalled by defense counsel to testify during the defense's case regarding these matters if defense counsel desired to do so. These witnesses were "available" which is all *Crawford* requires. There was no violation of the Confrontation Clause.

Dr. Berkland's testimony

Habeas counsel asserts that appellate counsel should have argued that Dr. Berkland's testimony violated the Confrontation Clause. Dr. Nielson performed an autopsy. Dr. Woods performed an autopsy later as well. Dr. Berkland did not perform any autopsy in this case. Dr. Berkland testified; Dr. Woods did not. In other words, a medical examiner who did not actually perform the autopsy testified as to the cause and manner of death of the victims.

Appellate counsel was not ineffective. The law at the time was that the testimony of the physician that actually performed the autopsy was not necessary. The well-established precedent was that any qualified medical examiner could testify as to the cause and manner of death, even though another examiner performed the actual autopsy. *Capehart v. State*, 583 So.2d 1009, 1012-1013 (Fla. 1991)(rejecting a claim that the trial court erred in allowing

another medical examiner to testify regarding the cause of death upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case where the medical examiner who had performed the autopsy had died prior to trial); *Waterhouse v. State*, 596 So.2d 1008, 1016 (Fla. 1992)(rejecting a claim that the prosecution should have been required to call the person who prepared the New York autopsy report); *Geralds v. State*, 674 So.2d 96, 100 (Fla. 1996)(holding it was proper to permit a medical expert to testify as to the cause of death, despite the fact that the expert did not perform the autopsy, because the medical examiner testified as to his "independent conclusions largely on the objective evidence."); *cf. Schoenwetter v. State*, 931 So.2d 857, 870 (Fla. 2006). Appellate counsel cannot be ineffective for not anticipating the change in the law announced in *Crawford*.

Furthermore, even today, under the current view, Dr. Berkland's testimony is not a violation of the Confrontation Clause. *Geralds* is still good law after *Crawford*. The *Geralds* Court reasoned that a medical examiner, who did not perform the actual autopsy, is testifying as to his or her own "independent conclusions" based largely "on the objective evidence." *Geralds*, 674 So.2d at 100. The United States Supreme Court recently rejected a *Crawford* challenge to an expert's testimony based on much the same reasoning as this Court employed in *Geralds*.

In *Williams v. Illinois*, - U.S. -, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), the United States Supreme Court held that an expert's testimony in a rape case did not violate the Confrontation Clause. The prosecutor presented a DNA expert who testified that the defendant's DNA matched the rapist's DNA. One of the testifying experts developed the DNA profile from the defendant's blood. But the Cellmark DNA expert, who developed the DNA profile from the vaginal swabs of the rape kit, did not testify. In other words, the prosecution's DNA experts performed only half of the DNA testing but the State's DNA expert was still allowed to testify that the defendant's DNA was a match of the rapist's DNA without violating *Crawford*. A four-Justices plurality determined that hearsay statements from other experts related to the testifying expert as raw material used as the basis of their opinion "are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Williams*, 132 S.Ct. at 2228. Four Justices also determined that the DNA report was not testimonial. Such a report "is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions" that the Confrontation Clause was historically concerned about. *Williams*, 132 S.Ct. at 2228.

Justice Thomas also concluded that such sources are not testimonial because the reports lacked the requisite "formality and solemnity" to be considered testimonial. *Williams*, 132 S.Ct. at

2255 (Thomas, J., concurring). Justice Thomas' concurring opinion was the critical fifth vote and therefore, is the controlling opinion. *Marks*, 430 U.S. at 193, 97 S.Ct. at 993. Materials that experts rely on, that are not sworn or certified, are not testimonial and therefore do not violate the Confrontation Clause.

In light of *Williams*, *Geralds* is still good law today. Here, Dr. Berkland testified as to his own conclusions, not to Dr. Nielson's conclusions or Dr. Woods' conclusions. Indeed, habeas counsel acknowledges that Dr. Berkland's conclusions differed from Dr. Nielson's regarding some details. Pet. at 26. While much of Dr. Berkland's testimony was based on Dr. Wood's "autopsy protocols, diagrams and photos," Dr. Berkland was testifying as to his own expert opinion. Therefore, there was no Confrontation Clause violation. The "autopsy protocols, diagrams and photos" are "objective evidence" of the type routinely relied upon by expert's in this area to form their expert opinions, just as in *Geralds*. The autopsy reports are not testimonial under *Crawford*. *See People v. Dungo*, 286 P.3d 442 (Cal. 2012)(holding that a forensic pathologist's testimony as to the cause of death, based on another pathologist's autopsy report, was not testimonial under confrontation clause, relying on *Williams*). Dr. Berkland's testimony did not violate the Confrontation Clause even under the current jurisprudence. This Court would merely reject this Confrontation Clause issue citing *Williams* and *Dungo*. Therefore,

there was no prejudice from not raising the issue of Dr. Berkland's testimony.

Accordingly, this claim of ineffectiveness of appellate counsel should be denied.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE PROSECUTOR’S COMMENTS WERE FUNDAMENTAL ERROR?

Brooks asserts that his appellate counsel, Assistant Public Defender Davis, was ineffective for not raising a claim that the prosecutor’s comments during both the guilt phase and the penalty phase were a denial of due process. Appellate counsel was not ineffective because none of the prosecutor’s comments were error, much less fundamental error.

Merits

In *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), the United States Supreme Court, while condemning the prosecutor's comments, held that the comments were not constitutional error because they did not deprive the defendant of a fair trial. The prosecutor's comments included calling the defendant an "animal"; expressing a personal wish for the defendant's death by saying: “I wish [Mr. Turman] had had a shotgun in his hand when he walked in the back door and blown his [Darden's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun". The prosecutor, referring to the defendant, said: “He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash” and "I wish someone had walked in the back door and blown his head

off at that point." *Darden*, 477 U.S. at 180, n.12, 106 S.Ct. at 2471, n.12. The Court observed that these "comments undoubtedly were improper." *Darden*, 477 U.S. at 180, 106 S.Ct. at 2471. But it is not enough that the prosecutors' remarks were "undesirable or even universally condemned;" rather, the relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The *Darden* Court noted that appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." The Supreme Court relied upon six factors in evaluating a due process claim arising from a prosecutor's inappropriate comments in closing argument: (1) whether the prosecutor manipulated or misstated the evidence, (2) whether the comments implicated other specific rights of the accused (such as the right to remain silent), (3) whether the comments were invited by or responsive to defense counsel's arguments, (4) whether the trial court's instructions ameliorated the harm, (5) whether the evidence weighed heavily against the defendant, and (6) whether the defendant had an opportunity to rebut the prosecutor's comments. The *Darden* Court concluded that these comments "did not deprive petitioner of a fair trial." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471.

In *Parker v. Matthews*, - U.S. -, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012), the Supreme Court recently rejected a claim that the prosecutor's argument, which insinuated that the defendant colluded with his lawyer and expert to manufacture an extreme emotional disturbance defense, violated the due process test established in *Darden*. The Court noted that *Darden* involved "considerably more inflammatory" comments by the prosecutor such as referring "to the defendant as an animal." The Court observed that the *Darden* standard is a very general one, leaving courts more leeway in reaching outcomes in case-by-case determinations" and that therefore, in an AEDPA case, a state court's rejection of a *Darden* claim is due that much more deference. So, "the Sixth Circuit had no warrant to set aside the Kentucky Supreme Court's conclusion" that the prosecutor comment's did not violate due process.

In *Reese v. Sec'y, Fla. Dep't. of Corr.*, 675 F.3d 1277, 1287-88 (11th Cir. 2012), the Eleventh Circuit denied habeas relief in a case where the prosecutor referred to the crime as "every woman's worst nightmare;" suggested that the defendant would be released on parole absent a sentence of death; compared the defendant to a "vicious dog;" and urged the jury to show the defendant "the same sympathy, the same pity that he showed to" the victim which was "none." The *Reese* Court denied the due process claim under both AEDPA standard and alternatively, under *de novo* review.

Furthermore, the Supreme Court has never granted habeas relief based upon a prosecutor's closing argument. *Reese v. Sec'y, Fla. Dep't. of Corr.*, 675 F.3d 1277, 1287-88 (11th Cir. 2012)(observing that "the Supreme Court has never held that a prosecutor's closing arguments were so unfair as to violate the right of a defendant to due process."); *Reese v. Sec'y, Fla. Dep't. of Corr.*, 675 F.3d 1277, 1294 (11th Cir. 2012)(Martin, J., concurring)(agreeing that "it is true that the Supreme Court has never granted habeas relief based upon a prosecutor's closing argument."). This is because the Supreme Court has a very high barometer regarding what a prosecutor must say to amount to a denial of due process. Many arguments that state courts find to be error, and even fundamental error, such as comments like "show the defendant the same mercy he showed the victim," would be viewed as perfectly proper arguments by the United States Supreme Court. And, even when Supreme Court finds arguments, such as "do your duty" to be improper, such arguments are not sufficient to amount to a denial of due process. *Cf. United States v. Young*, 470 U.S. 1, 18, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)(condemning a prosecutor's exhortation for the jury to "do its job" but concluding the argument was not plain error in a federal prosecution); *but see Strouth v. Colson*, 680 F.3d 596, 606 (6th Cir. 2012)(observing that "a prosecutor has no less right to discuss a jury's duty to impose the death penalty if legally warranted than a defense counsel has the right to discuss a jury's

duty to acquit (or give a life sentence) if legally warranted" in a federal habeas case).

Burden shifting

Brooks asserts that his appellate counsel was ineffective for not raising a claim that several of the prosecutor's comments regarding the reasonable-doubt standard of proof amounted to burden shifting. But descriptions of the reasonable-doubt standard of proof are not burden-shifting comments. They are two distinct concepts. One concept, the burden of proof, involves which party must prove the matter. The other concept, the standard of proof, involves how high that party's burden is - a mere scintilla; a preponderance; clear & convincing; or beyond a reasonable doubt. Appellate counsel is not ineffective for knowing that they are two distinct concepts.

Furthermore, the prosecutor's comment that the beyond-a-reasonable-doubt standard does not require that the State prove its case with 100% certainty is a correct statement of that standard of proof and does not violate *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The United States Supreme Court has approved of a definition of reasonable doubt that included the statement that "absolute or mathematical certainty" was not required. *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Florida courts have also approved of a

definition of reasonable doubt that the prosecution was not required to prove the case "to 100 percent certainty." *Smith v. State*, 682 So.2d 1143 (Fla. 4th DCA 1996)(citing *Victor*).

Nor did the prosecutor's comments that there was no evidence connecting Gundy to the murder shift the burden to Brooks. A statement that there is no evidence is not a statement regarding who has the burden of proof. *Bell v. State*, 108 So.3d 639 (Fla. 2013)(holding prosecutor's comment that there was no evidence contradicting prosecution's evidence of victim's age was not improper and that prosecutor's comment that there was no evidence supporting defense counsel's argument regarding the reason for defendant's failure to appear was not improper).

Appellate counsel is not ineffective for recognizing that there was no burden shifting. Appellate counsel is not ineffective for not raising a meritless claim on appeal. *Conahan v. State*, 2013 WL 1149736, 11 (Fla. 2013)(noting that appellate counsel cannot be deemed deficient for failing to raise a meritless issue). Nor was there any prejudice because there is no merit to habeas counsel's confusion of the two concepts. This Court would have merely denied any such claim explaining the difference between the two concepts.

Stabbing gestures

Brooks argues that his appellate counsel should have raised a claim that the prosecutor's stabbing motion during closing argument was a violation of his due process right to a fair trial. Pet. at 31. During closing argument, the prosecutor made stabbing motions while counting the number of times the victims were stabbed. (T. 2410-2412). Defense counsel objected but the trial court overruled the objection.

In *Lisenba v. California*, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 (1941), the United States Supreme Court held that the prosecutor's use of live rattlesnakes was not a violation of the due process right to a fair trial. The defendant attempted to murder his wife with a rattlesnake. The prosecutor used a live snake as a demonstrative aid. Lisenba argued the sole purpose of the production of the snakes was to prejudice the jury against him and that those in the courtroom, including the jury, were in a panic as a result of the incident. The Court concluded that the prosecutor's use of the snakes did not so infuse the trial with unfairness as to deny due process of law. "The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process." *Lisenba*, 314 U.S. at 228-229; *see also State v. Duncan*, 894 So.2d 817, 829-831 (Fla. 2004)(concluding the trial court did not abuse its discretion in

allowing the prosecutor to use a dummy as a demonstrative aid during the eyewitness's testimony).

A prosecutor in a murder prosecution may make hand gestures demonstrating the manner in which the victims were killed in closing argument. And appellate counsel is not effective for knowing that. *Conahan v. State*, 2013 WL 1149736, 11 (Fla. 2013)(noting that appellate counsel cannot be deemed deficient for failing to raise a meritless issue). Nor was there any prejudice for the same reason.

Burden-shifting regarding the sentence

Brooks argues that his appellate counsel should have raised a claim that the prosecutor’s statement shifted the burden to the defendant to establish life was the appropriate sentence and unconstitutionally created a presumption of death Pet. at 33. During penalty phase closing arguments, the prosecutor explained that if the jury found that the mitigating circumstances outweighed the aggravating circumstances, then they “should” vote for life.

Appellate counsel was not ineffective because the claim is meritless. *Conahan v. State*, 2013 WL 1149736, 11 (Fla. 2013)(noting that appellate counsel cannot be deemed deficient for failing to raise a meritless issue). First, a prosecutor saying this is not improper burden shifting of any type. It is a correct statement of the law. § 921.141(2)(b), Fla. Stat. (providing: “Whether

sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist”). The prosecutor’s comments track the statute.

Moreover, both this Court and the United States Supreme Court have rejected such constitutional challenges. *Reynolds v. State*, 934 So.2d 1128, 1150 (Fla. 2006)(rejecting a claim that the standard jury instruction which reads “whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances” was unconstitutional burden shifting); *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006)(upholding Kansas's death penalty statute, which directs imposition of the death penalty when the state has proved that mitigating factors do not outweigh aggravators).

Appellate counsel’s performance was not deficient for not raising a claim that accords with the applicable statute, as well as this Court’s and the United States Supreme Court’s caselaw.

Nor was there any prejudice. Appellate counsel would have lost any such claim. This Court merely would have denied any such claim citing *Reynolds* and *Marsh*. Accordingly, this claim of ineffective assistance of appellate counsel should be denied.

ISSUE IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT THE PHOTOGRAPHS WERE INADMISSIBLE BECAUSE THEY WERE GRUESOME AND DUPLICATIVE?

Brooks asserts that his appellate counsel, Assistant Public Defender Davis, was ineffective for not raising a claim that the photographs were gruesome and duplicative. Pet. at 35. First, this Court had already ruled that many of the photographs were admissible in the first appeal. Appellate counsel performance is not deficient when he chooses not a raise an issue in the second appeal that was not successful in the first appeal. Moreover, gruesome-photographs issues are losers. This Court routinely rejects such claim when the photographs are used by either crime scene technicians or the medical examiner to illustrate their testimony, as these photographs were.

This Court had already ruled that some of the photographs were admissible in the first appeal. *Brooks v. State*, 787 So.2d 765, 781 (Fla. 2001)(holding five autopsy photographs were relevant and therefore, admissible). This Court rejected the claim that the probative value of the photos was substantially outweighed by their prejudicial effect. *Brooks*, 787 So.2d at 781. This Court concluded that "the photographs in question were relevant to Dr. Wood's determination as to the manner of Carlson's death." *Id.*

Habeas counsel makes much of the fact that defense counsel was willing to stipulate to the cause of death. But the test for the

admissibility of evidence is relevance, NOT necessity. *Brooks*, 787 So.2d at 781 (citing *Mansfield v. State*, 758 So.2d 636 (Fla. 2000)). Offers to stipulate only matter when the offer is to stipulate to prior convictions in the guilt phase. *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997); *Brown v. State*, 719 So.2d 882 (Fla. 1998)(following *Old Chief*); *Cox v. State*, 819 So.2d 705, 716 (Fla. 2002)(refusing to extend *Old Chief* to capital sentencing proceedings). Offers to stipulate as to the cause of death are simply irrelevant. *State v. Galindo*, 774 N.W.2d 190, 239-240 (Neb. 2009)(rejecting a claim that photographs of the victim's decomposed body was prejudicial, despite an offer to stipulate, because the defendant did not offer to stipulate to committing the crime). As the Nebraska Supreme Court explained, in a capital case, even if the State accepted the stipulation, "the photograph remained probative of the condition of the body, malice, and intent." That Court observed that "a defendant cannot negate an exhibit's probative value through a tactical decision to stipulate." Rather, the "State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing." *Galindo*, 774 N.W.2d at 240. This Court has also rejected the argument that if the defendant stipulates to the content of the photograph, the photograph is not admissible. *Armstrong v. State*, 73 So.3d 155, 167 (Fla. 2011).

Habeas counsel also complains because different and additional

crime scene photographs were used in the second trial. But these photographs were equally admissible as the five photographs at issue in the first appeal and for the same reasons. The photographs were used by the medical examiners' and crime scene technicians as part of their respective testimony. Pet. at 37. Crime scene photographs of the car, which was the actual murder scene, are relevant. *Armstrong v. State*, 73 So.3d 155, 167 (Fla. 2011)(rejecting a gruesome photograph claim which involved a particularly gruesome crime scene photograph of the body of the victim because such photographs are "relevant to assist the crime scene technician in explaining the condition of the crime scene when police arrived, to show the position and location of the body when it was found, or to show the manner in which the victim was killed). "Autopsy photographs that are relevant to show the manner of death, location of wounds, and the identity of the victim or to assist the medical examiner in explaining the victim's injuries are generally admissible evidence." *Patrick v. State*, 104 So.3d 1046, 1061 (Fla. 2012). "The mere fact that photographs may be gruesome does not mean they are inadmissible." *Ault v. State*, 53 So.3d 175, 199 (Fla. 2010).

Habeas counsel does not present a coherent argument as to why any particular photograph was unfairly prejudicial; she merely argues were 35 photographs and they "were duplicative of each other and the video." Pet. at 41. But this Court has rejected that exact

argument. In *Hampton v. State*, 103 So.3d 98, 114-116 (Fla. 2012), this Court rejected a gruesome photograph claim observing that "the 'unfairly' prejudicial nature of the photographs" was "neither self-evident nor well-defined by Hampton." This Court reasoned that "although Hampton argues that the autopsy photographs are duplicative or cumulative," the photographs each showed a different angle or view of the multiple injuries suffered by the victim and that any duplication was "slight" and "in no way independently prejudicial." This Court concluded that because Hampton did not "establish any meaningful level of unfair prejudice, much less unfair prejudice that 'substantially' outweighs the significant probative value of the photographic evidence," he failed to establish an abuse of discretion. *Hampton*, 103 So.3d at 116. Brooks' argument suffers from the same flaws as Hampton's did.

Instead, habeas counsel harps on the prosecutor being mistaken regarding the number of photographs that were introduced at the first trial. But the prosecutor's mistaken belief does not render the other photographs automatically inadmissible. Indeed, it is irrelevant to a proper analysis of the admissibility of the additional photographs.

Additionally, any error in the use of the crime scene photographs during Freeman's testimony was harmless. *Armstrong v. State*, 73 So.3d 155, 170-171 (Fla. 2011)(noting the erroneous admission of photographs is subject to harmless error analysis and

finding any error to be harmless).[5]

Gruesome-photographs issues are losers on appeal and appellate counsel is not deficient for recognizing that while such issue are often raised by the capital defense bar, they rarely prevail. *Patrick v. State*, 104 So.3d 1046, 1061-62 (Fla. 2012)(rejecting a gruesome photograph claim were the skin of the victim's head pulled back to reveal his skull and the entire torso opened to reveal his

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[5] In *Armstrong*, this Court stated that it was "well-established that the harmless error test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." *Armstrong*, 73 So.3d at 170. This quote is from Chief Justice Roger J. Traynor's book, *The Riddle of Harmless Error* (1970). But it is not well-establish that overwhelming evidence is not a critical part of a proper harmless error analysis. Justice Traynor wrote his book just a few years after the Supreme Court first adopted the current harmless error test in *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 826, 17 L.Ed.2d 705 (1967). The book does not reflect the past forty years of caselaw.

The United States Supreme Court often looks at the sheer strength of the State's case as part of a harmless-error analysis. In *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), the Supreme Court listed factors to consider in conducting a harmless error test under *Chapman*. The Court stated that "of course," the "overall strength of the prosecution's case" was one of those factors. *Van Arsdall*, 475 U.S. at 684, 106 S.Ct. at 1438. One of the test for harmless error employed by the Supreme Court is whether the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991). Such a test also looks at the other evidence relating to the error. If there is overwhelming evidence of the identity of the perpetrator and the error relates to identity, then that error is necessarily harmless. One must first identify what element the error relates to but if there overwhelming evidence that relates to the element in question, then the overwhelming evidence regarding that same element is properly considered in any harmless error analysis.

upper chest); *Ault v. State*, 53 So.3d 175, 198–200 (Fla. 2010)(rejecting a gruesome photograph claim). As this Court has observed, "those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Smith v. State*, 28 So.3d 838, 861 (Fla. 2009)(quoting *Henderson v. State*, 463 So.2d 196, 200 (Fla. 1985)).

Accordingly, this claim of ineffective assistance of appellate counsel should be denied.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by email to Linda McDermott of McClain & McDermott, P.A. at lindammcdermott@msn.com this 8th day of July, 2013.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

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