No. _____

IN THE

Supreme Court of the United States

LAMAR Z. BROOKS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals' *pro forma,* non-individualized, blanket denial of a certificate of appealability (COA) complies with the standards for reviewing a COA as set forth in 28 U.S.C. § 2253(c) and later enunciated in *Slack v. McDaniel* and *Miller-El v. Cockrell*?

2. Whether the petitioner has demonstrated that jurists of reason could disagree with the district court's resolution of his constitutional claims or that such jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, thereby entitling petitioner to the issuance of a COA?

LIST OF DIRECTLY RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Trial
Circuit Court of Okaloosa County, Florida
State of Florida v. Lamar Brooks, Case No. 96-735-CFB
Judgment Entered: September 29, 1998

Direct Appeal
Florida Supreme Court (No. 94308)
Lamar Z. Brooks v. State, 787 So. 2d 765 (Fla. 2001)
Judgment Entered: April 5, 2001 (reversing and remanding for retrial)
Rehearing Denied: June 4, 2001

Re-trial
Circuit Court of Okaloosa County, Florida
State of Florida v. Lamar Brooks, Case No. 96-735-CFB
Judgment Entered: February 25, 2002

Direct Appeal
Florida Supreme Court (No. 02-538)
Lamar Z. Brooks v. State, 787 So. 2d 765 (Fla. 2005)
Judgment Entered: June 23, 2005 (affirmed)
Rehearing Denied: December 22, 2005

Petition for a Writ of Certiorari
United States Supreme Court (No. 05-9813)
Lamar Z. Brooks v. Florida, 547 U.S. 1151 (2006)
Judgment Entered: May 22, 2006 (denied)

Postconviction Proceedings
Circuit Court of Okaloosa County, Florida
State of Florida v. Lamar Brooks, Case No. 96-735-CFB
Judgment Entered: March 12, 2012 (denying motion for postconviction relief)

Florida Supreme Court (No. SC12-629; No. SC13-706)
Lamar Z. Brooks v. State; Lamar Z. Brooks v. Jones, 175 So.3d 204 (Fla. 2015)
Judgment Entered: May 7, 2015 (affirming)
Rehearing Denied; September 17, 2015

Successive Postconviction Proceedings (*Hurst Relief)*
Florida Supreme Court (No. SC16-532)

Lamar Z. Brooks v. Julie L. Jones

Judgment Entered: March 10, 2017 (vacating death sentence and remanding for new penalty phase)

Resentencing Proceedings

Circuit Court of Okaloosa County, Florida

State of Florida v. Lamar Brooks, Case No. 96-735-CFB

Judgment Entered: August 27, 2019 (resentenced to life in prison)

Federal Habeas Proceedings

District Court for the Northern District of Florida

Lamar Z. Brooks v. Jones, No. 3:15-cv-264-MW

Judgment Entered: December 14, 2022 (denying federal habeas relief and denying a certificate of appealability)

Eleventh Circuit Court of Appeals

Lamar Z. Brooks v. Sec'y, Fla. Dep't of Corr., No. 23-10765

Judgment Entered: January 11, 2024 (denying certificate of appealability)

Reconsideration of Single Judge Order Denied: March 21, 2024

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Petitioner Lamar Brooks respectfully urges this Honorable Court to issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

DECISION BELOW

The Eleventh Circuit's Order denying Brooks' application for a COA appears as *Brooks v. Secretary, Florida Department of Corrections, Attorney General*, Case No. 23-10765 (11th Cir. Jan. 11, 2024), and is reproduced in the Appendix at A1.

JURISDICTION

On January 11, 2024, the Eleventh Circuit entered its Order denying a COA. App. A1. On March 21, 2024, reconsideration was denied. App. A2. This Court granted Petitioner an extension of time to file a petition for a writ of certiorari until July 19, 2024. This petition is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2253(c) provides in relevant part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court…

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE[1]

I. State Court Litigation

Lamar Brooks was charged with two counts of first-degree murder on May 23, 1996 (R. 1-2).[2] The State's case at trial was based entirely on circumstantial evidence. There were no eyewitnesses to the murders, nor was there any physical evidence tying Brooks to the crime scene. The main witness against Brooks, Mark Gilliam,

[1] Citations in this petition are as follows: References to the direct appeal record of Brooks' trial are designated as "R.__". References to the transcript of Brooks' trial are designated as "T.__". References to the record on appeal from the denial of postconviction relief are designated as "PC-R.__". References to exhibits entered at the postconviction evidentiary hearing are designated as "Ex.__". References to the transcript of Brooks' resentencing proceeding are designated as "RT.__". References to the direct appeal record of co-defendant Walker Davis' trial are designated as "DR.__". References to the transcript of co-defendant Walker Davis' trial are designated as "DT.__". All other references are self-explanatory or otherwise explained herewith.

[2] The victims in this case are Rachel Carlson and Alexis Stuart.

admittedly lied to police investigating the murders, and he subsequently lied during his testimony regarding the extent of his involvement in the crimes.

Another key witness against Brooks was a jailhouse snitch, Terrance Goodman, who was a cellmate of Brooks at the Okaloosa County Jail. Goodman testified that Brooks admitted his involvement in the murders several times (T. 2095, 2099-2103). According to Goodman, Brooks said it took heart to stab someone (T. 2102).

In addition to Gilliam and Goodman, the State introduced numerous hearsay statements made by co-defendant Walker Davis that were used against Brooks. On direct appeal, the Florida Supreme Court observed that "[m]ost of the statements complained of were focused solely on Davis and his motives and plans to kill the victims." *Brooks v. State*, 787 So. 2d 765, 770 (Fla. 2001). The Florida Supreme Court proceeded to reverse and remand for a new trial, stating, "Our review of the record in light of the State's theory at trial as well as the circumstantial nature of the evidence against Brooks establishes that the cumulative effect of the numerous errors discussed above in the admission of improper hearsay unfairly prejudiced Brooks." *Id*. at 779.

Prior to the retrial, the State encountered significant credibility issues with Goodman and Gilliam. Goodman recanted his prior testimony, stating that Brooks never admitted in any way to participating in the murders (R. 1242-44). Goodman stated that the basis for his testimony was information provided by law enforcement (R. 1242-44). While Goodman admitted that he lied at Brooks' deposition and trial,

he subsequently recanted his recantation (R. 1242-44, 1255). Goodman was not called as a witness by the State during the guilt phase of Brooks' second trial.

Similarly, Gilliam recanted his testimony prior to the retrial, to the effect that Brooks and Davis did not plan or attempt to carry out the murders. After being arrested by the State for perjury, Gilliam also recanted his recantation and testified against Brooks at the second trial (T. 1614).

Despite the exclusion of evidence and testimony as well as witness credibility issues, Brooks was found guilty at the retrial and sentenced to death (R. 5129, 5250-55). On direct appeal, the Florida Supreme Court found the trial court erred in allowing a worker with the child support division of the Department of Revenue to testify that she had received a telephone call from a person who called herself Rachel Carlson and who wanted child support from Davis. *Brooks v. State*, 918 So. 2d 181, 193 (Fla. 2005). The Florida Supreme Court also determined the trial court erred in admitting notes that the police seized from Davis after they were found when his leg cast was removed. *Id.* at 199-200. And the Florida Supreme Court found the trial court erred in allowing the State to impeach the testimony of a witness, Melissa Thomas, by having a police officer testify she told him that on the night of the murders, Brooks came to her house wearing black pants but left wearing shorts. *Id.* at 201-01. However, the majority of the court determined these errors were harmless individually and cumulatively. *Id.* at 202.

Two justices of the Florida Supreme Court voted to reverse Brooks' conviction based on the "admission of evidence identifying Walker Davis as the primary

beneficiary of a life insurance policy on Alexis Stuart, the infant child of Davis's paramour, Rachel Carlson." *Id.* at 211 (Pariente, C.J., concurring in part and dissenting in part with an opinion, in which Anstead, J., concurs). And, following Brooks' motion for rehearing subsequent to the Florida Supreme Court's affirmance, a third justice voted for reversal ("[T]he 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"). *Id.* at 221 (Lewis, J., dissenting from denial of rehearing).

Brooks proceeded to state postconviction proceedings where he presented claims based on violations of *Brady v. Maryland,* 373 U.S. 83 (1963), *Giglio v. United States,* 405 U.S. 150 (1972), *Strickland v. Washington*, 466 U.S. 668 (1984), as well as newly discovered evidence of innocence. Following several evidentiary hearings, the circuit court denied relief on March 12, 2012 (PC-R. 1247-1535). On appeal, the Florida Supreme Court affirmed the denial of relief. *Brooks v. State*, 175 So. 3d 204 (Fla. 2015). However, Brooks later obtained penalty phase relief based on *Hurst v. Florida*, 136 S. Ct. 616 (2016). After a jury rejected sentencing Brooks to death, he was re-sentenced to life in prison on August 27, 2019.

II. Federal Court Litigation

On September 30, 2015, Brooks filed a petition for writ of habeas corpus, which was later amended on two occasions, seeking relief from his state court convictions. NDFL-ECF 4, 48, 58. On December 14, 2022, the district court entered an order denying Brooks relief. NDFL-ECF 79. At the conclusion of its Order, the district court

denied a COA. NDFL-ECF 79 at 116. After reciting the applicable rules and standards outlined in *Miller El. v. Cockrell*, 537 U.S. 322 (2003) and *Slack v. McDaniel*, 529 U.S. 473 (2000), the district court stated that "Brooks has not made such a showing [of the denial of a constitutional right] in this case and a COA will be denied." NDFL-ECF 79 at 116. Judgment was entered on December 20, 2022. NDFL-ECF 82.

On January 11, 2023, Brooks filed a motion to alter or amend the judgment and/or for reconsideration of the denial of a COA. NDFL-ECF 83. Brooks' motion was denied on February 7, 2023. NDFL-ECF 86. The district court stated that Brooks had not met the requirements for a COA as set forth in *Slack*, and that "no amount of re-argument of his claims will change that result." NDFL-ECF 86 at 3-4.

On March 6, 2023, Brooks filed a notice of appeal. NDFL-ECF 87. Thereafter, on March 24, 2023, Brooks filed a COA application with the Eleventh Circuit. On January 11, 2024, the Eleventh Circuit denied the application in a single-judge Order, stating that "[b]ecause reasonable jurists would not debate the district court's denial of Brooks's § 2254 petition, his motion for a COA is DENIED, and his motion for IPF status is DENIED AS MOOT." CA11-ECF No. 9-2 at 2 (citation omitted).

On January 31, 2024, Brooks filed a motion for reconsideration, which was denied by the Eleventh Circuit panel on March 21, 2024. CA11-ECF Nos. 10, 11 at 2. The court stated that, "Upon review, Brooks's motion for reconsideration is DENIED because he has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions." CA11-ECF Nos. 10, 11 at 2.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to address whether the federal court's pro forma denial of a COA application complies with the standards set forth in 28 U.S.C. § 2253(c) and later enunciated in *Slack v. McDaniel* and *Miller-El v. Cockrell*.

In *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000), this Court delineated the proper procedures for the issuance of a COA under AEDPA, stating that the applicant must make a substantial showing of the denial of a constitutional right. Thereafter, in *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), this Court reiterated that a petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims, or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This Court considered the manner in which a federal court should conduct a COA inquiry, stating "[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 326-27. Accordingly, courts must "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id*. Full consideration of the merits is not required; rather, the statute forbids it. *Id*.

In its opinion in *Miller-El*, this Court further emphasized the relative attainability of a COA, stating it does not require a showing that the appeal will succeed. *Id*. at 337. "Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id*. Rather, "a COA determination is a separate proceeding, one

distinct from the underlying merits." *Id*. (citations omitted). As this Court explained, the court below should have inquired as to whether there had been a substantial showing of the denial of a constitutional right. *Id*. at 342. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*.

The legal landscape outlined by this Court is pertinent to the circumstances of Brooks' case. While citing to the appropriate standards, no actual "overview of the claims" nor "general assessment of their merits" was conducted by the Eleventh Circuit. And no analysis as to whether the applicant had made "a substantial showing of a denial of a constitutional right" was performed. Moreover, the absence of a COA inquiry by the Eleventh Circuit is compounded by the failure of the district court to provide any reasoned explanation or analysis for its denial of a COA.

The need for this Court's intervention is further necessitated by the incongruent treatment from various circuit courts of appeals to COA determinations. Some circuits, like the Sixth and Tenth, have required COA denials to include individualized findings. *See e.g., Porterfield v. Bell,* 258 F.3d 484, 486 (6th Cir. 2001) ("[Blanket grants and blanket denials] undermine the gate keeping function of [COAs], which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability."); *Murphy v. Ohio,* 263 F.3d 466, 467 (6th Cir. 2001) ("In this case, the district court similarly failed to undertake the individualized determination of each claim presented by petitioner in considering whether to grant a COA under 28 U.S.C. §

2253(c).”). *See also LaFevers v. Gibson,* 182 F.3d 705, 710 (10th Cir. 1999) (“It is equally important, however, that district courts do not proceed to the other end of the jurisdictional spectrum and make a blanket denial of a [COA .]”); *Thomas v. Gibson,* 218 F.3d 1213, 1219 n. 1 (10th Cir. 2000) (disapproving “blanket” COAs in general).

Conversely, in addition to the Eleventh Circuit, other circuits have not required courts to make individualized findings when denying a COA. *See e.g., Haynes v. Quarterman,* 526 F.3d 189, 194 (5th Cir. 2008) (“Even assuming *arguendo* that we should follow these persuasive authorities, and find that the district court violated Rule 22(b)(1) by not stating individualized reasons in its denial of COA, Rule 22 does not necessarily require us to remedy a violation by vacating the district court’s defective issuance or denial of COA and remanding the case back to the district court.”). *See also Dansby v. Hobbs,* 691 F.3d 934, 936 (8th Cir. 2012) (“We do not think § 2253(c) of the Supreme Court’s decisions regarding [COA] dictate that a court of appeals must or must not publish a statement of reasons when it denies [a COA].”).

As a result of the latter position, even with Brooks asserting viable constitutional claims in his habeas petition, he has been denied the ability to litigate them further—and left without any reason why. This Court should grant certiorari to clarify that a pro forma denial of a COA is not in conformity with its jurisprudence.

II. This Court should grant certiorari to review whether Brooks was entitled to a COA on the issues he raised.

Given the absence of any analysis by the Eleventh Circuit, this Court should grant certiorari to address whether on the record in this case, Brooks has established his entitlement to a COA. Conducting "an overview of the claims in the habeas petition and a general assessment of their merits", *Miller-El*, 537 U.S. at 336, makes it clear that Brooks' issues are "debatable" and thus warrant a COA.

A. Denial of a Reliable Adversarial Testing

In Ground I of his petition, Brooks asserted that he was deprived of his right to a reliable adversarial testing due to the ineffective assistance of counsel and/or the prosecution's violation of *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972). Brooks submitted that whether defense counsel failed to present evidence, or the prosecution suppressed it, confidence was undermined in the outcome because the jury was deprived of an opportunity to hear available, exculpatory evidence.

During Brooks' trial, the jury did not hear available testimony and evidence that extensive hair examination was conducted by the Florida Department of Law Enforcement (FDLE), hairs found at the scene were compared to Brooks' known hair samples, and no hairs were microscopically consistent with him (D-Ex. 56, 57). The jury did not hear that FDLE received debris from numerous items belonging to Brooks yet was unable to locate any hairs that were consistent with the victims' hairs (D-Ex. 56, 57, 58). The jury did not hear that a Caucasian hair was found in the victim's palm, thereby excluding Brooks, who is African American, as the source of the hair. And the jury did not hear that an FDLE expert examined multiple items

belonging to Brooks for the presence of blood, and that none of them tested positive (D-Ex. 73, 90).

The jury also did not hear available testimony and evidence that prior to the State's interest in Brooks and his co-defendant, Walker Davis, Gerrold Gundy was the investigators' prime suspect. The jury did not hear that shortly after the victims were found, a confidential informant told the police that he/she had seen Gundy riding earlier that same day with the white female victim driving the car found at the crime scene (D-Ex. 104). The jury did not hear that a K-9 dog was called to the crime scene by the Crestview Police Department, it was directed to "follow a set of shoe track impressions" from the scene, and it proceeded to lead police to the doorstep where Gundy resided (D-Ex. 104), a location where no evidence or testimony placed Brooks. The jury did not hear that, according to another police report, witnesses placed Gundy in the victim's vehicle hours before the murders, the brand of cigarette he smoked was found at the crime scene, and witnesses said the victim was his girlfriend (D-Ex. 105, 106).

The jury did not hear evidence placing Brooks at a different location than where the crime occurred. During Brooks' trial, the State tried to establish that the murders occurred at approximately 8:30 p.m. in Crestview, Florida. Unbeknownst to the jury, there was available evidence that Brooks and Davis were still near Davis' residence, a lengthy distance from Crestview, between 8:45 and 9:00 p.m. on the night of the murders. According to a police report dated April 25, 1996, a witness, Laconya A. Orr, stated that between 8:45 and 9:00 p.m., Davis and a "skinny, shorter black

male" came to her house looking for her husband, who was not home at the time, and then left on foot (D-Ex. 54).

The jury did not hear that, according to a police report dated April 27, 1996, a witness named Tim Clark saw the victim alive and well between 9:00 and 10:00 p.m., (D-Ex. 49), a time which also would have precluded Brooks from having committed the murders. The jury was never informed that according to a follow-up police report dated April 28, 1996, Clark was shown a photo of Davis and Brooks "to see if he could identify one of them as being the black male that the victim was talking to outside the bank on [sic] Wednesday, 24 April 96." (D-Ex. 49). Clark "could not identify the black male from the photos that he was shown." (D-Ex. 49).

The jury also was not informed of a prior consistent statement by State witness Melissa Thomas. At trial, Thomas testified that on the night of the murders, Davis and Brooks came to her house around 9 p.m. The State asked Thomas, "Do you remember telling Agent Haley that Lamar Brooks came out of the bathroom in shorts?" She responded, "I don't remember." (T. 1533). Later, the State called FDLE Agent Dennis Haley, who testified over objection that Thomas stated to him that Brooks had in fact changed into shorts (T. 2157). The State subsequently used this statement in its closing argument to establish that Brooks had changed clothes shortly after the murders (T. 2434).

However, the jury was unaware of the fact that in a polygraph examination of Melissa Thomas, by Special Agent Tim Robinson, Thomas was asked if she noticed if Brooks changed clothes, to which she answered, "No." (D-Ex. 17). Robinson opined

that Thomas was truthful in her answer (D-Ex. 17). Trial counsel testified to the relevance of this evidence:

> [T]here's an insinuation that if the jury believed that he changed clothes, that he did so for a reason. To hide blood or get rid of evidence. And if Ms. Thomas testified with some more strength that she now does not remember that he didn't change clothes, then that might help the jury believe in his innocence.

(PC-R. 7056).

Finally, the jury did not hear testimony that, according to a police document dated April 29, 1996, a green Nissan pickup truck was a suspect vehicle in the murders. The truck had no connection to Brooks or Davis.

Additionally, jurists of reason could debate whether the district court conducted a proper *Strickland* analysis. The district court found that Brooks did not meet the prejudice prong of *Strickland* as to each of the subclaims raised. NDFL-ECF 79 at 27, 30, 35, 38. Yet, the district court failed to conduct a cumulative review, instead finding a lack of prejudice as to each individual error. However, as this Court has explained, the prejudice component of a *Brady* standard, the same standard as the one used for ineffective assistance of counsel claims, requires evaluation of the evidence that the jury did not hear "collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

Brooks' case is one based almost entirely on circumstantial evidence, and in which a multitude of evidence has been thrown out as inadmissible by the Florida Supreme Court. *See Brooks*, 787 So. 2d at 777; *Brooks*, 918 So. 2d at 193, 199-201. As the State conceded during the postconviction appeal, "*Brooks II* was truly a close

case." (NDFL-ECF 69, Att. 37 at 29, fn 9). Jurists of reason could find that when consideration is given to the wealth of exculpatory evidence that did not reach Brooks' jury, either because the State failed to disclose or because trial counsel failed to discover, confidence in the reliability of the outcome is undermined.

B. The *Strickland* Claim Regarding Trial Counsel's Opening Statement

In Ground II of his petition, Brooks asserted that he was deprived of his right to the effective assistance of counsel at the guilt phase when trial counsel failed to present available evidence despite having promised to do so in his opening statement.[3] Trial counsel conveyed to the jury that it would learn about a lack of forensic or physical evidence linking Brooks to the crime as well as other suspect evidence regarding Gundy (T. 1101-08). This included the fact that "Jerold Gundy smokes that type of cigarette that was found outside of Rachel Carlson's car"; "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"; and "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 (Gundy's residence)." (T. 1101-08).

The district court in its Order found that trial counsel made a reasonable strategic decision not to present the aforementioned evidence to the jury. NDFL-ECF 79 at 52-56. Jurists of reason could certainly disagree, and have done so, by finding

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

that it is not a reasonable trial tactic for defense counsel to inform the jury that it will learn of critical evidence, and then to never present that evidence despite its availability. *See, e.g.*, *United States v. Udo*, 795 F.3d 24, 31 (D.C. Cir. 2015) (finding that trial counsel's incorrect promise in opening statement that defendant would testify was a "a tactical misstep" and thus deficient performance); *U.S. ex rel. Hampton v. Leibach,* 347 F.3d 219, 259 (7th Cir. 2003) ("Making such promises and then abandoning them for reasons that were apparent at the time the promises were made cannot be described as legitimate trial strategy."); *McAleese v. Mazurkiewicz,* 1 F.3d 159, 166 (3rd Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.").

In Brooks' case, the evidence was available and counsel wanted to get it before the jury. Yet, while the evidence was important enough for counsel to proffer into the record to preserve the issue for appeal, counsel inexplicably failed to present it to the jury. Jurists of reason could find that Brooks was prejudiced as a result of trial counsel's deficient performance.

C. Ineffective Assistance of Counsel-*Martinez*

In Ground III of his petition, Brooks raised a claim of ineffective assistance of counsel through *Martinez v. Ryan*, 556 U.S. 1 (2012), and, alternatively through the actual innocence gateway under *House v. Bell*, 547 U.S. 518 (2006) and progeny. The district court denied relief, finding that Brooks' procedurally defaulted claims should not be excused based on evidence of actual innocence, and that the issue was not

meritorious. NDFL-ECF 79 at 58-73. Because both findings are debatable, a COA should be granted.

First, jurists of reason could debate the district court's extension of *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) to bar a district court from considering evidence of actual innocence. Despite recognizing that *Shinn* did not concern the actual-innocence gateway, the district court nevertheless held that actual-innocence evidence is barred because "language in *Shinn* suggests" that could be so. NDFL-ECF 79 at 62-63. But this Court has already declined to apply § 2254(e)(2) to claims raised under the actual innocence gateway. *See House*, 547 U.S. at 539 (rejecting argument that the § 2254(e)(2) standard of review should apply because the provision is "inapplicable" to "defaulted claims based on a showing of actual innocence"). The district court's decision to extend this Court's precedent beyond its holding is debatable.

Second, a COA is warranted because the district court failed to consider procedurally defaulted subclaims that were based on evidence in the state court record. This Court was explicit in *Shinn* that *Martinez* remains a valid gateway for procedurally defaulted claims. *Shinn*, 142 S. Ct. at 1737-38. Thus, a federal court, when adjudicating a claim under *Martinez*, is free to consider any evidence that was presented in state court because, by definition, a petitioner could not have failed to develop that evidence, and *Shinn* does not apply.

Additionally, in declining to apply the actual innocence gateway, the district court stated that "[t]he evidence Brooks seeks to submit does not show actual, factual

innocence, but merely presents possible inconsistencies in or fuller explanation of evidence presented at trial." NDFL-ECF 79 at 61. This finding is debatable because it directly conflicts with this Court's precedent. "[B]ecause an [actual innocence] claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record." *House*, 547 U.S. at 538. As such, this Court has held that evidence "inconsistent" with evidence presented at trial or evidence that would provide fuller context qualifies as evidence of actual innocence. *See*, *e.g.*, *id.* at 542-48 (crediting petitioner's "alternative explanation" for piece of inculpatory evidence).

Jurists of reason could debate whether the evidence submitted by Brooks satisfies this burden under *House*. Despite the bloody crime scene, there is no direct, forensic, or physical evidence that ties Brooks to the crime. *Brooks*, 787 So. 2d at 769; *see also Brooks*, 918 So. 2d at 211 (Pariente, J., concurring in part and dissenting in part) ("[T]he evidence in this case was wholly circumstantial, focusing on the proximity of Davis and Brooks to the murder scene, Brooks' false statements as to his whereabouts on the night of the murders, and the testimony of convicted perjurer Mark Gilliam[.]"). The State's case relied substantially on the testimony of Mark Gillam—the "convicted perjurer"—who suffered from overwhelmingly "dubious credibility." *Brooks*, 918 So. 2d at 211, 216. Further, the evidence Brooks presented in the district court is so "inconsistent" with the State's timeline of the crime as to make it all but impossible for him to have committed the murders. And it goes without saying that evidence that Gundy actually committed the murders in this case is

"inconsistent" with the evidence presented at trial. In light of the evidence of Brooks' actual innocence, the district court's failure to excuse any procedural default under the actual innocence gateway is debatable.

D. Confrontation Violation

In Ground V of his petition, Brooks asserted that his Sixth Amendment right to confrontation was violated based on the prosecution's introduction of evidence concerning a life insurance policy that Walker Davis obtained for Alexis Stuart. The district court rejected this claim on the basis that it was not "fairly presented" as a federal issue to the Florida Supreme Court on direct appeal, and it lacked merit. NDFL-ECF 79 at 84-92. Jurists of reason can debate both findings.

First, "fair presentment" is intended to be an "easily" met requirement. *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). A petitioner can satisfy this requirement "by citing in conjunction with the claim the federal source of law on which he relies or . . . or by simply labeling the claim 'federal'" or by providing a "citation of any case that might have alerted the court to the alleged federal nature of the claim." *Id*. at 32-33. In his claim heading, Brooks alerted the court to the federal constitutional amendment upon which the federal rights he was asserting were grounded, "THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE." NDFL-ECF 69-14 at 31. Brooks later referenced the Sixth Amendment's Confrontation Clause in describing the "constitutional" violation. *Id*. at 34-36. And Brooks cited *Garcia v. State*, 816 So. 2d 554, 561 (Fla. 2002), which specifically discusses the right of confrontation under both the United States and Florida constitutions. Thus, jurists of reason could find

that the multiple references to the Sixth Amendment and Confrontation Clause violation constitute fair presentation to alert the Florida Supreme Court to the federal nature of Brooks' claim.

Jurists of reason could also find that to the extent Brooks' claim was not fairly presented in state court and thus procedurally barred, the bar should be excused, and the claim should be given merits review pursuant to the miscarriage of justice exception. Because Brooks is actually innocent of the crimes, the miscarriage of justice exception to procedural bars provides him with the opportunity to pursue "habeas corpus relief based on constitutional claims that are procedurally barred under state law." *House*, 547 U.S. at 521-22.

Second, as to the merits, jurists of reason could find that all capital defendants have the constitutional right to cross-examine and confront their accusers with great latitude. *See Olden v. Kentucky*, 488 U.S. 227 (1988); *United States v. Owens*, 484 U.S. 554 (1988). Yet, Brooks was unable to confront Davis about the life insurance policy, a clear violation of Brooks' right of confrontation. And while the dissenting opinion did not address the Confrontation Clause issue, it did find that it was erroneous to admit the life insurance based on state law grounds, and it did not find the error to be harmless. *Brooks*, 918 So. 2d at 211 (Pariente, C.J., concurring in part and dissenting in part with an opinion, in which Anstead, J., concurs).

E. Testimony and Evidence Related to Davis' Culpability

In Ground VI of his petition, Brooks asserted that the trial court erred in permitting testimony and evidence at his trial, and the Florida Supreme Court erred in its harmless error analysis. The State, over objection, provided evidence of a call allegedly made by the victim to Billie Madero of the Child Support Division of the Department of Revenue, where she claimed that Walker Davis was the father of her child. The State also introduced two notes found in Davis' cast into evidence, and despite repeated objections, utilized them to bolster both its lacking case and its heavily impeached star witness, Mark Gilliam.

The district court in its Order initially determined that Brooks' claim regarding Madero was procedurally defaulted. NDFL-ECF 79 at 97-98. Specifically, the district court held that Brooks' reference to a violation of the Sixth Amendment in the claim heading contained in his Initial Brief to the Florida Supreme Court did not fairly present the constitutional claim to the court. *Id*.

Jurists of reason could find that the district court's ruling misapprehended the law. Such jurists could find that by alerting the state court to the Sixth Amendment issue in his claim heading. *See* NDFL-ECF 69, Att. 14 at 40, Brooks fairly presented his federal claim. *See Baldwin*, 541 U.S. at 32. Further, jurists of reason could find that to the extent Brooks' claim was not fairly presented in state court and thus procedurally barred, Brooks' actual innocence provides a basis for the miscarriage of justice exception, and thus, merits review. *See House*, 547 U.S. at 521-22.

As to the notes from Davis' cast, after finding it "questionable whether the content of the notes was testimonial," the district court found that the introduction of the notes did not have a substantial and injurious effect on the jury's verdict pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993). NDFL-ECF 79 at 103. The district court likewise found that even if the Madero issue constituted a Confrontation Clause violation, it did not meet the *Brecht* standard.

Jurists of reason could disagree in light of the weakness of the State's case, and "in light of the absence of direct evidence of Brooks' culpability and the dubious credibility of the State's key witness." *Brooks,* 918 So. 2d at 211 (Pariente, C.J., concurring in part and dissenting in part with an opinion, in which Anstead, J., concurs). Jurists of reason could find that the errors, individually and combined, had a substantial and injurious effect in determining the jury's verdict. That jurists of reason could debate the issue of harmlessness is evidenced by the fact that, on direct appeal, two justices disagreed with the majority's finding of harmless error:

> In light of the absence of direct or compelling forensic evidence of Brooks' complicity in these murders as well as the dubious credibility of the State's key witness, I cannot conclude beyond a reasonable doubt that the errors in admitting the life insurance policy, combined with the erroneous admission of the evidence from the child support caseworker on which Brooks also was not shown to have any knowledge, did not affect the verdict.

Brooks, 918 So. 2d at 214-217 (Pariente, C.J., concurring in part and dissenting in part with an opinion, in which Anstead, J., concurs).

F. Actual Innocence

In Ground VIII of his petition, Brooks asserted that his convictions stand in violation of the Eighth and Fourteenth Amendments as he is actually innocent of the crimes. The district court cited to the fact that this Court's binding precedent forecloses habeas relief on a freestanding claim of innocence not accompanied by an independent constitutional violation and, even if it was cognizable, at best, it raises questions to the sufficiency of the evidence. NDFL-ECF 79 at 111, 113.

Jurists of reason could debate whether a freestanding claim of innocence is cognizable in federal habeas proceedings. In *Herrera v. Collins*, 506 U.S. 390, 417 (1993), this Court "assume[d], for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." And since *Herrera*, the Court has consistently held the door open for claims of actual innocence. *See*, *e.g.*, *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009) (assuming, in a non-capital case, that a freestanding claim of actual innocence can be raised in a federal habeas action).

Jurists of reason could also find that the totality of the evidence detailed throughout Brooks' petition demonstrates that his claim of actual innocence is "truly persuasive." *Herrera*, 506 U.S. at 417. As detailed in Brooks' grounds for relief, the State's already circumstantial case has been discredited. Further, newly discovered evidence establishes that Gundy, despite his denial of knowing the victim, was with

her in the parking lot of Club Rachel's on the evening of the crime.[4] Ira Feguson's testimony to that effect is corroborated by Charles Tucker's April 25, 1996, statement to police in which he identified Gundy as being at Club Rachel's at 10:30 p.m. the night before (D-Ex. 109). And, Ferguson's testimony further corroborates the implausibility of the State's timeline, as he saw Rachel Carlson alive with Gundy after 10:30 p.m. on the night of the murders, yet reliable evidence was presented at trial to establish that at 9:22 p.m., Brooks and Davis were already at Melissa Thomas' house, and could not have committed the crime after that time.

CONCLUSION

Based on the foregoing, this Court should grant a writ of certiorari to review the decision of the Eleventh Circuit in this cause.

Respectfully submitted,

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[4] Gundy also denied being at Club Rachel's.