

NO. _____

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2017**

JEROME BROOKS,

Petitioner,

v.

ADMINISTRATOR, NEW JERSEY STATE PRISON,
ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

CRAIG S. LEEDS, ESQ.
Counsel for Petitioner/Counsel of Record
1205 Anderson Avenue, Suite 2
Fort Lee, New Jersey 07024
Tel: (201)886-8200
Fax: (201)886-0801

QUESTIONS PRESENTED

1. Should Petitioner's convictions be vacated because the admission of the statement of Ronald Wimbush, a non-testifying co-conspirator, was a violation of the Confrontation Clause?
2. Did Petitioner receive the ineffective assistance of appellate counsel by failing to challenge the admissibility of the statement of Ronald Wimbush?

PARTIES TO THE PROCEEDINGS

The Petitioner is:

Jerome Brooks

The Respondent is:

Administrator, New Jersey State Prison
Attorney General of New Jersey

TABLE OF CONTENTS

Questions Presented.....	i
Parties to the Proceedings	ii
Table of Authorities.....	iv
Opinions Below.....	1
Statement of Jurisdiction.....	1
Constitutional and Statutory Provisions Involved.	1
Statement of the Case.	2
Reasons for Granting the Writ.....	5
Petitioner’s convictions must be vacated because the admission of the statement of Ronald Wimbush, a non-testifying co-conspirator, was a violation of the Confrontation Clause.....	5
Petitioner received the ineffective assistance of appellate counsel because counsel failed to challenge the admissibility of the statement of Ronald Wimbush.	32
Conclusion.....	37
Appendix:	
United States Court of Appeals for the Third Circuit Order and Opinion.	App. 1-11

TABLE OF AUTHORITIES

Cases

<i>Beneshunas v. Klem</i> , 137 Fed. Appx. 510 (3d Cir.), cert. denied, 546 U.S. 1019 (2005).....	8
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993).	27,28,30,32
<i>Bruton v. United States</i> , 391 U.S. 123 (1968).....	9,23
<i>California v. Green</i> , 399 U.S. 149 (1970)	13,14
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973), 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).	13
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).	14,15,22
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	14,35
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986)	28
<i>Eley v. Erickson</i> , 712 F.3d 837 (3d Cir. 2013).	6
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985)	34,35
<i>Grant v. Stickman</i> , 122 Fed. Appx 590 (3d Cir.), cert. denied, 546 U.S. 846 (2005).....	8
<i>Jacobs v. Horn</i> , 395 F.3d 92 (3d Cir. 2005).....	6
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983).....	34
<i>Jones v. Basinger</i> , 635 F.3d 1030 (7th Cir. 2011).	4,14,15,28,30,32
<i>Kotteakos v. United States</i> , 328 U.S. 750 (1946).	28,30

<i>Lambert v. Blackwell</i> , 387 F.3d 210 (3d Cir. 2004), <i>cert. denied</i> , 544 U.S. 1063 (2005).....	7
<i>Mason v. Scully</i> , 16 F.3d 38 (2d Cir. 1994).	23,24,25,26,27
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)....	2,16
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	7
<i>Miller-El v. Dretke</i> , 545 U.S. 231 (2005).	7
<i>O’Neal v. McAninch</i> , 513 U.S. 432 (1995).....	28
<i>People v. Cruz</i> , 100 A.D.2d 882, 474 N.Y.S.2d 142 (N.Y. App. Div. 1984)	24
<i>People v. Felder</i> , 108 A.D.2d 869, 485 N.Y.S.2d 576 (N.Y. App. Div. 1985)	25
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965).	14
<i>Richardson v. Marsh</i> , 481 U.S. 200 (1987).	9
<i>Roundtree v. Balicki</i> , 640 F.3d 530 (3d Cir. 2011).....	6,27
<i>Ryan v. Miller</i> , 303 F.3d 231 (2d Cir. 2002).	4,15,23
<i>Showers v. Beard</i> , 635 F.3d 625 (3d Cir. 2011).	5
<i>Slack v. McDaniel</i> , 529 U.S. 473 (2000).....	4
<i>Smith v. Robbins</i> , 528, U.S. 259 (2000).	4
<i>State v. Alston</i> , 312 N.J.Super. 102, 711 A.2d 363 (N.J. Super. App. Div. 1998).....	11

<i>State v. Baker</i> , 228 N.J. Super. 135, 549 A.2d 62 (N.J. Super. App. Div. 1988).	11
<i>State v. Bankston</i> , 63 N.J. 263, 307 A.2d 65 (1973).. . . .	8,9,10,11,12,15,27
<i>State v. Branch</i> , 182 N.J. 338, 865 A.2d 673 (2005)	9,11,12,13,15
<i>State v. Brooks</i> , 201 N.J. 156, 988 A.2d 1178 (2010).	3
<i>State v. Brooks</i> , 213 N.J. 46, 59 A.3d 603 (2013).	3
<i>State v. Frisby</i> , 174 N.J. 583, 811 A.2d 414 (2002).. . . .	9
<i>State v. Fritz</i> , 105 N.J. 42, 519 A.2d 336 (1987).	33
<i>State v. Garron</i> , 177 N.J. 147, 827 A.2d 243 (2003), <i>cert. denied</i> , 540 U.S. 1160, 124 S.Ct. 1169, 157 L.Ed.2d 1204 (2004)	13
<i>State v. Irving</i> , 114 N.J. 427, 555 A.2d 575 (1989).	9,11
<i>State v. Roach</i> , 146 N.J. 208, 680 A.2d 634, <i>cert. denied</i> , 519 U.S. 1021, 117 S.Ct. 540, 136 L.Ed.2d 424 (1996)	9,10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).. . . .	30,33,34
<i>United States v. Check</i> , 582 F.2d 668 (2d Cir. 1978)	26
<i>United States v. Cronin</i> , 466 U.S. 648 (1984).. . . .	33
<i>United States v. Danzey</i> , 594 F.2d 905 (2d Cir.), <i>cert. denied</i> , 441 U.S. 951 (1979).	24
<i>United States v. Day</i> , 969 F.2d 39 (3d Cir. 1993).. . . .	34
<i>United States v. Figueroa</i> , 750 F.2d 232 (2d Cir. 1984)	24
<i>United States v. Mannino</i> , 212 F.3d 835 (3d Cir. 2000).. . . .	34

<i>United States v. Meises</i> , 645 F.3d 5 (1st Cir. 2011).	4,15
<i>United States v. Reyes</i> , 18F.3d (2d Cir. 1994).	24
<i>United States v. Reynolds</i> , 715 F.2d 99 (3d Cir. 1983).	24,25
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).	7,27
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).	6

Rules

N.J.R.E. 801.	9
N.J.R.E. 802.	9

Statutes

28 U.S.C. § 1254(1).	1
28 U.S.C. § 1291.	5
28 U.S.C. § 2253.	5
28 U.S.C. § 2253(c).	4
28 U.S.C. § 2254.	1,5
28 U.S.C. § 2254(a).	5
28 U.S.C. § 2254(d).	1,2,5,6
28 U.S.C. § 2254(d)(1).	6
28 U.S.C. § 2254(d)(2).	6,7,8

N.J.S.A. 2C:11-3a(1).....	2
N.J.S.A. 2C:11-3a(2).....	2
N.J.S.A. 2C:11-3a(3).....	2

Constitutional Provisions

U.S. Const. Amend VI	1,9,13,15,22,34
N.J. Const., Art. 1, Par. 10.....	9,13,15,22

Other Authorities

5 John Henry Wigmore, Evidence § 1367.	13
---	----

OPINIONS BELOW

On January 31, 2018, the United States Court of Appeals for the Third Circuit affirmed the District Court's denial of habeas relief. App. 1-11.

STATEMENT OF JURISDICTION

Jerome Brooks seeks review of the January 31, 2018 Order of the United States Court of Appeals for the Third Circuit. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 of the United States Constitution, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), reads, in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Bergen County Indictment No. 05-10-1814 charged appellant, Jerome Brooks, with murder, a crime of the first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(1) and (2) (Count One), and two counts of felony murder, a crime of the first degree, contrary to the provisions of N.J.S.A. 2C:11-3a(3) (Counts Two and Three).

The Hon. Eugene H. Austin, J.S.C., presided over a pretrial *Miranda*¹ hearing on June 6 and 7, 2006, after which, the motion to suppress was denied. Judge Austin also presided over the jury trial on October 17, 18, 19, 24, 25, 26, and 27, 2006. On the latter date, appellant was found guilty on all counts.

On February 9, 2007, the appellant was sentenced on his conviction for murder on Count One to a term of life imprisonment with a parole ineligibility period of thirty (30) years. The appellant's convictions for felony murder on Counts Two and Three were merged into Count One.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

On October 22, 2009, in a *per curiam* decision, the Appellate Division affirmed the defendant's conviction and sentence. The New Jersey Supreme Court denied Certification on January 26, 2010. *State v. Brooks*, 201 N.J. 156, 988 A.2d 1178 (2010).

On or about March 25, 2010, the defendant filed a timely Petition For Post-Conviction Relief. After presiding over a non-evidentiary hearing on September 24, 2010, Judge Austin denied said application.

On June 22, 2012, the Appellate Division affirmed that denial, and thereafter, the New Jersey Supreme Court denied Certification. *State v. Brooks*, 213 N.J. 46, 59 A.3d 603 (2013).

Appellant then filed a *pro se* federal habeas petition setting forth eight separate grounds for relief. By Order dated April 28, 2016, the district court denied the habeas petition. The district court also ordered that a certificate of appealability shall not issue.

On or about May 19, 2016, appellant filed an application for a certificate of appealability with the Court of Appeals for the Third Circuit, which was also treated as his Notice of Appeal.

Appellant's request for a certificate of appealability was granted by the Court of Appeals on January 17, 2017 as to the following issues:

The foregoing request for a certificate of appealability is granted as to Brooks' claim that appellate counsel provided ineffective assistance of counsel by failing to challenge the admissibility of the statement of Ronald Wimbush, a non-testifying co-conspirator, as a violation of the Confrontation Clause. Jurists of reason would debate whether the challenged testimony contained an implicit accusation of Brooks. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Brooks has made a substantial showing, see 28 U.S.C. § 2253(c), that Detective Bendul's testimony and the prosecutor's closing argument violated the Confrontation Clause as the testimony and argument may have revealed the content of Wimbush's statement. See United States v. Meises, 645 F.3d 5, 21-22 (1st Cir. 2011); Jones v. Basinger, 635 F.3d 1030, 1043 (7th Cir. 2011); Ryan v. Miller, 303 F.3d 231, 248 (2d Cir. 2002) ("if the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible."). Accordingly, jurists of reason would debate whether appellate counsel performed unreasonably in failing to present this claim on appeal. Smith v. Robbins, 528, U.S. 259, 288 (2000).

Brooks request for a certificate of appealability was denied as to the remaining claims.

On January 31, 2018, the United States Court of Appeals for the Third Circuit affirmed the District Court's denial of habeas relief. App. 1-11.

REASONS FOR GRANTING THE WRIT

PETITIONER'S CONVICTIONS MUST BE
VACATED BECAUSE THE ADMISSION OF THE
STATEMENT OF RONALD WIMBUSH, AN
ALLEGED NON-TESTIFYING CO-CONSPIRATOR,
WAS A CLEAR VIOLATION OF THE
CONFRONTATION CLAUSE

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 2254 because Brooks' habeas petition alleged that he was incarcerated in violation of the United States Constitution; this Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. Review of the District Court's opinion is plenary, when as in this case, the District Court denies a habeas corpus petition based on its review of the record and does not conduct an evidentiary hearing. *Showers v. Beard*, 635 F.3d 625, 628 (3d Cir. 2011).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Brooks must satisfy two statutory requirements to prevail on his federal habeas petition. First, he must establish that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Second, since the state appellate court ruled on the merits of his claims, he must also go further and show that his detention is the result of a state court decision that was (1) "contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States;” or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Contrary to clearly established Federal law” means the state court applied a rule that contradicted the governing law set forth in U.S. Supreme Court precedent or that the state court confronted a set of facts that were materially indistinguishable from U.S. Supreme Court precedent and arrived at a different result than the Supreme Court. *Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). The phrase “clearly established Federal law” “refers to the holdings, as opposed to the dicta” of the U.S. Supreme Court’s decisions. *Williams*, 529 U.S. at 412.

Under § 2254(d)(1), “[a] state court decision is an unreasonable application . . . if the court identifies the correct governing legal rule from the Supreme Court’s cases but unreasonably applies it to the facts of the particular case.” *Jacobs v. Horn*, 395 F.3d 92, 100 (3d Cir. 2005). The state court’s application of clearly established law must be objectively unreasonable before a federal court may grant the writ. *Roundtree v. Balicki*, 640 F.3d 530, 537 (3d Cir. 2011).

Under § 2254(d)(2), an application for a writ of *habeas corpus* should be granted which resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding. See *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (granting habeas relief where state court's finding of no *Batson* discrimination was clearly erroneous, unreasonable and reflected a “dismissive and strained interpretation” of the evidence); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (“[A] decision adjudicated on the merits in a state court and based on a factual determination will ... be overturned on factual grounds [if it is] objectively unreasonable in light of the evidence presented in the state-court proceeding.”); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (granting habeas petition, in part under Sections 2254(d)(2), where state court of appeals’ factual conclusions about what the trial record revealed were clearly erroneous as to specific facts as well as generally wrong in its overall conclusion that there was sufficient evidence counsel provided effective representation).

See also *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005) (“The fundamental prerequisite to granting the writ on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section 2254(d)(2) mandates the federal habeas court to assess whether the state court's determination was reasonable or unreasonable given that evidence. If the state court's decision based on such a determination is

unreasonable in light of the evidence presented in the state court proceeding, habeas relief is warranted.”); see also *Grant v. Stickman*, 122 Fed. Appx 590, 594 (3d Cir.), *cert. denied*, 546 U.S. 846 (2005); *Beneshunas v. Klem*, 137 Fed. Appx. 510, 514 (3d Cir.), *cert. denied*, 546 U.S. 1019 (2005) (We may also grant a writ under § 2254(d)(2) if the state court decision was based on an objectively unreasonable factual determination.).

Here, Brooks has not procedurally defaulted his claims, and has exhausted them in the state court. That is, Brooks certainly argued that he was wrongly convicted on the basis of hearsay testimony in violation of the Confrontation Clause of the federal and state constitutions and that appellate counsel was ineffective for failing to raise that issue on direct appeal.

Specifically, relying on *State v. Bankston*, 63 N.J. 263 (1973), it was submitted that the introduction of Ronald Wimbush’s statement, through the testimony of Detective Bendul, coupled with the Prosecutor’s remarks, in sum, clearly implied to the jury that the State possessed superior knowledge, outside the record, that incriminated Mr. Brooks.

In affirming the PCR judge’s denial of post-conviction relief in state court, the appellate division concluded that “the PCR judge correctly determined that

nothing in the detective's testimony with regard to his interaction with Wimbush rose to the level of prejudicial error."

The Appellate Division recognized that:

Under Bankston, "the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." State v. Branch, 182 N.J. 338, 350 (2005) (citing Bankston, supra, 63 N.J. at 268-69); see U.S. Const. amend. VI; N.J. Const., art. I, ¶ 10; N.J.R.E. 801, 802. The Bankston rule is triggered "[w]hen the logical implication to be drawn from [police] testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused's guilt." Bankston, supra, 63 N.J. at 271; see State v. Frisby, 174 N.J. 583, 592-93 (2002); State v. Irving, 114 N.J. 427, 445-46 (1989)

The Appellate Division also considered that:

[t]he Sixth Amendment of the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. amend. VI. The right of confrontation includes the right to cross-examine witnesses at trial. Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702, 1706, 95 L.Ed. 2d 176, 185 (1987). Consequently, the introduction of an out-of-court statement made by a non-testifying codefendant which directly or by necessary implication inculcates another defendant has the capacity to violate that defendant's Sixth Amendment right of confrontation. Bruton v. United States, 391 U.S. 123, 125-26, 88 S.Ct. 1620, 1622, 20 L.Ed. 2d 476, 478-89 (1968); State v. Roach, 146 N.J. 208, 224-225, cert.

denied, 519 U.S. 1021, 117 S.Ct. 540, 136 L.Ed. 2d 424
(1996)

Nonetheless, the Appellate Division found that there was no implication that the detectives possessed superior knowledge, outside the record, that incriminated Mr. Brooks:

...we find no error I the testimony elicited from the detective at trial. No testimony was offered pertaining to the substance of the statements made by the out-of-court declarant and no implication was raised, therefore, about the detectives alleged “superior knowledge” outside of the record. Further, as noted, even if the detective’s statements at trial respecting his conversations with Wimbush violated the Bankston principle, in view of the defendant’s confession and his testimony at trial, the error was harmless. R. 2:10-2, Roach, supra, 146 N.J. at 226. Consequently, defendant’s assertion that appellate counsel was ineffective is without merit.

In so doing, it is respectfully submitted that the state appeals court erred. Brooks contends that the state court decisions were an unreasonable application of established federal law and/or based on an unreasonable determination of the facts; therefore, it is also contended that his writ of of *habeas corpus* should have been granted.

As will be demonstrated herein, impermissible hearsay evidence was allowed in the state's case, over trial counsel’s objection, and moreover, petitioner was seriously prejudiced by it because the logical implication to be drawn

therefrom was that Wimbush, a nontestifying witness, had provided law enforcement with evidence of the defendant's involvement. Trial counsel, in objecting to that improper hearsay testimony, relied upon *State v. Bankston*, 63 N.J. 263 (1973) which certainly supports this proposition, as does its progeny:

'It is well settled that the hearsay rule is not violated when a police officer explains the reason he approached a suspect or went to the scene of the crime by stating that he did so "upon information received."'. *State v. Bankston*, 63 N.J. 263, 268 (1973). Such testimony is admissible to show that the officer was not acting in an arbitrary manner, or to explain his subsequent conduct. *Ibid.* ...**[However w]hen the logical implication to be drawn from the testimony leads the jury to believe that a nontestifying witness has given the police evidence of the defendant's guilt, the testimony should be disallowed as hearsay.** *State v. Irving, supra*, 114 N.J. at 444-48, 555 A.2d 575; *State v. Bankston, supra*, 63 N.J. at 271, 307 A2d 65; *State v. Baker*, 228 N.J. Super. 135, 140 549 A.2d 62 (App. Div. 1988) . [emphasis added]

State v. Alston, 312 N.J. Super. 102, 113 (App. Div. 1998).

More recently, the New Jersey Supreme Court has further clarified the *Bankston* rule. *State v. Branch* 182 N.J. 338 (2005) involved a burglary where the state's case rested primarily on the victims' identification of the defendant as the burglar:

Immediately preceding [the detective's] testimony concerning the photographic identifications...the jury

learned that not one identifiable fingerprint lifted from the victims' home matched defendant's. iThe detective] then gave his reason for placing defendant's picture in the photographic array in response to the prosecutor's questioning:

Q: Now,..based on information received did you develop a suspect in this case?

A: Yes, I did.

Q: And who was that person?

A: Mr. Alexander Branch.

Q: And did you obtain a photo array containing Alexander Branch's photograph?

A:Yes, ma'am. ...

Branch at 347.

In *Branch*, the state argued that the detective followed the rule of *Bankston* when he testified that he acted "based on information received" to explain that he did not proceed with the identification in an arbitrary manner. *Id.* The court disagreed:

[W]e know that [the detective] received the 'information' making defendant a suspect in the crime before [the victims] identified defendant's photograph from the array. We also know that there was no trial testimony or evidence, other than those identifications, that could have led [the detective] to focus on defendant as a suspect. Thus, the jury was left to speculate that the detective had superior knowledge through hearsay information implicating defendant in the crime. Because the nameless person who provided the 'information' to [the detective] was not called as a witness, the jury never learned the basis of that person's knowledge regarding defendant's guilt, whether he was a credible source, or

whether he had a peculiar interest in the case. Defendant never had the opportunity to confront that anonymous witness and test his credibility in the crucible of cross-examination.

Both the hearsay rule and the right of confrontation protect a defendant from the incriminating statements of a faceless accuser · who remains in the shadows and avoids the light of court."

Id.

Both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee a criminal defendant the right to confront "the witnesses against him." *U.S. Const.* amend. VI; *N.J. Const.* art. I, ¶ 10. The right of confrontation is an essential attribute of the right to a fair trial, requiring that a defendant have a "fair opportunity to defend against the States accusations." *State v. Garron*, 177 N.J. 147, 169, 827 A.2d 243, 256 (2003) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308 (1973)), *cert. denied*, 540 U.S. 1160, 124 S.Ct. 1169, 157 L.Ed.2d 1204 (2004). A defendant exercises his right of confrontation through cross-examination, which has been described as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489, 497 (1970) (quoting 5 *Wigmore* § 1367); *see*

also *Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965).

As illustrated in *Jones v. Basinger*, 635 F.3d 1030 (7th Cir. 2011) the United States Supreme Court's view of the Confrontation Clause is well-settled:

[t]he Confrontation Clause guarantees criminal defendants the benefit of "the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) — subjecting that testimony to "the crucible of cross-examination," *Crawford*, 541 U.S. at 61, 124 S.Ct. 1354. In the American legal system, the role of cross-examination has paramount importance to a criminal trial's core truth-seeking function. See *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (calling cross-examination "the greatest legal engine ever invented for the discovery of truth" (quotation omitted)). A rigorous cross-examination may bring to light a variety of reasons to doubt a witness's testimony, ranging from innocent failures in perceptions and memory to biases, prejudices, or ulterior motives, or outright inconsistencies and falsehoods. See *Davis*, 415 U.S. at 317, 94 S.Ct. 1105. The Confrontation Clause also advances the pursuit of truth by "insur[ing] that the witness will give his statements under oath — thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury," and by "permit[ting] the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green*, 399 U.S. at 158, 90 S.Ct. 1930.

To ensure these benefits of cross-examination, the Sixth Amendment bars the admission of "testimonial hearsay" against a criminal defendant unless (1) the declarant is unavailable at trial; and (2) the defendant had a prior opportunity to cross-examine that declarant. *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354. Neither of these requirements was satisfied here. Lewis was clearly available — the prosecution had Lewis under subpoena but simply chose not to call him as a witness.... Jones never had a prior opportunity to cross-examine Lewis about his statement. See *id.* at 54, 124 S.Ct. 1354 ("[T]he common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations."). Therefore, Jones' right to confrontation was violated if Lewis' statement (1) was testimonial; and (2) was hearsay. See *id.* at 68, 124 S.Ct. 1354. It was both.

Jones v. Basinger, 635 F.3d 1030, 1040-41 (7th Cir. 2011)

With regard to the case at bar, it is submitted that Brooks' right to confrontation was violated contrary to both the Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution.

U.S. Const. amend. VI; *N.J. Const.* art. I, ¶ 10. See also *Jones v. Basinger*, 635 F.3d 1030, 1043 (7th Cir. 2011); *Ryan v. Miller*, 303 F.3d 231, 248 (2d Cir. 2002); *United States v. Meises*, 645 F.3d 5, 21-22 (1st Cir. 2011); See also *State v. Bankson*, 63 N.J. 263, 271 (1973); *State v. Branch*, 182 N.J. 338 (2005).

Initially, it should be pointed out that at the *Miranda* hearing, Det. Bendul testified that there was a previous investigation into the death of Roberto Arenas, during the years 1996 to 1998 which had been conducted by Det. John Palotta of the Bergen County Prosecutor's Office and Det. James Woods of the Passaic County Prosecutor's Office. This investigation had produced a statement by Ronald Wimbush incriminating Mr. Brooks. Thereafter, Wimbush was murdered in 1998, unrelated to the investigation.

During Brooks' trial, at the very outset of the State's presentation to the jury, in his opening remarks, the Prosecutor made reference to that statement. The Prosecutor clearly suggested that Detective Bendul went to the Passaic County Jail to question Brooks because Brooks had been inculcated in the crime in a statement given to the police by Ronald Wimbush:

There are other people involved. You'll hear their names. You'll hear the name of **Ronald Wimbush** [emphasis added]

* * * * *

You'll hear testimony that in about 1996 **Ronald Wimbush**, one of the persons in t*he car, one of the persons involved in this, he was apprehended, questioned about something else, and he **gave a statement and based on that statement, the investigation was reopened .**

You'll hear how he was about to be involved in some undercover work that would help to uncover what had happened in this case and to proceed forward, so that the persons who committed this crime would be brought to justice, and in an unrelated matter not related tot his at all he died in Paterson before he could assist any further in the investigation.

So in 1998, this could case became colder because . . . Ronald Wimbush was no longer around. [emphasis added]

As can be seen, the prosecutor told the jury that when Ronald Wimbush (who was one of the other persons in the car in this case) was apprehended, he gave a statement to police. According to the prosecutor, "based on that statement, the investigation was reopened...so that the persons who committed this crime would be brought to justice." The clear inference is that it was Wimbush who provided law enforcement with Mr. Brooks' name.

This, however, was not an isolated incident during the course of the trial. That Ronald Wimbush gave a statement inculpatng the defendant was again brought to the jury's attention by the Prosecutor, over trial counsel's objection, during his direct examination of Detective Bendul:

PROSECUTOR: And can you tell us whether in 1996 something had occurred that had briefly made this case active again prior to you taking it over as a **cold case**?

DET. BENDUL: **On November 18 of 1996, a man by the name of Ronald Wimbush was arrested by members of the Fugitive Task Force with the FBI in Paterson. He provided -**

COUNSEL: Objection, Judge. Hearsay I'd like to be heard.

TRIAL COURT: I haven't heard any statements that this witness said were being said by a **Mr. Wimbush** . . . I'm going to overrule the objection.

PROSECUTOR: That would be my understanding what the witness would testify to. What did he provide?

DET. BENDUL: **He provided a statement to a Detective John Palotta with our office as well as a Detective James Woods with the Passaic County Prosecutor's Office relative to this homicide.**

PROSECUTOR: And can you tell us what kind of a **statement** was it?

DET. BENDUL: It was a **stenographic statement**.

PROSECUTOR: Let me show you what's been marked S-133.

COUNSEL: I would object under State v. Bankston. I don't believe this testimony is admissible. I believe it would call for hearsay which has been found to be objectionable by courts for a long time and I would ask that it not be admitted.

TRIAL COURT: I haven't heard anything.

COUNSEL: Well, Judge, I can see where this is going. It's clear to me at this point where the State intends to go with this testimony and under Bankston I believe that this type of testimony is inadmissible.

TRIAL COURT: Let me hear from the Prosecutor.

PROSECUTOR: I withdraw the question. I would like to rephrase the question.

TRIAL COURT: Withdrawn.

COUNSEL: Judge, it's not the question itself. It's the whole line of questioning regarding this statement. This person obviously -

PROSECUTOR: We haven't heard the testimony yet.

TRIAL COURT: He's not going to get the testimony of the statement in. It's not coming in. He's not asking for it to come in. He said there was a statement, a stenographic statement. He's shown this witness something that's going to be marked for ID S-133 and I'm sure after he looks at what's been marked for identification he'll tell us what if anything he did in response to that document. He's not going to tell us what's in the document.

COUNSEL: That's the basis for the objection. I would ask to be heard outside the presence of the jury.

PROSECUTOR: I withdraw the question, Judge.

TRIAL COURT: Withdraw the question. Next question.

COUNSEL: I would ask the entire statement be withdrawn.

PROSECUTOR: I haven't done anything with the -

TRIAL COURT: it's not been offered.

COUNSEL: It was just handed to the witness.

TRIAL COURT: Next question.

PROSECUTOR: Now, what year did you say you reviewed some items in the file?

DET. BENDUL: Was -

PROSECUTOR: **From what year were the items?**

DET. BENDUL: **In 1996.**

PROSECUTOR: As a result of reviewing the file did you go about beginning your own investigation of a cold case of the murder of Roberto Arenas?

DET. BENDUL: Yes.

PROSECUTOR: Can you tell us did you focus on any individuals at that time?

DET. BENDUL: Yes.

COUNSEL: Objection for the same reason previously stated.

TRIAL COURT: Overruled.

PROSECUTOR: **What were the identities of the individuals that you began your investigation upon?**

DET. BENDUL: **Jerome Brooks and Albert Bolt.** [emphasis added]²

As illustrated above, the prosecutor again, this time though the testimony of Det. Bendul, undoubtedly suggested to the jury that Wimbush had inculcated Brooks. The Prosecutor told the jury in his opening statement that the investigation had been reopened based upon the statement provided by Wimbush. Then, during his examination of Det. Bendul, the prosecutor asked for the

² All the above argument took place in the presence of the jury.

identities of the individuals that began the reopened investigation, to which Det. Bendul responded by identifying Mr. Brooks and Mr. Bolt. This was undoubtedly attributable to the statement given by Wimbush because Det. Bendul testified that Brooks and Bolt were the focus of the investigation based on his review of the item(s) from 1996. Thus, it is respectfully submitted that the crystal clear inference was that the statement obtained from Wimbush identified Mr. Brooks. Appellant further submits that there really is no other objective way to look at it.

On the other hand, if there was any doubt left as to whether Wimbush's statement inculpated Brooks, this improper line of questioning continued when the prosecutor asked Det. Bendul about his interrogation of the defendant:

PROSECUTOR: What did you proceed to say?

DET. BENDUL: **I told him that again emphasizing that I believed that I knew that he was involved in the murder of Roberto Arenas, but I believed he was not the mastermind, that the murder itself was not his idea. I told him that Wimbush had previously provided a statement to the police and had confirmed that the murder -**

COUNSEL: Judge, objection. For the same reason.

TRIAL COURT: Sustain the objection. [emphasis added] ³

³ Defense renewed its objection to the hearsay at the close of testimony that day.

While the objection was sustained, the answer was not stricken, nor was any curative instruction given. Therefore, the clear and unambiguous implication was that, in his statement to the police before his death, Mr. Wimbush had identified Mr. Brooks as being involved which triggered the reopening of this “cold case.”

As if this weren't enough, the prosecutor in his closing argument again continued this theme that it was Wimbush that had inculcated the defendant and that the detectives were well aware of that:

Now, you heard from Detective Bendul. Detective Bendul took the stand and told you what he did. He reviewed the file. He knew about the various reports in the file. **And he took the effort, obviously, to go and find that Jerome Brooks.** [emphasis added]

* * * * *

(T)he detectives had read the file . . . **They knew about Ronald Wimbush and they knew about James Brooks . . . They knew he was involved.** [emphasis added]

This was an unmistakable violation of both the Sixth Amendment to the United States Constitution and Article 1, Paragraph 10 of the New Jersey Constitution which guarantee a criminal defendant the right to confront “the witnesses against him.” *U.S. Const.* amend. VI; *N.J. Const.* art. I, ¶ 10. See also *Crawford v. Washington*, 541 U.S. 36 (2004).

In another federal case, *Ryan v. Miller*, 303 F.3d 231 (2d Cir. 2002), the Court explained that:

[t]he crux of this right is that the government cannot introduce at trial statements containing accusations against the defendant unless the accuser takes the stand against the defendant and is available for cross examination. *See Bruton v. United States*, 391 U.S. 123, 128, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (holding defendant "was denied his constitutional right of confrontation" where the government introduced codefendant's statement that implicated defendant "in a form not subject to cross-examination, since [codefendant/accuser] did not take the stand")

Id. at 247.

Ultimately, in *Ryan v. Miller* the Second Circuit held that the Appellate Division "unreasonably applied clearly established Supreme Court precedent in denying Ryan's Confrontation Clause claim." This was because [t]he testimony of the testimony of the two police officers constituted hearsay and contained implicit accusations against Ryan in violation of the Confrontation Clause." Id. at 256.

In coming to this conclusion, the Court explained:

...it is well established in this Circuit that lawyers may not circumvent the Confrontation Clause by introducing the same substantive testimony in a different form. "In general, this Court has condemned practices designed to circumvent these principles by asking a witness what he *learned* from an out-of-court declarant," as opposed to asking what an out of court declarant *said*. *Mason*, 16

F.3d at 43 (emphasis added). If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible. "The fact that the content of [the co-conspirator's] statement to [the detective] was not revealed in detail was immaterial, *for the plain implication* that the prosecutor sought to elicit, and emphasized in his summation, *was that the conversation with [the co-conspirator] led the police to focus on [the defendant]."* *Id.* (finding the testimony contained an implicit accusation and constituted reversible error) (emphasis added); *Reyes*, 18 F.3d at 69 ("[A]lthough the jury was not told exactly what words [the codefendants] had spoken, *[the witness's] testimony clearly conveyed the substance of what they had said.*") (emphasis added); *Danzey*, 594 F.2d at 917, 918 (holding that testimony that "[the codefendant] had named the nine men although none of the names were mentioned" violated the Confrontation Clause because "[e]ven on the agent's testimony that names were named, the jury could readily infer that [the defendant] was among them"); *People v. Cruz*, 100 A.D.2d 882, 883, 474 N.Y.S.2d 142 (N.Y.App.Div.1984) ("The prosecutor's questioning of [the witness] concerning a conversation with [a non-testifying witness], which directly preceded [the witness's] testimony that he made two arrests in the case was improper inasmuch as *it was designed to create the impression in the jurors' minds that [the non-testifying witness] had implicated the defendant. ...*"); *see also United States v. Figueroa*, 750 F.2d 232, 240 (2d Cir.1984) ("[F]rom a practical standpoint, [the witness's] testimony became a recital by [the informant] of proposals made by the recipient of the phone calls [believed to be the defendant].... [Thus,] the government successfully introduced crucial information while shielding the source of that evidence — the informant — from potentially devastating cross-examination.");

Reynolds, 715 F.2d at 101 (finding that inspector's testimony that the codefendant told the defendant, "I didn't tell them anything about you," violated the Confrontation Clause); *People v. Felder*, 108 A.D.2d 869, 870, 485 N.Y.S.2d 576 (N.Y.App.Div.1985) (holding erroneous testimony that "the complainant made a response following which `we patted down both subjects, placed them in handcuffs, and removed them from the bar,'" because "[e]ven though his response was not admitted into evidence, the testimony left the jurors with the clear impression that he was particularly sure and that the arrests were made as a result of this response"). Such hearsay testimony containing implicit accusations violates the Confrontation Clause.

Ryan's case resembles the facts in *Mason v. Scully*, 16 F.3d 38 (2d Cir.1994). In *Mason*, the main police investigator testified to the arrest of the three co-conspirators. In explaining how the police focused on the defendant, the police investigator testified as follows:

Q. And, after the lineup [in which [the victim] identified [a co-conspirator]], was a conversation held with [that co-conspirator]?

This is a yes or no question.

A. Yes.

Q. And, after this conversation with [the co-conspirator], were you looking for somebody?

A. Yes, I was.

Q. And, who were you looking for?

A. Terrence Mason.

Id. at 40. Thus, as in Ryan's case, the police testimony did not "reveal[] in detail" "the content of [the codefendant's] statement to [the detective]." *Id.* at 43. However, the Court found this "immaterial, for the plain implication that the prosecutor sought to elicit, and emphasized in his summation, was that the conversation with [the codefendant] led the police to focus on [the

defendant]." *Id.* at 43. The Second Circuit held this type of testimony containing implicit accusations violates the Confrontation Clause. *See id.*; *cf. United States v. Check*, 582 F.2d 668, 679 (2d Cir.1978) (holding that a witness's testimony about what he said to an informant, in response to what the informant told the witness about the informant's conversation with the defendant, qualified as hearsay because "in substance, significant portions of [the witness's] testimony ... was a transparent attempt to incorporate into the [witness's] testimony information supplied by the informant who did not testify at trial.").

Ryan argues that, as in the *Mason* case, the officers' testimony, while not repeating an explicit accusation against Ryan, left the jury with nothing to conclude other than that Peter Q. had accused Ryan because Jensen and Reck testified that Jensen instructed Reck to charge Ryan with murder after learning from Palumbo what Peter Q. said. Conversely, respondent argues that the testimony was not hearsay because it was simply "a nebulous reference to an unelaborated verbal communication" and because neither officer's testimony directly revealed the source or the content of the conversation between Jensen and Reck. This, however, misses the point of Ryan's argument. The relevant question is whether the way the prosecutor solicited the testimony made the source and content of the conversation clear. That is, did the testimony make obvious to the jury the content of the conversation — an accusation against Ryan — and the source — Peter Q. — even though it did not directly state this information.

Respondent argues that *Mason* is distinguishable because the *Mason* Court noted that "there was no police work that turned up [the defendant], and the only lead to him obviously came from [the detective's] conversation with [the co-defendant]," *Mason*, 16 F.3d at 44, whereas in

this case, independent police investigation, not just Peter Q.'s accusations, led the police to focus on Ryan. We reject this contention that *Mason* is distinguishable.

It is respectfully submitted that the Brooks case, likewise, is analogous to the facts in *Mason v. Scully* since Det. Bendul's testimony, coupled with the Prosecutor's remarks, while not repeating an explicit accusation against Brooks, left the jury with nothing to conclude other than that Wimbush had accused Brooks thereby triggered the reopening of the investigation which began with Mr. Brooks.

Based upon the foregoing, it is respectfully submitted that, in the instant matter, the state court was, indeed, "objectively unreasonable" in not finding a Confrontation Clause violation. See *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) ; *Roundtree v. Balicki*, 640 F.3d 530, 537 (3d Cir. 2011).

Finally, in affirming the lower Court's denial of post-conviction relief, the Appellate Division concluded in this case that "even if the detectives statement at trial respecting his conversations with Wimbush violated the *Bankston* principle, in view of defendant's confession and his testimony at trial, the error was harmless."

On habeas review, a constitutional error is considered harmless unless it can be shown to have "had substantial and injurious effect or influence in determining

the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993), quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). If the Court has so much as a "grave doubt as to the harmlessness of [a constitutional error], it should grant relief." *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

When determining whether a Confrontation Clause error was harmless, several factors are examined, including "the importance of the witness testimony in the prosecution's case, whether the testimony was cumulative, the presence of absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) .

Weighing these factors, it is submitted that there can be little doubt that Det. Bendul's testimony regarding Wimbush's statement had a particularly "substantial and injurious effect" on the jury's verdict. *Brecht*, 507 U.S. at 622. Essentially, "[a]t its core, that testimony was nothing but a thinly-veiled introduction of additional, but inadmissible, evidence" of Brooks' guilt. See *Jones v. Basinger*, at 1052.

Nonetheless, the state appellate court, the United States District Court, and thereafter, the Court of Appeals for the Third Circuit, concluded that any error was

harmless. It is respectfully submitted that these courts erred, however, because they focused on what the evidence would have shown without Wimbush's statement finding that there was independent evidence from Brooks confession and trial testimony that Brooks was a criminal actor. App. 1-11.

In fact, while the Court of Appeals agreed that there was a likely violation of the Confrontation Clause, that appellate counsel was ineffective for failing to raise the issue in the state proceedings and that the state court's conclusion to the contrary amounted to an unreasonable application of federal law, the Court of Appeals found this to be "harmless":

Although the contents of the statement were not admitted in evidence at Brooks's trial, we agree with Brooks that the testimony, when combined with the prosecutor's repeated references to Wimbush's statement in his closing argument, likely violated Brooks's rights under the Confrontation Clause because it implied to the jury that Wimbush had implicated him in the murder. We also agree that Brooks's appellate counsel was ineffective for failing to raise that issue in the state proceedings and that the state court's conclusion to the contrary amounted to an unreasonable application of federal law.

That said, in light of the overwhelming evidence of Brooks's guilt - including his trial testimony attempting to walk back an earlier taped confession - we agree with the District Court that any Confrontation Clause violation was harmless, and moreover, that any deficiency on the part of Brooks's appellate counsel did not rise to the level of prejudicial error as required under

Strickland v. Washington, 466 U.S. 668 (1984). We therefore affirm the District Court's denial of habeas relief. App. 1-11.

Yet, as illustrated in *Jones, v. Basinger*, that analysis is fatally flawed:

That analysis ignores the significant prejudicial effect the error can have on a jury's ability to evaluate fairly the remaining evidence. That analysis also offers prosecutors no real incentive to comply with the Constitution so long as any evidence not admitted in error is legally sufficient to sustain a conviction. For that reason, under *Brecht*, the harmless-error "inquiry cannot be merely whether there was enough [evidence] to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence" in light of the entire record. *Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1239; *Brecht*, 507 U.S. at 638, 113 S.Ct. 1710.

Jones v. Basinger, at 1053.

If the District Court, state appellate court, and Court of Appeals had not overlooked this principle, it is contended that they would have recognized Wimbush's statement's substantial effect on the jury's evaluation of Brooks' credibility. This is especially true given that the prosecutor, in summation, pointed out repeatedly, that based upon Wimbush's statement, the police knew when Brooks was lying to them:

So he [Brooks] lied and he was caught in another lie. And the reason why this case moved forward was because Detective Bendul knew enough about the case

that he knew when he was lying that when he said that he wasn't around in November of 1983, Detective Bendul took a break, went upstairs to the squad room, got records together, came back and put the records before him and said, "This shows that you were around during that period of time."

He was caught in his lie. He was caught in his lie. And then he started to deny his involvement he had to say well, I was there but I only shot one time.

And you notice that in the time frame that according to Detective Bendul, that happened, that basic first admission happened at 11:40 AM, just prior to noon. He wasn't there being browbeaten. He wasn't there for hours and hours and deprived of sleep or somehow mistreated. He was only there an hour, but when it was proven to him that he was a liar, he had to go ahead and start backtracking from his original statement.

But again why is he going to tell the detectives? Well, because the detectives had read the file. They knew about Albert Bolt. They knew about Ronald Wimbush and they knew about Jerome Brooks. So when he would lie to them, they knew he wasn't telling the truth and when they would confront him he would have to go and admit a little bit more.

And what was his real motivation? What was his real motivation? He knows that he's been caught in lies. He knows he was involved and that he lied about that.

Therefore, by allowing Bendul's testimony about the substance of Wimbush's statement, coupled with the prosecutor's remarks relying thereon to argue that the police knew that Mr. Brooks was lying to them, it was much more

likely that the jury would resolve any doubts about Brooks' credibility in favor of conviction. See *Jones v. Basinger*, at 1054.

In light thereof, it is submitted that it can not be said that the improper use of Wimbush's statement was harmless. To the contrary, the testimony regarding Wimbush's statement undoubtedly had a substantial influence on the jury's guilty verdict thereby warranting habeas relief under *Brecht*.

PETITIONER WAS DENIED THE EFFECTIVE
ASSISTANCE OF APPELLATE COUNSEL IN
VIOLATION OF THE UNITED STATES
CONSTITUTION

It is submitted that Mr. Brooks did not receive effective assistance of counsel on his direct appeal. Specifically, appellate counsel failed to properly raise those issues asserted herein regarding the improper admission of the statement of Ronald Wimbush, an alleged non-testifying co-conspirator. (See above Point.)

A basic tenet of the system of justice in the United States is that every person being tried for criminal charges is entitled to the assistance of counsel. In some instances, counsel has acted in a manner, either by choice or by virtue of the State's or court's actions, so contrary to the interests of his or her client that the courts will judge the performance constitutionally invalid without looking further

to the consequences of counsel's actions. More often, however, counsel's failing will be somewhat less blatant and, while still deficient, not present quite so clear a picture as to the constitutional adequacy of his or her performance.

Therefore, the United States Supreme Court has developed a test for determining whether an attorney has provided effective assistance to his or her client in cases where that attorney has not acted in a way so egregious as to allow the court to make a *per se* finding that he or she has rendered ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 673 (1984) reh. den. 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864; *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Thus, in such cases, a claim for ineffective assistance of counsel is evaluated under the two prong standard set forth in *Strickland v. Washington*, 466 U.S. 668; 80 L. Ed. 2d 674 (1984).⁴ In order to establish a claim of ineffective assistance of appellate counsel, Mr. Brooks must show (1) that counsel's performance was deficient and (2) that the deficient performance was prejudicial. *Strickland v. Washington*, at 687.

⁴ This standard was adopted by the Supreme Court of New Jersey in *State v. Fritz*, 105 N.J. 42 (1987).

The first prong requires Brooks to show that counsel made errors “so serious that counsel was not functioning as ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* This showing can be made by demonstrating that the attorney’s performance was unreasonable under prevailing norms. *United States v. Day*, 969 F.2d 39, 42 (3d Cir. 1993).

To establish prejudice under the second prong, Brooks must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *United States v. Mannino*, 212 F.3d 835, 840 (3d Cir. 2000).

It is true that an appellate attorney does not have to raise issues which he considers frivolous on appeal. *Jones v. Barnes*, 463 U.S. 745, 749; 77 L. Ed. 2d 987, 991 (1983). Nevertheless, an attorney must raise the meritorious issues on appeal which are likely to lead to a defendant's conviction being reversed on appeal. Otherwise such an attorney is rendering ineffective assistance of counsel. See *Evitts v. Lucey*, 469 U.S. at 389; 83 L. Ed. 2d at 823. Mr. Brooks respectfully submits that the record demonstrates that he would have received a new trial on appeal if his appellate counsel had raised the appropriate issues asserted herein. (See above Point.)

In this case, it is simply inexplicable that appellate counsel on direct appeal would not have raised the issue that Brooks was wrongly convicted on the basis of hearsay testimony in violation of the Confrontation Clause of the federal and state constitutions. Trial counsel not only objected to this line of questioning numerous times during Det. Bendul's testimony, but even renewed the objection to this impermissible and highly prejudicial hearsay at the close of testimony that same day. (See above Point.)

The failure by Brooks' appellate attorney to subject the prosecution's case to meaningful adversarial testing meant that the adversary process itself became presumptively unreliable. See *Davis v. Alaska*, 415 U.S. 308; 39 L. Ed. 2d 347 (1974). In failing to raise these obvious issues, appellate counsel failed in the role of expert assistant to the defendant. See *Evitts v. Lucey*, 469 U.S. at 394; 83 L. Ed. 2d at 828 n. 6.

Although the contents of the statement were not admitted in evidence at Petitioner's trial, the Court of Appeals, nonetheless, agreed with Petitioner that the testimony, "when combined with the prosecutor's repeated references to Wimbish's statement in his closing argument, likely violated Brooks's rights under the Confrontation Clause because it implied to the jury that Wibmush had implicated him in the murder." The Court of Appeals agreed "that Brooks's

appellate counsel was ineffective for failing to raise that issue in the state proceedings and that the state court's conclusion to the contrary amounted to an unreasonable application of federal law." App. 1-11.

Ultimately, however, the Court of Appeals agreed with the District Court "that any Confrontation Clause violation was harmless." Moreover, the Court of Appeals concluded "that any deficiency on the part of Brooks's appellate counsel did not rise to the level of prejudicial error as required under *Strickland v. Washington*, 466 U.S. 668 (1984)." In so doing, for the reasons set forth herein, it is respectfully submitted that the Court of Appeals erred.

To the contrary, for the foregoing reasons, it is respectfully submitted that Mr. Brooks was not afforded the effective assistance of appellate counsel.

CONCLUSION

For the reasons stated in this petition, Mr. Jerome Brooks respectfully requests that a writ of certiorari be issued to review the decision below.

Respectfully submitted,

CRAIG S. LEEDS, ESQ.
Counsel for Petitioner/Counsel of Record
1205 Anderson Avenue, Suite 2
Fort Lee, New Jersey 07024
(201)886-8200

Dated: April 24, 2018