IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-707
LOWER TRIBUNAL NO. 16-1992-CF-3708

STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

GERALD DELANE MURRAY,

Appellee/Cross-Appellant.

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Honorable Judge Russell Healey
Judge of the Circuit Court, Division CR-I

CROSS-REPLY BRIEF

THIS IS A CAPITAL CASE

THE SICHTA FIRM, LLC.
RICK A. SICHTA, ESQUIRE
Fla. Bar No.: 669903
SUSANNE K. SICHTA, ESQUIRE
Fla. Bar No.: 059108
JOE HAMRICK, ESQUIRE
Fla. Bar No.: 047049
301 W. Bay St., Ste. 14124
904-329-7246
rick@sichtalaw.com
Attorneys for Mr. Murray

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

Cases

Other Authorities

ARGUMENTS IN REPLY

GROUND ONE

NEW EVIDENCE ESTABLISHES THE STATE'S MAIN WITNESS ANTHONY SMITH HAS DEFRAUDED THE COURT, CONFESSED TO COMMITTING PERJURY, AND FABRICATED EVIDENCE – EVEN WRITING A LETTER TO THE PROSECUTION IN MURRAY'S POSTCONVICTION PROCEEDINGS THAT MURRAY MAY NOT HAVE CONFESSED AND HE MAY HAVE GOTTEN HIS INFORMATION BY WATCHING AMERICA'S MOST WANTED. BECAUSE THE STATE RELIED HEAVILY UPON SMITH IN ALL FOUR OF MURRAY'S TRIALS AND A CONVICTION WAS IMPOSSIBLE WITHOUT HIM, MURRAY WILL PROBABLY BE ACQUITTED IF RETRIED; THE DENIAL OF A NEW TRIAL WILL RESULT IN VIOLATIONS OF MURRAY'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The State, in its answer, concedes that Smith "started filing false documents as part of his own appeal in an attempt to get the prosecutor to give him a better deal." (Cross answer at 26.) The state does not dispute that Smith confessed to lying about the state coercing him, and wrote the prosecutor a letter in 2015 "to again try to receive a better deal in his own case" and that his letter "was a ploy." (Cross answer at 26.) However, despite Smith's obvious disregard for the truth for many years, the State guesses that despite all of his lies and manipulation of the Justice System, Smith somehow told the truth during Murray's trials – even if everything else he has said is a lie. This argument is flawed in numerous respects.

First, contrary to the state's assertion, the trial court's credibility determination is not relevant to this newly discovered evidence assessment. The newly discovered evidence Murray relies on here is impeachment evidence of Smith's demonstrated pattern of fraud and manipulation of the court system using Murray's case as his ruse. Smith "started filing false documents" in his postconviction proceedings and continued with this pattern of deceit up to the present date. (Cross answer at 26.) No one disputes that he has been manipulating the system with factually specific lies based on made-up stories – for years. Therefore, the thrust of the newly discovered evidence analysis is not whether or not the postconviction court finds that Smith told the truth at trial, but whether *a jury* on retrial would probably acquit Murray given the significant newly discovered impeachment, especially considering Smith's other revelation that Mr. Murray may not have ever confessed to him in the first place. See Swafford v. State, 125 So. 3d 760, 775-76 (Fla. 2013)("the postconviction court must consider the effect on the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a *new trial*")(emphasis supplied). This determination includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence, not merely whether the trial court believes Smith was credible at Murray's latest trial. See Jones v. State (II), 709 So. 2d 512, 521 (Fla. 1998).

The trial court's finding that Smith was credible should also not be considered by this Court because the trial court presided only over a portion of the evidentiary hearing, and did not witness Smith's testimony in Murray's trials. A court must personally observe a witness to make a credibility determination. See McCloud v. State, 150 So. 3d 822, 823 (Fla. 1st DCA 2014) ("Appellant's conviction depended entirely upon the jury's resolution of conflicts in the evidence and the relative credibility of the witnesses. Under these circumstances, a successor judge, who was not present at trial, could not competently assess the weight of the evidence as required to resolve Appellant's motion for new trial.") Thus, even if this credibility determination is somehow relevant, it is not binding because the trial court could not "competently assess" the evidence. To be sure, the state acknowledges this law that credibility determinations can only be made by a court that actually views the testimony (Cross answer at 25), but fails to recognize that the postconviction judge who ruled on Murray's 3.851 did not witness Smith's trial testimony, or the first portion of his evidentiary hearing testimony. [1]

[1] (Cross answer at 25) ("Additionally, credibility is a critical issue in a newly discovered evidence claim that relies on an admission of perjury. Spann v. State, 91 So. 3d 812, 816 (Fla. 2012). In these circumstances, this Court is 'highly deferential to the trial court' because 'the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the convicting testimony. The cold record on appeal does not give appellate judges that type of perspective.' Id.")

Even if this court should find that Smith's credibility is appropriate and relevant to the newly discovered evidence analysis, the state and trial court's conclusion, that we should believe every word of what Mr. Smith says, *except* those things Mr. Smith admits are lies, is patently unreasonable and is turning a blind eye to the gravity of this new impeachment evidence against Smith and the State's case.[2] (e.g. Answer on Cross at 23-24, 1 PCR 568, 630.) See Hildwin v. State, 141 So. 3d 1178, 1182 (Fla. 2014)("we cannot turn a blind eye to the fact that a significant pillar of the State's case, as presented to the jury, has collapsed and that this same evidence actually supports the defense theory that Hildwin presented at trial.") Mr. Smith is an eight-time convicted felon, and convicted murderer, who avoided a death sentence in his own case by testifying against Murray, and has established a pattern of lying and attempted manipulation of the court system in his own postconviction proceedings. Smith even told the prosecution he did not know whether Mr. Murray confessed to him – a critical fact the trial court discounts to irrelevance in its analysis. See Porter v. McCollum, 558 U.S. 30, 43 (2009)(The Florida Supreme Court, following the postconviction court, "unreasonably discounted the evidence of Porter's childhood abuse and military service," as the evidence may "have particular salience for a jury" for numerous

[2] And if Smith is always credible when testifying as a witness against Murray, this Court should then consider his trial statement that he would do anything to avoid the death penalty "even if it meant deception." (15 R 1040.)

reasons). A jury would certainly find Smith's long-established pattern of fraud and admission that Murray may have not confessed to him pertinent when ascertaining the weight of the State's main witnesses' credibility at a new trial.

The state, without offering any analysis in support of its conclusion, also claims that the impeachment value of Smith's patterns of fraudulent postconviction filings and other suspicious actions such as Smith's sudden self-reflection concerning of Murray's confession, is minimal. (Cross answer at 27-28.) With this assertion, the state forgets that where newly discovered impeachment evidence concerns a critical witness for the state, like Mr. Smith, it is "especially likely" to be material. See Silva v. Brown, 416 F.3d 980, 987 (9th Cir. 2005)("Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case.") As explained in depth in Murray's initial brief on cross appeal, Smith was critical to the state's case as evidenced in its reliance on his testimony in opening and closing statements, as well as this Court's opinion on direct appeal. (Cross IB 59-63.) Smith *was* the State's case against Murray, as Smith so astutely pointed out during Mr. Murray's postconviction proceedings. We know now that Smith has been shown to be the type of person who would perjure himself (and admit to it), and jury would likely give that impeachment evidence great weight. United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977) ("A jury may very well give great weight to a precise

reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself.")

Further, the state repeatedly mischaracterizes the newly discovered evidence regarding Mr. Smith as a "recantation," stating that recantations have historically been found unreliable by this Court. (Cross-answer at 24-25.) However, only a portion of Mr. Smith's newly discovered evidence was a recantation (i.e. the letter to De la Rionda stating that Smith now finds himself unsure what Murray actually said to him). The remainder of the newly discovered evidence is rich impeachment demonstrating Smith's manipulative behaviors, his pattern of utilizing Murray's case to better himself, his ability to concoct intricate falsities and weave them into a made-up story, and evidence of bias and motivation for his trial testimony other than the truth. It impossible to ignore the similarity between what Mr. Smith accomplished by testifying in Murray's trials (the avoidance of the death penalty using Murray's case) and what he has attempted to accomplish in his own postconviction proceedings (a sentence reduction using Murray's case).

The state suggests that Smith's testimony was not the only evidence against Murray, but this claim must fail for two reasons. First, the State continues to forget that without Smith, the State's case against Murray would not survive a Motion for Judgment of Acquittal and the remainder of its case relies on impermissibly pyramiding of the inferences. Second, the state nor the lower tribunal

consideredthat this is a newly discovered evidence claim, not a Strickland claim:[3] thus, this Court does not conduct a retrospective analysis to ascertain whether there is a reasonable probability that the outcome would have been different under otherwise identical circumstances; rather, the Court must perform a prospective analysis and consider all evidence presented at trial *in addition* to all newly discovered evidence and all other admissible evidence, including evidence or issues that were found procedurally barred on appeal or in postconviction. See Lightbourne v. State, 841 So. 2d 431 (Fla. 2003); Geralds v. State, 111 So. 3d 778 (Fla. 2010), Swafford, 125 So. 3d at 775-76, .Richardson v. State, 546 So. 2d 1037, 1039 (Fla. 1989). As explained in Murray's initial brief, this Court's eight points of guilt set forth in the direct appeal opinion would be eliminated or significantly undercut on retrial resulting in a reasonable probability of acquittal on retrial.

Again, Smith *is* the state's case against Murray, otherwise they would not have paraded him to the jury in each of Murray's four trials and touted his credibility in their opening statement and closing arguments. This reliance was only increased after the trial court excluded the DNA evidence prior to Murray's fourth trial. It increased after their hair expert opined he could not say whether the hairs at the scene belonged to Murray. It increased when their footprint expert

[3] Indeed, as pointed out in the initial brief, the lower tribunal did not apply the correct standard in ruling on this newly discovered evidence claim. (Cross IB 80-83.)

could not say whether there was more than one set of footprints at the scene. It also increased when Mr. Dixon came forth in Murray's postconviction proceedings to state Murray is innocent and he knows who the real killer is in this case. For a jury to disbelieve Smith is to disbelieve the state's already weak case against Murray. This apparent fact explains why the trial court's order and the state's response carefully downplays the countless times Smith defrauded the court – an admission by the state to the obvious fact that Smith is unreliable is an admission that their case is over.[4] However, as explained in Porter, discounting Smith's postconviction manipulation and fraud to irrelevance is contrary to the law, and a new trial must be granted when the evidence is properly evaluated. See Jones II, 709 So. 2d at 526)(Newly discovered evidence satisfies the second prong of the Jones II test if it "weakens the case against [the Defendant] so as to give rise to a reasonable doubt as to his culpability.")

The state's answer does nothing to undercut Mr. Murray's position that its main witness' multi-year patterns of egregious fraudulent activity involving Murray's case is powerful impeachment against him, which, if heard by a new jury along with all other available evidence, including the newly discovered evidence

[4] It bears mentioning again that the prosecution has yet to taken *any* action against Mr. Smith, although he confessed to filing frivolous pleadings, lying under oath, and attempted to blackmail them into giving him a better disposition in his own homicide case. Of course, in doing so the prosecution would be implicitly admitting its main witness has severe credibility issues, impacting the strength of its case against Murray.

below concerning Mr. Dixon, would probably result in an acquittal on retrial.

GROUND TWO

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MURRAY'S SUCCESSIVE RULE 3.851 MOTION AND MOTION TO COMPEL DISCOVERY, WHICH WERE PREMISED ON AN INTERVIEW AND AFFIDAVIT FROM JAMES DIXON, WHO EXPLAINED TO MURRAY'S INVESTIGATOR THAT HE KNOWS MR. MURRAY IS INNOCENT AND THE TRUE PERPETRATOR IS WALTER HOLTON – A MAN ORIGINALLY INTERVIEWED ABOUT THE INSTANT CASE, THEREBY VIOLATING MR. MURRAY'S DUE PROCESS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION TO A FAIR, FULL, AND IMPARTIAL POSTCONVICTION HEARING

The state's answer raises numerous arguments in response to this claim, almost none of which were advanced by the trial court in denying the claim, and those arguments miss the mark in numerous respects:

Initially, the state's assertion that Mr. Murray failed to say where the information contained in the successive 3.851 came from is a misstatement of the record. (Cross answer at 29) ("Appellant also does not cite any sources for the information contained in the Motion which was not part of Mr. Dixon's affidavit.") (Cross answer at 32) ("All of the information contained in the Motion which was not part of the affidavit was assumedly provided by Dixon, though Appellant does not directly state the source.") As specifically set forth in Mr. Murray's successive 3.851 motion, any facts not contained in Dixon's September 15, 2017 affidavit, were derived from an interview of Mr. Dixon conducted by Murray's investigator.

The motion stated:

> In addition to admitting that he was provided jewelry owned by the victim Ms. Vest by Mr. Holton's girlfriend Angela Smith, **Dixon provided the following to Mr. Murray's investigator concerning this homicide**:
>
> Dixon's relationship with Mr. Holton
> Mr. Dixon [] he was known as "Lil Jack" in the 90's and sold large amounts of cocaine for Mr. Holton [And so forth…]

(1 NDER 9) (emphasis added.) Had an evidentiary hearing been granted, the investigator would have testified about those statements if Mr. Dixon had denied making them. Contrary to the state's supposition that any information not contained in the affidavit must be untrue (Cross answer at 32), the affidavit was intended to be a summary of Mr. Dixon's information on the matter – not a line-by-line dictation of what he would say if called as a witness in Mr. Murray's case. Further, Mr. Dixon was hesitant to incorporate all of his knowledge of this matter into the affidavit because of his fear of retaliation, as well as incriminating himself – which would have been explained at the evidentiary hearing.

The state also claims that despite the successive 3.851 motion being filed within one year of Mr. Dixon's September 15, 2017 affidavit, Mr. Murray probably knew about the information beforehand, so the due diligence prong of Jones' newly discovered evidence test has not been fulfilled. (e.g. Cross answer at 28; 29)("Dixon's affidavit is dated September 15, 2017, and Appellant would have this Court reply on this as the date of the 'newly discovered evidence.'") The

state's speculation here is unfounded and unsupported by the record – there is nothing to support a supposition that Murray knew about Dixon's statements "much earlier." (Cross answer at 29.) The successive 3.851 motion was filed well within a year of September 15, 2017 and explains that Murray previously investigated Mr. Dixon, but Mr. Dixon only recently agreed to cooperate and come forward with an affidavit because Mr. Holton died and Mr. Dixon is no longer afraid for his life. This matter could have been explored by the state in an evidentiary hearing, but an evidentiary hearing was not granted.

Not only is the state's implication that Mr. Murray has been sitting on the Dixon information unsupported, it is also illogical – Murray amended his 3.851 motion five times prior to the conclusion of his proceedings, based on factual developments in his case. If he had known about the Dixon information prior to the disposition of his 3.851 proceedings, history shows that he would have sought to amend his 3.851 motion again, not waited until the initial 3.851 proceedings were over and the case was in the Florida Supreme Court on appeal. [5]

The state goes on to criticize Mr. Murray for failing to put forth any

[5] The also incorrectly asserts that Mr. Murray should have refiled his Discovery Motion relating to this issue after this Court relinquished jurisdiction, but fails to point out that the trial court previously dismissed this motion, as well as the newly discovered motion concerning Mr. Dixon, for lack of jurisdiction. After this Court relinquished jurisdiction, the trial court ruled on the newly discovered evidence motion, so it does not make sense why Murray would have to renew his discovery motion but not his newly discovered evidence motion.

evidence except the Dixon affidavit in support of this claim (Cross appeal at 30), but forgets that he was not given the opportunity to present evidence because no evidentiary hearing was granted. All Mr. Murray must do in drafting a 3.851 claim is sufficiently plead it. To sufficiently plead a 3.851 claim, the claim must include:

> (A) a description of the judgment and sentence under attack and the court that rendered the same;
> (B) a statement of each issue raised on appeal and the disposition thereof;
> (C) the nature of the relief sought;
> (D) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought

Fla. R. Crim. P. 3.851(e)(1). Further, if a 3.851 claim is based on newly discovered evidence, it "shall include:"

> (i) the names, addresses, and telephone numbers of all witnesses supporting the claim;
> (ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;
> (iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and
> (iv) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available.

Fla. R. Crim. P. 3.851(e)(2)(C). With his successive 3.851 motion, Murray has fulfilled the pleading requirements of R. 3.851, down to providing the address and telephone number of Mr. Dixon and stating that he would be available to testify under oath at an evidentiary hearing. (1 NDER 11.) As such, an evidentiary

hearing was appropriate and necessary for this claim, Mr. Murray was prepared to present evidence in support of his claim at evidentiary hearing, but was not given the opportunity to do so, and it is inappropriate for the state on appeal to fault Mr. Murray for any shortcomings in the evidence supporting this claim. To the extent the trial court believed that Mr. Murray's 3.851 was insufficiently pleaded (which it did not state in the order denying the 3.851), Mr. Murray should have been granted an opportunity under Spera to amend. See Spera v. State, 971 So. 2d 754, 761 (Fla. 2007).

The state also alleges that Dixon's information is both "immaterial" and "inherently incredible," stating that it contradicts the evidence presented at trial because the "sailboat pin" was found buried in Taylor's backyard, thus it couldn't have been pawned as claimed by Dixon. (Cross answer at 31.) The state is mistaken again. Dixon never mentioned a sailboat *pin*, he mentioned a "sailboat *necklace*," two readily distinguishable types of jewelry. (1 NDER 21) (emphasis added.) Instead of diminishing the credibility of Dixon's affidavit, the fact that another piece of sailboat jewelry was linked to Ms. Vest indicates that she may have collected sailboat jewelry. And again, the state's point that the record contains no evidence that Dixon was investigated or that a sailboat necklace was pawned (Cross answer at 30-32) actually supports Mr. Murray's point that an

evidentiary hearing was required.[6] The law is clear that evidentiary hearing is required before denying a 3.851 claim unless the record conclusively refutes it. McLin v. State, 827 So. 2d 948, 955 (Fla. 2002). Here, the record is silent with respect to Mr. Dixon's allegations because neither the defense nor the state have been given the opportunity to support or refute them.

Finally, the state argues that the newly discovered evidence claim must fail because the theory advanced by Mr. Dixon is contradictory to the record at trial and does not contradict any of the evidence against Murray, and cites this Court's eight points of Murray's guilt. (Cross answer at 33.) Here again, the state forgets that this is a newly discovered evidence claim, thus the court must conduct a prospective analysis of all admissible and available evidence, including all newly discovered evidence to ascertain whether there a jury would probably acquit Mr. Murray. Where, as set forth in Murray's initial brief, Murray has eliminated or

[6] The trial court's finding that Dixon's statement is incredible discounts all of the evidence that supports it. See Chambers v. Mississippi, 410 U.S. 284 (1973). Mr. Dixon was interviewed after Ms. Vest's body was found. As was Mr. Holton. The "stolen" car belonging to Mr. Holton was found approximately thirty miles from the crime scene – not only a few miles from where Mr. Dixon resided, but where Mr. Holton worked. The jewelry was found near Mr. Dixon's home and not connected to Murray. Mr. Murray has also denied involvement in this homicide absent Mr. Smith's unreliable testimonies. The evidence technician conceded he could not say there was two different shoeprints at the scene. (13 R 731-32). The hair microscopically similar to Murray was conceded to be not an absolute identification. To be sure, the "facts" of this case are now vastly different than what this Court believed they were when authoring its direct appeal opinion on this case in 2003.

undermined many of the eight points in postconviction and all that remain are truly circumstantial points that are easily explainable by a hypothesis of innocence – such as Murray's presence in the vicinity of Vest's home, which was a block from his home – the probability of Mr. Murray's acquittal on retrial given a cumulative assessment of all the evidence is great. To be sure, the Dixon affidavit provides validation to Mr. Murray's fervent claim of innocence and states that another person committed this homicide. Yet, the opposition ignores this fact (as well as ignoring Smith's inability to tell the truth in the claim above) and does not want to hold a hearing to determine whether they indeed have the right man. This claim should be reversed for an evidentiary hearing.

GROUND THREE

THE TRIAL COURT ERRED IN SUMMARILY DENYING MANY OF MR. MURRAY'S 3.851 CLAIMS ALTHOUGH THEY WERE SUFFICIENTLY PLEADED AND NOT REFUTED BY THE RECORD, VIOLATING MR. MURRAY'S DUE PROCESS RIGHTS TO A FAIR, FULL, AND IMPARTIAL POSTCONVICTION HEARING CONTRARY TO HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION[7]

In responding to this claim, the state again misunderstands or mischaracterizes Mr. Murray's argument on appeal – Cross-Appellant did not state that the trial court summarily denied 16 of his claims "without explanation."

[7] These claim involves the summary denied claims in Mr. Murray's Fifth Amended 3.851 motion. The summary denied claims are: 1, 2, 3, 7, 8, 9, 10, 11, 12, 14, 15, 19, 22, 23, 24, and 26.

(Cross answer at 37.) What Cross-Appellant said was that the trial court failed to provide any explanation for why an evidentiary hearing was not necessary in light of this Court's longstanding policy to liberally grant evidentiary hearings in capital postconviction cases, nor did the court provide specific record attachments. (Cross IB at 107.) See Rivera v. State, 995 So. 2d 191, 197 n.2 (Fla. 2008); Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998) (Wells, J. concurring) (Expressing a preference that evidentiary hearings are granted on a fact-based 3.851 postconviction proceedings.); Jackson v. State, 147 So. 3d 469 (Fla. 2014)

I. The Summarily Denied Claims

A. Grounds 1-3: The unexplained plastic bag[8]

The state first posits that the trial court correctly summarily denied Claim 1 of Mr. Murray's 3.851 motion, that counsel was ineffective in failing to object to a Richardson violation when the state presented Wilson for the first time in four trials to clear up the chain of custody issue with respect to the lotion bottle and bag, because Wilson's testimony "did not conflict" with any prior testimony. (Cross answer at 39.) However, that is not the standard for triggering Richardson. This

[8] Ground One alleged defense counsel was deficient in failing to request a Richardson hearing and move for a mistrial regarding Wilson's surprise testimony (3 Supp. 11400-11424); Ground Two alleged defense counsel was deficient in failing to discover that Wilson allegedly put the lotion bottle in the plastic bag, and; Ground Three asserted counsel was ineffective by inadequately preparing for trial with respect to the tampering claim concerning the white garment and bottle of lotion.

Court has found that Richardson is triggered when the testimony or statement of a state witness has *changed* – there is no requirement that the new testimony conflicts with the prior statement. State v. Evans, 770 So. 2d 1174, 1182 (Fla. 2000); see also Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979)(finding discovery violation where medical examiner's report did not state one way or another that the victim's spinal cord may have been severed by one of the bullets fired by the defendant, but medical examiner told the prosecutor the day before trial that, in her opinion a bullet had severed the victim's spinal cord and defense was not informed). [9] Evans explains that Richardson is triggered where the state "provides the defendant with a witness's 'statement' – as that term is defined in rule 3.220(b)(1)(B) – and thereafter fails to disclose to the defendant that the witness intends to change that statement to such as extent that the witness is transformed from a witness who 'didn't see anything' into an eyewitness who observed the material aspects of the crime charged. Here, there were several prior "statements" of Wilson; he had testified and been deposed before. However, his testimony changed from not mentioning or having anything to do with the chain of custody of the lotion bottle to personally being the one who placed the lotion bottle in a bag. The state disputes the importance of this new testimony. (Cross answer at

[9] The state has not supplied any caselaw to support its contention that Richardson is only invoked when testimony is conflicting. (Cross appeal at 39.)

39.) However, where Mr. Murray's trial was *reversed* on the state's gap in the chain of custody on this point, Wilson's addition/change to testimony in this regard was absolutely material to Mr. Murray's case and should have been disclosed to the defense. Id. Trial counsel's failure to request a Richardson hearing was prejudicial to his case.

The state further critiques Murray's motion for presenting competing theories. (Cross appeal at 40.) However, Murray has not raised competing theories, he has raised *alternative* theories. Scott v. State, 46 So. 3d 529, 533 (Fla. 2009), cited by the state in support of its argument that the defense cannot allege competing theories stands for the proposition that a defendant cannot advance two competing theories of defense – e.g. I killed the victim in self-defense, but if this court finds it wasn't self-defense, then I wasn't there. On the other hand, postconviction defense claims are occasionally argued in the alternative to ensure proper preservation. See e.g., Taylor v. State, 3 So. 3d 986, 995 (Fla. 2009); Marty v. State, 210 So. 3d 121, 125 (Fla. 2d DCA 2016)("Marty presents his argument primarily as one of fundamental error. However, in the alternative, Marty suggests that this court may also reverse based on ineffective assistance of counsel."); Freeman v. State, 761 So. 2d 1055, 1062 (Fla. 2000).

The state further challenges Mr. Murray's claims based on the Wilson's new testimony stating that Murray cannot establish that he was prejudiced. However,

the state misses that Murray's entire trial theory was tampering, built on the state's inability to explain the plastic bag on the lotion bottle. Defense counsel promised the jury that the state would be unable to tell them where the plastic bag came from. (12 R 395-96) Certainly, had the state informed the defense about Wilson's new testimony prior to trial, or defense counsel investigated and discovered Wilson's role in placing the lotion bottle in the bag, the entire defense theory would have changed.

And to the extent that the state is criticizing Mr. Murray for a failure to present testimony and evidence supporting these claims (Cross answer at 40-41), he was not granted an evidentiary hearing on these issues, and did not have the opportunity to present anything in support of his claim, which is precisely the problem. Jackson, 147 So. 3d 469 (Stressing the "critical importance of evidentiary hearings" in capital cases that require factual development).

B. Claim 8: Brady violations in failing to disclose the DOJ's investigation into the FBI's hair lab and its hair expert

The state, in its answer, defends the trial court's summary denial this claim, finding that the FBI's knowledge of the DOJ investigation of their lab cannot be imputed to the state. (Cross answer at 42). However, the FBI's knowledge may be imputed to the state as the prosecution has an obligation to disclose any "favorable evidence known to others acting on the government's behalf in the Archer v. State, 934 So. 2d 1187, 1203 (Fla. 2006). case." See also Murphy v. State, 24 So. 3d

1220, 1224 (Fla. 2d DCA 2009) (citing Commonwealth v. Lykus, 451 Mass. 310, 328, 885 N.E.2d 769, 783 (2008) ("The degree of cooperation between State and Federal prosecutors in this case specifically was very high, and the FBI was aware that the defendant's motion for all laboratory reports had been allowed. The judge correctly determined that the burden for the failure to disclose the FBI voiceprint laboratory report should fall on the Commonwealth, not the defendant.")) The trial court's legal conclusion is wrong and this issue requires reversal for evidentiary hearing. See generally State v. Alfonso, 478 So. 2d 1119, 1121 (Fla. 4th DCA 1985) ("[I]nformation within the possession of the police is considered to be in the possession of the prosecution").

The state's conclusion that the issue is not material simply because the hair evidence was not the only evidence against Murray misconstrues the law. Evidence can be material even if there was other evidence presented against the defendant. As explained by the Fifth Circuit, the court must consider "the quantity and quality of other evidence in the record," United States v. Sipe, 388 F.3d 471 (5th Cir. 2004). In the instant case, as explained throughout Mr. Murray's postconviction proceedings, without the hair evidence, all that's left against Mr. Murray is circumstantial evidence and testimony of Mr. Smith, who has a demonstrated pattern of fraud upon the courts.

C. Claim 9: Brady violation as a result of the State's failure to disclose FBI analyst Dr. Dizinno's initials were forged on

the hair evidence, and counsel was deficient in failing to object to this Brady violation and request a Richardson hearing

Here, Mr. Murray refers to his analysis for Claim 8 above to rebut the state's arguments in answer here. Further, the state made no effort to defend the trial court's erroneous ruling in summarily denying this 3.851 claim that Mr. Dizinno's testimony did not change throughout the proceedings. (1 PCR 584.) As set forth in detail in the cross-initial brief (Cross IB at 120-27), Dizinno's testimony evolved significantly, until he finally admitted in the third-recross of the fourth trial that he didn't even write his initials on the evidence. Just like the facts in State v. Scott, 33 S.W.3d 746, 760-61 (Tenn. 2000), tampering cannot be disproven given the FBI's inability to show who handled the evidence here.

D. Claim 10: Giglio violations by presenting false testimony of Det. O'Steen, Officer Powers, Dr. Dizinno, and Det. Chase

First, while qualifying the state witness's inconsistencies as "incidental" the state admits that the testimonies of these witnesses were inconsistent. (Cross answer at 43.) The state simply argues that the state didn't know the testimony was false. (Cross answer at 43.) The state also concedes that these testimonies were material to the tampering claim. (Cross answer at 43.)

Clearly, where Mr. Murray's third trial was reversed as a result of the state's inability to explain how the white garment allegedly containing a hair that matched Murray and a lotion bottle arrived in separate packaging, and several witnesses

suddenly came forward, without notification to the defense, and explained that discrepancy in the fourth trial, the implication is that the testimony was false and that the state was involved in the false testimony. Dizinno's testimony, that someone else placed his initials on the evidence at the FBI lab, was also material where both Q20 and Q42, the only damaging forensic evidence in Murray's case were admitted through Dizinno after he claimed that he was aware of their handling.

E. Claim 11: Deficient Performance in failing to request a Richardson hearing, move for a mistrial, impeach Dizinno, and renew a tampering claim

Here, the state, like the trial court in p 43 of its order (1 PCR 52) claims that counsel made a detailed objection "at the completion of Dizinno's testimony." (Cross answer at 44.) The state fails to note that objections must be contemporaneous and specific. See Doorbal v. State, 983 So. 2d 464, 492 (Fla. 2008).

Further, the state argued on direct appeal that the only issue pertaining to Dizinno that was preserved was the discrepancy in the number of hairs presented. (Answer on Direct at 16.) The instant issue either was preserved or it wasn't. The state can't have both. Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001) ("'Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including

quasi-judicial, proceedings.' Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998). The doctrine prevents parties from 'making a mockery of justice by inconsistent pleadings,' American Nat'l Bank v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983), and 'playing fast and loose with the courts.' Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990).")

As expressed in the cross initial brief (Cross IB 130), the trial court erred in summarily denying this claim, for which it did not even apply a Strickland analysis as required. (1 PCR 593-94.)

However, should this Court find that the issue was preserved as the state and trial court claim, then the trial court's failure to address Dizinno's changed testimony concerning the initials is properly before this Court in the state habeas corpus motion.

F. Claim 14: Failure to request *Batson* inquiries and/or object to the trial court's abbreviated Batson inquires

In responding to this subclaim, the state, like the trial court in summarily denying this issue, incorrectly argue that a white man is not part of a discernible class and thus, cannot raise this issue. (Cross answer at 44.) However, as pointed out in the cross initial brief, this argument simply has no merit, as the United States Supreme Court has ruled in direct contravention to this position, determining that all races, including white males, may challenge a prosecutor's peremptory challenge if it was racially motivated. Powers v. Ohio, 499 U.S. 400 (1991) (A

white Defendant has standing to challenge racial discrimination against black persons in the use of peremptory challenges)

G. Claims 22 and 24

The state mistakenly argues that that Mr. Murray did not brief underlying claims claim 22 (cumulative error) and 24 (NDE Smith's 3.850 evidentiary hearing testimony) so they should be considered waived. (Cross answer at 47.) However, **Mr. Murray fully briefed these issues in the initial brief** on cross-appeal **as claims 1** (Cross IB at 59 – all Smith newly discovered evidence, including underlying grounds 4, 24, and 27 were briefed in this claim as stated in fn. 5**); and claim 8** (Cross IB at 162 – cumulative error claim).

GROUND FOUR

THE TRIAL COURT ERRED IN DENYING MURRAY'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING TRIAL COUNSEL'S FAILURE TO PRESENT TESTIMONY FROM A MICROSCOPIST AT MURRAY'S TRIAL TO REBUT THE FBI ANALYST'S CONCLUSIONS, WHICH THE FBI HAS NOW ADMITTED WERE SCIENTIFICALLY INVALID IN VIOLATION OF MURRAYS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

I. Deficiency

In arguing that the trial attorney's performance was not deficient here, the State ignores the last-minute nature of the defense attorney's scramble to consult an expert—days before trial—and how this hampered a full and thorough

evaluation of how an expert could have undermined the reliability of the State's expert's conclusions, which provided the only forensic evidence against Murray at this trial. (See Cross IB 132-34.) Instead, the State cites a single case in support of its argument that "it is not necessary for defense counsel to retain an expert where defense counsel cross-examined the State's experts to establish the facts necessary for the defense," citing Smithers v. State, 18 So. 3d 460, 471 (Fla. 2009). (AB 49.) The situation in Smithers was very different than the situation faced by trial counsel here. In Smithers, the defense counsel was able to use the State's expert to support and corroborate the defense theory at trial, which was that the victim died of blunt trauma, and not strangulation, before she was in the water. Similarly, in Belchers v. State, the case that the State's brief noted that this Court quoted in Smithers, the defense was able to establish the facts that it wanted through the State's own expert. 961 So. 2d 239 (Fla. 2007).

In Murray's case, the defense could not use Dizinno to support anything of the defense theory; rather, the defense attempted through cross-examination to undermine and challenge Dizinno's conclusions, and having its own expert to provide scientifically validity to the defense theory of the problems with Dizinno's examination process would have been critical to undermining the jury's confidence in Dizinno's conclusion that hairs consistent with Murray's hairs were found at the crime scene. Further, this Court in Smithers noted that the defense expert in

postconviction would have provided harmful testimony against Smithers, i.e., it would have undermined Smithers' argument that the victim lost consciousness quickly due to unconsciousness from the blows to the head, and thus suffered less. No harmful testimony would have come from having an expert microscopist critique Dizinno's work here. Here, the trial attorney was trying to refute the State's expert's conclusions, and to impeach him through cross-examination. That is a very different situation than trying to use the expert's conclusions to support the defense. Here, an expert's criticism of the state's expert's procedures could have led both the jury to question his conclusions as well as the trial court to exclude the evidence altogether. The State's argument altogether ignores Murray's argument in his cross initial brief regarding the prejudice that occurred as to the Frye hearing, and that is a critical point in Murray's appeal.

II. Prejudice

Besides unreasonably disregarding the effect of having an expert to present testimony to the jury refuting the reliability of the State's only forensic evidence—in a field of evidence that has come under considerable fire—the State notably fails to make any argument regarding how an expert could have pushed the trial court to having excluded this evidence under Frye, particularly in light of this Court's reliance on Frye in Murray's first two direct appeals in reversing his convictions

based on problems in the reliability of the procedures of the State's experts in the DNA analysis.

In combination with the weighty concerns raised by Murray's postconviction expert with Dizinno's procedures here (see Cross IB 136-38), the reliance on this hair evidence is furthered rendered questionable by the multiple other problems with evidence handling in this case, i.e., the gross discrepancy in the hair counts between the State's crime scene evidence technician and Dizinno, the sketchy explanation provided by the State at the last trial to white wash the probable indicia of tampering as to the Q20 hairs that previously merited reversal by this Court, and the fact that a full defense review was impossible based on the State's destruction of all the relevant hairs through DNA analysis. (See Murray II, 838 So. 2d at 1081 (In determining that the State's DNA failed the Frye analysis, this Court emphasized the failure of the State's analyst to adequately document the testing for later review, as well as the fact that the State's expert used up all the pertinent hairs in the DNA testing, which prevented the defense from hiring its own expert to review the State's DNA findings.). Murray's current conviction hinges upon the shakiest of forensic evidence, and having a qualified expert to challenge Dizinno's work and conclusions could have made the different in securing a ruling from the trial court finding his testimony wholly inadmissible under Frye. There was no strategic reason not to employ an expert to mount a full-throttle challenge on this

point, and the failure to do so undermines confidence in the trial court's ruling that the jury should have ever heard this hair analysis in the first place. A new trial is necessary on this point under Strickland. See Fitzpatrick v. State, 118 So. 3d 737 (Fla. 2013) (granting Strickland relief for failure to call DNA expert to challenge the State's expert's conclusions); Ibar v. State, 190 So. 3d 1012, 1014 (Fla. 2016) (granting Strickland relief for failing to call forensic expert to challenge State's conclusion that Ibar could be identified by the video surveillance in the victim's residence.)

GROUND FIVE

THE TRIAL COURT ERRED IN DENYING MURRAY'S NEWLY DISCOVERED EVIDENCE CLAIM REGARDING THE FBI'S RECANTATION OF ITS EXPERT'S MICROSCOPIC HAIR/FIBER ANALYSIS AND TESTIMONY IN MURRAY'S TRIAL RESULTING IN VIOLATIONS OF MURRAY'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The state mistakenly suggests that this claim was not raised below and is procedurally barred. (Cross answer at 51, 54.) However, Mr. Murray raised this precise issue in Claim 25 of his underlying 3.851 motion, titled:

> Washington Post articles (which were corroborated by the FBI report sent to Murray) reveal that the hair lab is scientifically unreliable for numerous reasons and a "veil of secrecy" was in place to hide this information from the public; **newly discovered evidence exists that Dizinno's lab report and testimony in Murray's trial were invalid, that the entire FBI lab was under scrutiny at the time of Murray's Fourth trial**; and that the state was aware that testimony like Dizinno's was misleading; this newly discovered evidence would

> probably produce an acquittal on retrial; the inability to present this new evidence at trial would result in violations of the Fifth, Sixth, Eight, and Fourteenth Amendments of the U.S. Constitution and the corresponding provisions of the Fla. Constitution.

(3 SPCR 10468) (emphasis added.) The opening paragraph of the Murray's Claim 25 stated:

> After continuously requesting evidence from the state and FBI concerning a DOJ investigation of the FBI lab, as reported in the Washington Post articles, and being denied, opposing counsel, Bernardo de la Rionda, provided undersigned with an August 20, 2013 letter and accompanying materials from the DOJ, which revealed that a DOJ investigation of Murray's case determined that both Joseph Dizinno's lab report and his testimony in Murray's fourth trial exceeded the limits of science and were therefore, invalid. (Exhibit 23, p 3, 7, 9.)

(3 SPCR 10468.) Murray also attached the FBI/DOJ letter regarding the errors that Dizinno made in Mr. Murray's case as exhibit 23 of his Fifth Amended 3.851 Motion (3 SPCR 10652-665), was granted evidentiary hearing on the claim (3 SPCR 9667), and presented evidence in the evidentiary hearing in support of this claim, which was denied by the trial court. (1 PCR 627-29.) Thus, this claim is not procedurally barred, and Murray believes the state was simply mistaken here.[10]

[10] The state, under its mistaken belief that this claim wasn't raised below, proposed that Mr. Murray's Brady claim regarding the state's failure to inform the defense of the DOJ investigation of the FBI hair and fiber lab was the "most applicable claim." (Cross answer at 52-53.) However, the state's Brady analysis is inapplicable to this issue and should be disregarded because it was raised below as a newly discovered evidence claim, not a Brady claim. (3 SPCR 10468.)

Although the title of the State's claim suggests that this type of evidence does not constitute NDE or that it was not timely raised—"Evidence regarding errors in the microscopic hair analysis and testimony by DiZinno was not newly discovered" (AB 51)—the substance of its argument makes it clear that its only challenge to Murray's argument is as to this evidence's materiality, i.e., whether it rises to the level of likely producing an acquittal on retrial. It must be noted that the State raises no objection to this type of recantation by the FBI of its own analyst's testimony being the proper subject of an NDE claim. (See IB 144-45 (citing Duckett; Wyatt; Smith.) Nor does the State challenge that Murray timely amended his 3.851 to raise this claim after the FBI letter was provided to the State and Defense here. (See IB 145-46.)

Moving to the materiality argument, the State primarily relies on the defense postconviction microscopist Jason Beckert to challenge whether this new evidence would likely result in an acquittal on retrial. First, despite Beckert's opinion regarding Dizinno's statements during trial, it is still admissible and hugely significant that FBI/DOJ disagreed with Beckert/Dizinno and found Dizinno's trial testimony to have been scientifically invalid in two separate instances. Secondly, like the IAC Microscopy argument in Claim 4, the State ignores the focus of Murray's materiality argument in his cross IB, that this new evidence of the FBI's recantation plus Beckert's testimony, would result in a different outcome at the

Frye/Daubert hearing. The only reference that the State makes to the admissibility question of Dizinno's testimony in light of the FBI recantation is in a footnote, where it asserts that Frye not Daubert would be the standard at retrial. (AB 54, n.12.) However, as noted in Murray's cross initial brief, the Florida legislature has adopted Daubert and this Court has not yet ruled upon that statute's constitutionality, so it is presumed constitutional, and Daubert should be applied in conducting the materiality analysis for Murray's NDE claim here. (See Cross IB 147, n.26.) Further, the State provides no argument under either Frye or Daubert as to how DiZinno's testimony would still be admissible in light of the FBI recantation, particularly since Beckert supports the FBI position that the statements made during the Frye hearing to the trial court by Dizinno did exceed the bounds of science. (See Cross IB 147-52.) Rather, the State merely argues that this NDE claim should be denied because the trial court found that this new evidence would not be material under Brady. However, this application of the legal materiality standard to the facts presented in postconviction is a conclusion which this Court reviews de novo, and the State makes no effort at arguing the substance of this application. In light of the FBI recantation, as well as the multiple other problematic details with the hair evidence in Murray's trial (see prejudice argument in Claim Four above), it would be a denial of due process for this Court not to grant a new trial under this NDE claim. C.f., Lucas v. Davis, No. 15cv1224-

GPC (WVG), 2017 U.S. Dist. LEXIS 69125, at *29-30 (S.D. Cal. May 5, 2017) ("Moreover, in Claim 12, Petitioner alleges that he was convicted based in part on faulty scientific evidence, specifically hair comparison evidence and testimony presented in his case. The claim relies in part, as discussed above, on a 2009 National Academy of Sciences Report which challenges the reliability of such evidence. The Ninth Circuit recently held that 'habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence "undermined the fundamental fairness of the entire trial."' Gimenez v. Ochoa, 821 F.3d 1136, 1145 (9th Cir. 2016), quoting Lee v. Houtzdale SCI, 798 F.3d 159, 162 (3rd Cir. 2015); see also Briceno v. Scribner, 555 F.3d 1069, 1077 (9th Cir. 2009) ('[E]vidence erroneously admitted warrants habeas relief only when it results in the denial of a fundamentally fair trial in violation of the right to due process.'), citing McGuire v. State, 489 So. 2d 729 (Fla. 1986). This claim, grounded in the due process clause and premised on clearly established authority providing for habeas relief in the event Petitioner can demonstrate that the admission of this evidence violated his right to a fair trial, is also not 'plainly meritless.'").

GROUND SIX

THE TRIAL COURT ERRED IN DENYING MURRAY'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING TRIAL COUNSEL'S FAILURE TO OBJECT TO INADMISSIBLE HEARSAY THAT SUGGESTED THAT MURRAY WAS CONNECTED TO THE VICTIM'S

MISSING JEWELRY IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The bulk of the state's response to this claim relies on non-record material contained in Steven Taylor, Mr. Murray's co-defendant's, case. While this Court takes judicial notice of all prior records in this case (see e.g. April 19, 2017 Order at ¶ 4), undersigned is unaware of any precedent allowing this Court to judicially recognize a co-defendant's record as part of a defendant's record on appeal. Furthermore, undersigned does not believe that any party entered Mr. Taylor's record into evidence in Murray's 3.851 evidentiary hearing or requested that the lower tribunal take judicial notice of Mr. Taylor's record for the purposes of ruling on Mr. Murray's 3.851.

Although trial counsel testified in evidentiary hearing that his recollection was that Det. O'Steen had direct knowledge of the jewelry from a photo of Ms. Vest (1 SPCR 391), the state failed to enter either any photo of Vest wearing jewelry (because there wasn't one) or Det. O'Steen's testimony from Taylor's trial into evidence in Murray's 3.851 proceedings to rebut this claim. Further, as conceded by the state, the prosecution never "connect[ed] the dots" between the photo of Ms. Vest and the jewelry discussed by Det. O'Steen in Murray's trial. (Cross answer at 56.) The state surmised, without confirmation, that the state admitted a photo of the victim wearing jewelry in Murray's trial. (Cross answer at

56-57.) However, the clerk's exhibit memo clearly indicates that the witness was presented with an "ME Photo" of Ms. Vest, which she identified as her friend. Clearly, a photo from the medical examiner of the victim would not have had her wearing jewelry, much less jewelry that had been stolen during the course of the robbery/homicide.[11] Rather, the prosecution allowed this witness to conclude her testimony and be excused from the trial without attempting to have her identify any jewelry at issue. It is speculative beyond the tolerance of the Strickland prejudice analysis to assume that the State would have recalled a prior witness to have "connected the dots" had trial counsel objected to the detective testifying to a critical conclusion which was based entirely on hearsay. Defense trial counsel attempted to make a self-serving explanation that he assumed that Det. O'Steen had personal knowledge based on a photograph of that jewelry, but that supposed photograph was never admitted into evidence and the detective's statement in the passive voice makes it clear that he was relying on what some other person told him, rather than any photograph that he had personally viewed: the items of jewelry "were identified" as having belonged to the victim. (R. 792.)

[11] Undersigned counsel visited the clerk's office prior to filing this reply and swears and affirms that Exhibit 32 of the fourth trial, which is part of the record and was physically mailed to this Court for Murray's direct appeal, was an ME photo of the deceased who was not wearing any jewelry. Undersigned did not attach that photo to this reply for confidentiality reasons and out of respect for Ms. Vest, but will supplement the photo if requested by this Court.

Counsel was deficient in failing to object to the hearsay. The trial court's finding that the failure to object was strategic is belied by the record --as ignored by the state, counsel knew that he should have objected where he discussed O'Steen's testimony concerning the jewelry in a motion for new trial (8 R 1564), and the trial court stated that the issue could not be entertained because counsel "surpris[ingly]" failed to object to the hearsay. (8 R 1565.)

The state surmises that there is no prejudice because, assuming the hearsay objection would have been sustained (which we know it would have based on the trial judge's comment that he was surprised no one objected to the hearsay), Ms. Engler would have testified that the jewelry belonged to the victim. However, the state's suggestion is mere speculation as Ms. Engler has not testified that any such jewelry belonged to the victim and state certainly did not present any such testimony at Murray's 3.851 evidentiary hearing.

Further, defense counsel's failure to object to Det. O'Steen's hearsay testimony concerning the jewelry was prejudicial because the jewelry was damaging to Mr. Murray's case. Contrary to the state's understanding of the facts, Murray was circumstantially linked to the jewelry – the state attempted to link Murray to the jewelry found in Taylor's backyard by demonstrating that Taylor and Murray's brother met Murray at the P-farm, then went immediately to the location where the jewelry was found. (1 SPCR 455.) Thus, it is incorrect to state

that the jewelry was linked "only to his co-perpetrator." Indeed, this Court in the opinion on direct appeal, mentioned the jewelry twice as evidence supporting Murray's guilt. It was point #6 in its list of evidence "consistent with Murray's guilt." Murray v. State, 3 So. 3d 1108, 1113, 1125 (Fla. 2009).

GROUND SEVEN

DEFENSE COUNSEL WAS DEFICIENT IN FAILING TO REBUT THE TESTIMONY OF STATE SHOEPRINT ANALYST AT TRIAL WHEN PRIOR TO TRIAL THE ANALYST TOLD DEFENSE COUNSEL THERE WAS ONLY ONE SHOEPRINT AT THE SCENE RESULTING IN VIOLATIONS OF MR. MURRAY'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FEDERAL CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

The state here misses the point, and makes the same critical error that the prosecutor made at trial by saying that "a single unidentified shoeprint was found at the victim's house." (Cross answer at 58.) Simply put, *no expert has ever testified that there was more than one type of shoeprint found at the scene*. In the fourth trial Wilson specifically answered in the negative when asked if it was his opinion that the 48E came from a separate shoe. (13 R 732.) It just as easily could have come from the Britannia shoe. (13 R 723-24, 732.) Thus, counsel was ineffective in failing to clear up that point with expert testimony and object to the prosecutor's misleading closing argument, which stated that the jury should "speculate" that there were two sets of prints. (16 R 1211-12.)

Prejudice is apparent from this Court's own opinion – this Court was so

misled by the prosecutor's unchecked closing argument concerning the shoeprint that its direct appeal opinion refers to testimony "describing the presence of two different shoe prints" as point "4" of the "evidence" of Mr. Murray's guilt. Murray, 3 So. 3d at 1125 (in describing 8 points of guilt – point 4 – "testimony describing the presence of two different shoe prints…"). Where no one ever testified that there were two sets of prints, and the state's own expert said he could not opine that a second set of shoes made 48E, counsel's error in failing to retain its own expert to clarify this matter or at least object to the prosecutor's mischaracterization of the evidence prejudiced the outcome of the trial.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Murray respectfully requests this Honorable Court reverse and remand the trial court's denial of the guilt phase claims of his 3.851 Motion for Postconviction relief for a new trial, which would render moot Murray's request for remand for an evidentiary hearing on the summarily denied claims.

Respectfully submitted,
THE SICHTA FIRM, LLC,

/s/ Rick Sichta
RICK A. SICHTA, ESQ.
Fla. Bar No. 669903
JOE HAMRICK, ESQ.
Fla. Bar No. 47049
SUSANNE K. SICHTA ESQ.
Fla. Bar No. 59108

301 W. Bay St. Suite 14124
Jacksonville, FL 32202
904-329-7246
rick@sichtalaw.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via email to the Office of the Attorney General at capapp@myfloridalegal.com and jennifer.donahue@myfloridalegal.com on this 31st day of July, 2018.

/s/ Rick Sichta_____
A T T O R N E Y

CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14-point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

/s/ Rick Sichta_____
A T T O R N E Y