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IN THE SUPREME COURT OF FLORIDA

John F. Mosley, Jr.,

Appellant,

vs.

STATE OF FLORIDA

Appellee.
_____/

Case No. SC23-1091
Lower Tribunal No.:
16-2004-CF-006675

APPEAL FROM THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, John Mosley, the defendant at trial, will be referred to as the "Defendant" or "Mosley". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal will be by the symbol "ROA" followed by the appropriate volume and page number(s), to the transcripts will be by the symbol "T" followed by the appropriate volume and page number(s), to any supplemental record or transcripts will be by the symbols "SROA" or "SCT" followed by the appropriate volume: page number(s), and to Mosley's initial brief will be by the symbol "IB".

STATEMENT OF THE CASE AND FACTS

This appeal arises from Appellant's resentencing proceeding where the court conducted a second *Spencer*[1] hearing after this Court had remanded the case for a violation of *Faretta*[2] at the previous *Spencer* hearing. *Mosley v. State*, 349 So.3d 861 (Fla. 2022). A jury had previously unanimously recommended a sentence of death and the trial court imposed a death sentence. This Court had previously

[1] *Spencer v. State*, 615 So.2d 688 (Fla.1993).

[2] *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525 (1975).

affirmed Appellant's convictions and sentence of death on direct appeal. *Mosley v. State*, 46 So. 3d 510 (Fla. 2009) (*Mosley I*). The Court summarized the relevant facts as follows:

> The murders of the two victims occurred on April 22, 2004, in Jacksonville, Florida. Although Mosley was married, he had a number of romantic relationships with other women in the Jacksonville area, including Lynda Wilkes. Because Wilkes was receiving Medicaid benefits for their son, Jay–Quan, she was required to participate in a proceeding to establish paternity. After Mosley failed to answer the petition to determine paternity, a default judgment was entered against him, and he was ordered to pay $35 a week in child support, with an additional $5 a week for retroactive child support. On March 12, 2004, Mosley filed a motion to have the final judgment set aside. A hearing on this motion was set for May 3, 2004.
>
> Around this time period, Mosley, who was thirty-nine, met Bernard Griffin, who was fifteen, and asked Griffin if he would be willing to kill a baby. During his attempts to convince Griffin to kill the child, Mosley pointed out Wilkes's house and gave him a sketch of the house's layout, but Griffin refused.
>
> On April 21, 2004, Mosley went to see Wilkes at her house in Jacksonville and asked Wilkes to meet him the next day at J.C. Penney so he could take Jay–Quan shopping. On April 22, 2004, Wilkes took her other children to school. That afternoon, she and Jay–Quan met Mosley at J.C. Penney, and together they left in Mosley's vehicle, a burgundy Suburban. Mosley picked up Griffin, and eventually drove to a deserted dirt road in another part of Jacksonville. Mosley asked Wilkes to get out and pretended to look for something in the seat. He then turned and strangled Wilkes, who futilely attempted to defend herself. After she stopped moving, Mosley took a

plastic shopping bag from the back of the vehicle, put it over Wilkes's head, and put her body in the back of the Suburban. Mosley put a crying Jay–Quan in another garbage bag, tied it, and also placed it in the back of his vehicle. He used a blue tarp to cover Wilkes's body and the bag with the baby in it. Initially, Griffin heard the baby crying, but after a while, the baby stopped. Mosley dropped Griffin off and went to work.1

Later that evening, while he was still at work, another of Mosley's girlfriends, Jamila Jones, called and asked him for some gas money. He agreed that he would give her some money before she needed to leave for work the next day. That evening, Mosley clocked out of work at 11:01, and sometime after that picked up Griffin again in his Suburban. Griffin noticed that the vehicle smelled bad. Mosley drove out of Jacksonville towards Waldo, which was approximately sixty miles from Jacksonville. A few miles south of Waldo, Mosley turned and went down a number of dirt roads, eventually finding a suitable spot to dispose of Wilkes's body. After Griffin refused to participate, Mosley pulled Wilkes to a clearing by himself, poured lighter fluid over her body, and then tossed a burning rag on her body. As the body began to burn, Mosley and Griffin ran to the vehicle and left. Mosley then drove approximately forty miles further south to Ocala and dumped the trash bag with the baby in a dumpster behind a Winn–Dixie store. He also threw his shoes and gloves into the dumpster. On the way back to Jacksonville, Mosley gave Griffin $100.

Once they arrived in Jacksonville, it was daylight. After asking Griffin to give him back $20, Mosley stopped by Jones's apartment at approximately six that morning and gave her $20. Jones asked Mosley why he did not answer his cell phone when she tried to call him the previous evening, and Mosley replied that he was “doing something for his mom.” Although Mosley was supposed to be back at work at six that same morning, he called in and said

that he would be late because he did not get any sleep that night. He finally arrived at work at 12:49 p.m. on April 23.

The victim's family knew something was wrong when Wilkes failed to pick up her children from school on the afternoon of April 22. The family called the police, reported Wilkes as missing, and began a search for her and Jay–Quan immediately. During the evening hours of April 22, they found her car abandoned at the J.C. Penney's parking lot.

On the morning after her disappearance (April 23), one of Wilkes's daughters (Naquita) and a family friend saw Mosley driving his vehicle and caught up to him while he was stopped at a traffic light. They told Mosley that Wilkes was missing. Initially, Mosley denied seeing her. After Naquita asked Mosley whether he failed to show up at J.C. Penney the previous day, Mosley admitted that he saw Wilkes the day before but claimed that he had dropped her off at her car. They asked Mosley if he could pull over, but he refused and drove away.

On Saturday, April 24, Mosley changed all four tires on the Suburban, despite the fact that the tires could be driven for a few more thousand miles. Mosley was adamant that the mechanic load his old tires into his vehicle.

During the investigation into Wilkes's disappearance, the police attempted to contact Mosley numerous times, trying to arrange for an in-person interview. Mosley never met with any police officer until after he was taken into custody, but he did talk to numerous officers over the phone. He claimed that he and Wilkes met at the J.C. Penney's parking lot on April 22 and left to see some nearby houses that Wilkes was considering renting. He further claimed that he dropped her off back at her car around one that afternoon.

Days after the murder, after seeing news reports about the missing woman and baby, Griffin told his mother that he knew something about the case. He then talked to the police and eventually led police to the locations where Mosley killed Wilkes, where he burned her remains, and where he dumped the baby. Griffin was subsequently convicted of two counts of being an accessory after the fact for his involvement in the murders.

Based on Griffin's assistance, the police were able to recover Wilkes's remains, which were badly burned. Wilkes's watch, which was found with the burned body, stopped at 2:29. Mosley's cellular phone records established that at 2:24 a.m., on April 23, an outgoing call was made from Mosley's cellular phone, and the cellular antenna used for this call was close to where Wilkes's body was found. Despite a diligent search for the baby's body, the baby's body was never recovered.

Wilkes's DNA was found on a carpet sample from the Suburban. The medical examiner testified that after a person was strangled to death, the body could exude pinkish blood from the nose and mouth.

After Mosley was arrested, he wrote Jones a letter, asking her to tell the police that he was alone when he came to her house on April 23 at 6:08 a.m. He also told her, “It is legal and okay to change your statement in court if you let the jury know the police pressured and coerced you to say something before they took the statement and during the statement.” Mosley also talked to his wife, Carolyn Mosley, asking her to “remember” that his mother stayed over that night and that he came home from work that night at 11:30. He told his wife that he needed her, their daughters, and his mother to write notarized statements that he arrived home that night at 11:30 and was there all night.

During his defense at trial, Mosley presented evidence through his wife and daughters that he was at home the

> night that Griffin claimed they disposed of the bodies. Mosley's doctor also testified that he was treating Mosley for some injuries sustained in a car accident. While the doctor discussed Mosley's injuries in depth, he also admitted that the injuries would not have made it impossible for Mosley to lift a body. The jury ultimately found Mosley guilty of two counts of first-degree murder.

Mosley I, 46 So. 3d 514–16 (footnotes omitted).

The jury convicted Appellant of two counts of first-degree murder, recommended a life sentence for the murder of Ms. Wilkes, and recommended a death sentence for the murder of Jay-Quan by a vote of eight to four. *Id.* at 517. The trial court subsequently sentenced Appellant to life in prison for the murder of Ms. Wilkes and death for the murder of Jay-Quan. *Id.* at 517-18. This Court affirmed Appellant's convictions and sentences on direct appeal. *Id.* at 529.

Appellant subsequently filed a post-conviction motion for relief under Florida Rule of Criminal Procedure 3.851 alleging eighteen claims. *Mosley v. State*, 209 So. 3d 1248, 1257-58 (Fla. 2016) (*Mosley II*). After an evidentiary hearing, the post-conviction court denied the motion on all grounds. *Id.* Appellant then appealed that denial to this Court and simultaneously filed a habeas petition raising an additional issue pertaining to ineffective assistance of appellate counsel. *Id.* at 1270. This Court affirmed the post-conviction court's

denial of his 3.851 motion on all grounds related to his guilt-phase claims and denied his habeas petition claims pertaining to ineffective assistance of appellate counsel. *Id.* at 1284. However, this Court granted Appellant's request to vacate his death sentence by retroactively applying this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *Id.*

The new penalty phase trial took place in December 2019 where Mosley represented himself. The jury unanimously recommended a death sentence for Jay–Quan's murder. The court offered Mosley counsel for the *Spencer* hearing, which he accepted, but later moved to represent himself shortly before the hearing. The trial court refused to hear the motion and proceeded with the hearing and sentencing. *Mosley v. State*, 349 So. 3d 861, 865 (Fla. 2022). Mosley appealed and the Florida Supreme Court found the court's denial constituted reversible error and remanded the case for a new *Spencer* hearing and sentencing. *Id.* at 867-69. This Court denied all other issues in the appeal.

Upon remand, Mosley's counsel moved to have counsel appointed which the court did. (ROA 174-84). Counsel then moved to adopt Mosley's previous *2017 and 2018 pro se* motion for an

evidentiary hearing on a motion for a new guilt phase trial based upon newly discovered evidence. (ROA 187-89). The trial court denied that motion in a written order. (ROA 198-239). The court held the *Spencer* hearing on May 31, 2023. Mosley called four witnesses: his daughters Amber and Alexis Mosley; his mother Barbara McKinney; and his wife Carolyn Mosley. Mosley also addressed the court where he maintained his innocence. On July 7, 2023, the court then pronounced sentence, again sentencing Mosley to death for the murder of Jay-Quan. (ROA 1349-58).

This appeal follows.

SUMMARY OF THE ARGUMENT

Point I: Mosley's contention that the jury ignored the court's instructions regarding the finding of mitigating factors is procedurally barred and without merit since this point could and should have been raised on the direct appeal of the second penalty phase trial**.** This Court remanded the case after the appeal of that penalty phase trial solely for the trail court to conduct a new *Spencer* hearing.

Point II: Mosley's claim that information that the Medical Examiner was mentally incompetent at the time of the original 2005

trial was newly discovered evidence is untimely and without merit. The trial court properly denied this claim on its merits without holding an evidentiary hearing.

ARGUMENT

POINT I

THE CLAIM THAT THE JURY DISREGARDED THE COURT'S INSTRUCTIONS AND THE LAW IS PROCEDURALLY BARRED AND WITHOUT MERIT. (Restated)

Mosley contends that the jury at his second penalty phase trial ignored the jury instructions regarding how to evaluate mitigating evidence because it failed to find any mitigating factors where the trial court later, in an independent evaluation of the information presented at the trial and other hearings, found a number of non-statutory factors in mitigation. Counsel at the second penalty phase trial had filed a motion for new trial based in part on an alleged court error in accepting the verdict because the jury's findings that there was no mitigating evidence indicated that the jury had not followed the law. (2020 R:1767). Mosley failed to raise that issue, the same issue he presents here, in his direct appeal, thereby waiving it. Only the events and litigation involving the new *Spencer* hearing are now

properly before this Court and any issues in this appeal must be limited to those. This issue is procedurally barred, waived, and without merit.

As this Court is aware, the appeal from the second penalty phase trial was already addressed in case number SC20-195, reported as *Mosley II*, 349 So.3d 861, where the case was remanded solely for the trial court to conduct another *Spencer* hearing based on a *Faretta* violation. Consequently, any issue regarding the jury's treatment of its instructions should have been raised on the direct appeal of that trial, in *Mosley II*; Appellant is now procedurally barred from raising the issue here. *Tanzi v. State*, 94 So. 3d 482, 494 (Fla. 2012) (All facts for the allegation were known at the direct appeal where it could have and should have been raised so it is now procedurally barred.); *Thompson v. State*, 759 So. 2d 650, 661 (Fla. 2000). Just as a defendant may not use a post-conviction motion or a petition for extraordinary relief as a second appeal, Mosley may not use the appeal of a *Spencer* hearing to reach back to get another opportunity to appeal the actual penalty phase trial. Mosley should have raised this issue in that earlier appeal. See *Martinez v. McNeil*, 979 So. 2d 219 (Fla. 2008); *Breedlove v. Singletary*, 595 So.2d 8, 10

(Fla.1992). Furthermore, since Mosley raised this issue in his motion for a new penalty phase trial, but later failed to raise it on the direct appeal of that trial, he has now waived it. This court should deny this claim and affirm the sentence.

At the second penalty phase trial, the jury found that the State had proven the following aggravators beyond a reasonable doubt: (1) Appellant was previously convicted of another capital felony; (2) the murder was especially heinous, atrocious, or cruel; (3) the murder was committed in a cold, calculated, and premeditated manner; and (4) the victim was less than twelve years of age. (2020 T: 2000-01). The jury also unanimously found that the aggravating factors were sufficient to impose the death penalty. (2020 T:2001). The jury found the existence of no mitigating circumstances, although some of the jurors voted to find the presence of a few. (2020 T:2002-09). The jury then unanimously found that the aggravating factors outweighed the mitigating circumstances. (2020 T:2009). The jury then unanimously found that Appellant should be sentenced to death. (2020 T:2010).

Prior to the jury deliberations, using the standard jury instructions, the trial court instructed the jury on the law it was to follow and use in its deliberations. (2020 T:937-961). The court

included specific directions on the evaluation of the proposed mitigating factors put forward by Mosley, specifically indicating that it was a decision for the individual jurors. (2020 T: 943-961). The jury obviously followed the instructions since some of the jurors found individual mitigators although a majority of them rejected all of the presented mitigation. (2020 T: 2002-09).

It is a well-established presumption that a jury would have properly followed a trial court's instructions. "Absent a finding to the contrary, juries are presumed to follow the instructions given them." *Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932, 942 (Fla.2000) (citing *Sutton v. State*, 718 So.2d 215, 216 (Fla. 1st DCA 1998)); *U.S. v. Olano*, 507 U.S. 725, 740 (1993) (finding presumption jurors follow instructions); *Burnette v. State*, 157 So.2d 65, 70 (Fla. 1963)(same). While the majority of the jurors may have accepted the facts behind the proposed mitigating factors, they did not find those facts mitigating. Mosley's allegation that the jury failed to follow the jury instructions is refuted by the record and this Court should affirm the sentence.

POINT II

THE TRIAL COURT PROPERLY DENIED MOSLEY'S MOTION FOR AN EVIDENTIARY HEARING AND HIS MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WHERE HE FAILED TO MEET ANY OF THE REQUIREMENTS FOR RELIEF ON SUCH A CLAIM. (Restated)

Mosley next claims that the trial court erred when it did not grant an evidentiary hearing on his motion for a new trial based on newly discovered evidence. In his original motion, filed in January 2018, he argued that the Medical Examiner, Margarita Arruza, who conducted the autopsy on the recovered body and testified at the original trial, was mentally incompetent due to dementia. He asserted, without basis, that she was likely incompetent from 2001, so was incompetent during both the autopsy and trial. After the conclusion of the second penalty phase trial and after the Florida Supreme Court affirmed, counsel at the new *Spencer* proceedings attempted to adopt the 2018 motion by reference. Despite this faling, the trial court went ahead and addressed the merits of the newly discovered evidence motion and properly denied it. Mosley failed to meet the test for relief based on newly discovered evidence and the court did not err in summarily denying the motion.

Initially, this claim was not adequately preserved for appeal because counsel during the *Spencer* proceedings failed to perfect the adoption of the previous pro se motion for a new trial due to newly discovered evidence. Mosley originally filed that motion on January 5, 2018 (2020 ROA 30-68); he subsequently amended the motion on February 12, 2018 (2020 ROA 263-308). Both were filed while Mosley was represented by counsel. Counsel in the new *Spencer* hearing filed a request for an evidentiary hearing on Mosley's previous motion to set aside his conviction based on newly discovered evidence, wherein counsel "explicit[ly]" adopted Mosley's request for an evidentiary hearing; counsel referenced Mosley's December 2019 supplemental exhibits to his motion.[3] (ROA 187-189). Counsel did not reference

[3]In the purported adoption motion, counsel contends that Mosley's motion to set aside his conviction based on new evidence was earlier adopted in the motion for a new trial filed after the conclusion of the second penalty phase trial. However, counsel simply tacked on the following as the last paragraph.

> The Court erred by not granting the Defense's Motions and objections in this case. (This includes all motions and objections made by the Defendant during the course of his pro se representation.)

Counsel provided no specifics or argument on the motion, nor did he orally bring any argument on it to the trial court's attention. As noted earlier, Mosley filed his motions while he was represented; counsel included no catch-all in his motion for new trial for those motions.

either the original or amended motion, nor did he actually file such a motion along with a request for an evidentiary hearing. Merely referencing exhibits to a motion, filed over four years before, is insufficient. Counsel is trying to resurrect a motion filed five years earlier which had been previously rejected by the court, not truly adopted by counsel previously and not addressed on appeal other than the issue of whether Mosley was pro se when he filed it. The attempted adoption was untimely and the court should not have entertained the motion. Further, the motion was untimely in that the trial court was not bound by *Farina* since the penalty phase was complete, with only the *Spencer* hearing outstanding.

In the court below, Mosley relied on this Court's instructions for trial courts to consider post-conviction claims of newly discovered evidence prior to commencing new penalty phase trials. *Farina v. State*, 191 So. 3d 454, 457 (Fla. 2016). While the trial court did reach the merits of the motion, in compliance with that decision, the State maintains that newly discovered evidence motions should remain in post-conviction litigation rather than being heard in the trial court before a new trial. Furthermore, the penalty phase trial was already complete by the time counsel moved to adopt Mosley's 2018 pro se

motion, making the procedure used by the trial court untimely even in the context of *Farina*.

Addressing the merits of the trial court's decision, it clearly correctly followed the law in denying the motion. In *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), the Florida Supreme Court set forth the test for a conviction to be set aside on the basis of newly discovered evidence:

> First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence."
>
> Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial.

(citations omitted); see *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). The Court has further explained the requirements of the second prong as follows:

> The requirement in the second prong of the *Jones* test that the alleged newly discovered evidence be of such a nature that it would "probably" produce an acquittal on retrial is on par with the "more likely than not" standard of prejudice. See *Gaskin v. State*, 822 So. 2d 1243, 1247 n.3 (Fla. 2002) (noting that the "more likely than not" standard is "invoked when a defendant asserts entitlement to a new trial on the basis of newly discovered evidence"). The "reasonable probability" prejudice standard ... is a lower

> standard of prejudice than "preponderance of the evidence" or "more likely than not." ... In other words, while the "reasonable probability" prejudice standard means a probability higher than mere chance, it does not mean a probability greater than fifty percent; conversely, the "probably" prejudice standard (and, accordingly, the "more likely than not" standard) does mean a probability greater than fifty percent.

Damren v. State, No. SC2023-0015, 2023 WL 5968167, at *2 (Fla. Sept. 14, 2023), reh'g denied, No. SC2023-0015, 2023 WL 8013110 (Fla. Nov. 20, 2023)(citations omitted).

Mosley submitted an array of varied documents in support of his motion in a series of amendments and supplemental filings. In his original and amended motions, he attached newspaper articles from 2016 about the possibility that the State Attorney knew of Dr. Arruza's dementia for some period of time before her retirement in 2011. (ROA 263-308, 555-562). Another article from 2016 was included in the two supplemental exhibits filed in 2019 where a member of the medical examiner's staff indicated that the first signs of Dr. Arruza's impairment may have been evident in late 2009 or 2010. The other documents contained in those two filings were a collection of instances where complaints had been filed against Dr. Arruza's office, ranging from 2001-2005, chiefly involving the office

failing to take jurisdiction in several deaths. One complaint disputed the cause of death - Dr. Arruza determined it was suicide but the family, seeking the life insurance payments, insisted it was a heart attack. (ROA 763-926,1110-1309). None of the complaints filed against Dr. Arruza's office involved a challenge to her competency or raised any warning or suggestion that she was impaired. Mosley either included those items in his motion to challenge the adequacy of her autopsy performance in his case or they were irrelevant regarding her subsequent dementia.

The trial court correctly noted that if Mosley were relying on the above complaints as a basis to impeach Dr. Arruza's testimony, those items were available at the time of his trial in 2005. (ROA 199). Further, the news articles Mosley included in his filings plainly indicated that Dr. Arruza developed memory problems, possibly linked to the start of dementia, shortly before her retirement in 2011. None of the sources supported Mosley's assertion that she was mentally impaired back in 2005 and, thus, do not support his request for an evidentiary hearing, or his motion for a new trial.

Finally, Mosley has utterly failed to meet the second requirement, that had this information been produced at trial, it

would more likely than not have led to an acquittal. As the trial court noted, Dr. Arruza testified on the condition of Wilke's incinerated body which was so damaged that she could not determine the cause of death other than it was homicide. The other body was never found. She merely testified that if a baby were put in a closed plastic bag, the baby would suffocate. The record also clearly shows that Dr. Arruza supported her finding and withstood cross-examination, giving no indication of any impairment. Also, the court correctly stated that: "Aruzza's testimony did not establish either the manner of death or the perpetrator of the murder." (ROA 203). It was Griffin and the other witnesses at trial that provided that information which ultimately led to Mosley's convictions. The motion for an evidentiary hearing and the motion for a new trial due to newly discovered evidence were properly denied, so this Court should affirm the denial of the motion.

CONCLUSION

Based on the foregoing arguments and authority, the State respectfully submits that this Court should affirm the sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to George D.E. Burden, Assistant Public Defender 444 Seabreeze Blvd. Suite 210, Daytona Beach, Florida 32118, burden.george@pd7.org this 27th day of March, 2024.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this foregoing Answer Brief is 14-point Bookman Old Style, in compliance with Rule 9.045, Florida Rules of Appellate Procedure. I further certify that the document contains 4447 words from the Preliminary Statement to the Conclusion.

/s/ *Lisa-Marie Lerner*
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Assistant Attorney General