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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12 - 1159

RAY J. JACKSON,

Appellant

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 2005-32590-CFAES

REPLY BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

Contents **Page(s)**

TABLE OF CONTENTS - *cont'd*

Contents **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES- *cont'd*

Cases **Page(s)**

PRELIMINARY STATEMENT

The Appellant, Ray J. Jackson (hereinafter referred to as "Jackson"), relies on his Initial Brief for all purposes, and offers the following reply to the Answer Brief of Appellee dated February 18, 2013.

As in the Initial Brief of the Appellant the references to the record on appeal will continue to be referred to as "(RV __)" followed by the appropriate volume number and then page number(s) and the post-conviction record on appeal will be referred to as "(PV____)" followed by the appropriate volume number and then page number(s). All other references will be self-explanatory or otherwise explained.

ARGUMENT AND CITATIONS OF AUTHORITY

(A) ARGUMENT IN RESPONSE TO ISSUE I: THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM 1.

The Appellee in quoting the post-conviction court's ruling stated on page 42 of the Answer Brief that "[t]hose findings turn completely on the facts from the evidentiary hearing and from trial, as well as the *implicit credibility determinations* of the post-conviction court, who heard the witnesses testify." It is clear from the post-conviction court's oral and later written ruling that there was no credibility assessment made by the court as to the testimony of the victim's brother, Mr. Curtis Lewis (hereinafter referred to as "Lewis"). The post-conviction court in denying relief stated that it was reasonable for Keating to rely on a private investigator that he had confidence in and thus trial counsel was not deficient. The court held that the decision to rely on the memo was reasonable because counsel "has used [Investigator O'Malley] in the past and ***felt*** [he] was a very confident investigator." (PV16, 2516). There was no indication that the post-conviction court found Lewis to not be credible. It is improper to infer credibility by the post-conviction court when it is not stated. *See Stephens v. State*, 748 So.2d 1018, 1034 (Fla. 1999) ("the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle. This obligation stems from the appellate court's

responsibilities to ensure that the law is applied uniformly in decisions based on similar facts and that the defendant's representation is within constitutionally acceptable parameters. This is especially critical because the Sixth Amendment right to assistance of counsel is predicated on the assumption that counsel 'plays the role necessary to ensure that the trial is fair.' Strickland, 466 U.S. at 685. 'The Sixth Amendment . . . envisions counsel's playing a role tha

ability of the adversar*ial system to produce just results.*' *Id.* (emphasis supplied).")

The Appellee implied that Lewis' testimony is questionable and inconsistent. On page 42 of the Answer Brief, the Appellee states that "[a]s to prejudice, the question is whether, had Mr. Keating presented the *vacillating and questionable testimony* of Curtis Lewis, there is a reasonable probability of a different outcome." Later, the Appellee also stated on page 44 of the Answer Brief that "Curtis Lewis has now re-aligned his testimony with his original statement." There is no credible, competent or substantial evidence that Lewis changed or re-aligned his testimony. *See Swafford v. State*, 828 So.2d 966, 977 (Fla. 2002). The post-conviction court made no such finding as to Lewis' testimony. *See Swafford*, 828 So.2d at 977. On cross-examination, Lewis was asked whether he had seen his sister "probably within two or three days" after his birthday, and he clearly responded that "[i]t *had to be a week* because it was on a weekend, because, usually that's when the park - - that's usually when the park has a lot of - - a large

crowd, is on the weekends." (PV2, 176-177) (emphasis added) (*See Appellee's Answer Brief* page 9). As argued on pages 41 to 43 of his Initial Brief, Lewis' testimony about the last time he saw his sister provided remarkable details, which were consistent with what he wrote under oath on April 17, 2005. Keating never personally spoke to Lewis in preparation for Jackson's case and that he simply relied on a memo from O'Malley, and O'Malley's assessment of Lewis' credibility. (PV5, 600-601 & 662-663). There is no testimony as to whether O'Malley spoke to the correct witness, if it was telephonic or in-person, or if the written statement was shown to Lewis. The record is devoid of any details regarding any purported interview. Keating's testimony regarding what investigation was done by O'Malley is speculation and the memo is hearsay. (PV5, 659-661). The evidentiary hearing clearly demonstrates that the last time Lewis saw his sister was on November 14, 2004. (PV2, 179). Therefore, the Appellee's assertion that "Lewis might have seen Paulk after November 9" is incorrect. Jackson has clearly shown trial counsel's deficient conduct at the evidentiary hearing and in his Initial Brief.

Jackson has also shown that trial counsel's deficient conduct prejudice Jackson. Jackson laid out in his Initial Brief from pages 51 to 55 the credibility problems that the prosecution's witnesses faced. This case was a circumstantial evidence case that was built around the testimony of cooperating prosecution

witnesses who all had reasons to lie. Also, it should be noted that trial counsel presented a non-existent serial killer theory of defense and incoherent closing remark, because trial counsel failed to reasonably investigate and present Lewis' exculpatory testimony. (Argued as Claims 6 and 15).

A closer look at the last time Fayonna Paulk (hereinafter referred to as "Fayonna") saw her cousin was on a Sunday, at Club Vines in Deland Florida. (RV 17, 142-143). Fayonna testified that she had the wrong date and believed it was on Sunday, November 9, which was actually Sunday, November 7. (RV17, 142-143). Much like Lewis, who was sure that he saw his sister on a Sunday because the events at Bethune-Cookman Park would occur on the weekends, Fayonna also knew she last saw her cousin on a Sunday because that is the only time they would go to Vibes. (PV2, 166-167) & (RV17, 142-143). Lewis testified he was certain that the last time he saw his sister was not on Sunday, November the 7th, after he went to church. (PV2, 177).

The Appellee stated that "several witnesses were present when Jackson forced Pallis into the truck (sic) of the car." (*See Appellee's Answer Brief* page 43). The only prosecution witness who testified as to the allegation that the victim was placed into the trunk by Jackson was Fred Hunt. Hunt had significant credibility issues and a motive to lie as outlined in the Initial Brief. (*See Appellant's Initial Brief* page 53-54). Jackson's initial brief clearly presented the

credibility problems with witnesses, Calvin Morris, Latisha Allen, Fred Hunt, V'Shawn Miles, and Curtis Vreen. (*See Appellant's Initial Brief* page 51-55). Particularly, the timing of Hunt's guilty conscience coinciding with the discovery of Paulk's remains showed that Hunt knew about the location of the remains. It should be noted that Hunt testified about being concerned when another body was discovered and that he went to Jackson to tell him about the body, yet it was not until Paulk's remains were found in the woods, that he went to the police. (RV21, 781-784). Moreover, Hunt testified that Brentson Thomas helped push the trunk down upon the victim, yet Brentson Thomas testified that he was held up at the kitchen and his clothes were given to him and he did not testify that he saw, heard, or helped put the victim in the trunk. (RV 21, 710-720 & 767-776). Hunt's conscience was not affected while he was conducting his drug business until the remains that he knew to be Paulk's were found. Hunt gave conflicting statements, at least four times throughout the case. (RV22, 837-838, 917-918, 920-921, 924, 931-932, 935-936 & 953-954). Hunt characterized his statements as not untruthful, just that they were not complete. (RV22, 887-888). He did not come forward until Paulk's body was found and his initial statements implicated Jackson and minimized his actions. (RV22, 837-838, 920-921 & 931-932).

Fred Hunt was the prosecution's main witness to prove up their allegation in this capital case and his credibility is greatly undermined when compared to Lewis'

testimony. Fred Hunt had a motive to lie and to implicate Jackson so as to save himself. Lewis has no motive to lie about the last time he saw his sister. Furthermore, Lewis testified that he stands by his original sworn and detailed statement and he has never wavered. (PV1, 27-28, 35 & 38-39). In viewing the totality of the circumstances, counsel's failure to investigate and present Lewis' exculpatory testimony fell below the range of competency demanded of attorneys in criminal cases. It is clear that counsel's failure to properly investigate and present Lewis' testimony constituted prejudicial ineffective assistance of counsel depriving Jackson of his rights afforded by the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and of his corresponding rights pursuant to the Florida Constitution. *See Strickland v. Washington*, 466 So.2d 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) & *see Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982 798 *citing Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1715-1716 (1980). Therefore, Jackson again respectfully requests this Court to reverse the court's ruling and grant a new trial.

(B) ARGUMENT IN RESPONSE TO ISSUE I: THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM 6.

The Appellee stated that trial counsel made a strategic decision after a reasonable investigation. (*See Appellee's Answer Brief* page 46). As explained in Jackson's Initial Brief, there was no reasonable investigation done by trial counsel

prior to putting on the serial killer defense during their case in chief. (*See Appellant's Initial Brief* pages 56-61). Keating was clearly not aware of Captain Brian Skipper's (hereinafter referred to as "Skipper") entire testimony but put him on without knowing what the witness would say. (PV5, 606-607). Keating's reasoning that he wanted to establish the initial parameters of the serial killings in comparison to Paulk's death and then "see if [he] could get anything more" is not sound trial strategy. Keating's investigation was limited to a five minute phone call with Skipper and newspaper articles. This is not a reasonable investigation into the serial killer defense prior to its presentation. Trial counsel had no idea what Skipper was going to testify in his case in chief and as a result he put on evidence that mocked the jury's commonsense to the detriment of Jackson.

Furthermore, Keating did not plant any seeds of reasonable doubt as stated by the Appellee. (*See Appellee's Answer Brief* page 46). The numerous dissimilarities between Paulk's death and the serial killings were highlighted by Skipper at the trial to the detriment of the defense. Skipper clearly testified that "there's strong evidentiary connections between the three serial cases, and there is no connections whatsoever with the Pallis Paulk case." (RV23, 1065). Trial counsel also conceded that the "dissimilarities came out, trial." (PV5, 479). There was no doubt whatsoever created by this defense. It is reasonable to assume that a jury would question why trial counsel would put on this non-existent serial killer

defense and an obvious reason would be the assumption that Jackson is guilty and trial counsel had nothing else. Hence, the credibility of Jackson and his trial counsels was lost with the jury. This shot is the dark by trial counsel backfired and cost Jackson his life.

The post-conviction court erroneously denied this claim by finding that the serial killer defense was a reasonable trial tactic as Keating was trying to raise grains of reasonable doubt to obtain a not guilty verdict, a verdict for a lesser, or to get a hung jury. (PV16, 2517-2518). The serial killer theory of defense could never be a defense in this case and to feed the jury this nonsensical defense hurt Jackson's credibility with them to his detriment. Had trial counsel conducted a reasonable investigation or had consulted with a serial killer expert (such as Brent Turvey), they could have presented a defense that actually made sense such as Lewis' exculpatory testimony (*See Claim 1* in this Reply brief and in *Appellant's Initial Brief*). Furthermore, had trial counsel conducted a reasonable investigation of had consulted with an expert, they would not have put on a witness (Skipper) who contradicted their chosen defense.

(C) ARGUMENT IN RESPONSE TO ISSUE I: THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM 11.

Jackson has fully argued and litigated this claim in the arguments in his Initial Brief from pages 61 to 63 that it was unreasonable and deficient for trial

counsel not to fully investigate and uncover the public information regarding the victim's working as a cooperating witness or informant that aided law enforcement. However, Jackson will clarify the Appellee's Evidentiary Hearing Facts as to this claim. (*See Appellee's Answer Brief* pages 11-12). The Metropolitan Bureau of Investigation records [Defense Exhibits 6 and 7] entered at the evidentiary hearing clearly demonstrate that the victim was initially arrested pursuant to a seven count arrest warrant and probable cause affidavit. (PV2, 244-246, 250-251, 254-255 & PV13, 2033-2056). There was probable cause for all of the charges against the victim. (PV2, 244-246, 250-251, 254-255 & PV13, 2033-2056). What is important in terms of trial counsel's failure to reasonably investigate the victim's background is that per Cocchiarella "these arrest warrants began the prosecution of these young women who were strippers in this nightclub, and some of them agreed to cooperate. And, eventually, there was an administrative action brought against the club, probably two of them, one by ABT and one by County of Orange that provided its adult code license. And so those continued after the arrest warrant." It is clear that the victim was one of the cooperating witnesses and she did obtain a benefit for cooperating where her seven probable cause charges were reduced to only one count. (PV2, 251 & 264). The records reflected that the victim was working off her charges. (PV 2, 264). Keating testified that based on a review of the MBI records, his trial strategy would

have been affected because it gives his defense more specifics and credibility. (PV5, 493-494). Keating clearly recognized that the MBI information gave him an opportunity to argue opportunity and motive. (PV5, 561).

(D) ARGUMENT IN RESPONSE TO ISSUE I: THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM 17.

The post-conviction court's ruling highlighted in the Appellee's brief is not supported by competent and substantial evidence. The evidence at the post-conviction proceedings does not support that court's finding that trial counsel "extensively discussed" the issues of substance abuse. Trial counsel Keating clearly admitted that he knew Jackson smoked a lot of pot daily. (PV5, 634-635). He spoke to Jackson's mother about her drug problem and *not regarding Jackson so much*. (PV5, 635). Trial counsel Keating's memo showed that Jackson smoked pot daily, all day, that Jackson drank Hennessey liquor, that Jackson sold drugs; *yet Keating indicated that Jackson denied drug use.* (PV12, 1843-1849). Counsel did not develop alcohol as a mitigator despite their knowledge. (PV5, 640-641). This is because trial counsel only believed Jackson to be a pot smoker and never even investigated all the evidence of substance abuse that was evident in the records as presented on pages 28 to 31 of Jacksons' Initial Brief. Moreover, trial counsel Bonamo displayed his ignorance as to the importance of this mitigation by contradicting himself regarding the evidence of drug use. As stated on page 15 of

the Answer Brief, trial counsel Bonamo agreed that "[t]he scenario presented to the jury was that Jackson and Paulk *had been using drugs together before she robbed* him" and also that "everything was about *drugs and the drug community*." (RV3, p.336). Yet, as stated on page 15 of the Appellee's Answer Brief, trial counsel Bonamo later contradicted himself by agreeing with the State on cross-examination that there was *no evidence* that Jackson used drugs on the day of the murder or during the events preceding the murder. (RV3, 370). In the face of such obvious evidence of substance abuse in Jackson's life, trial counsel failed to investigate or present any evidence to mitigate the prominent image of Jackson as a drug dealer through-out the guilt phase proceedings.

Trial counsel's failure is further evident in Dr. Danziger's testimony. Dr. Danziger, the defense's trial expert, clearly found that there was evidence of cannabis dependence but he was only asked to look for a connection with the date of the offense and cannabis use. (PV6, 818-820) (*See Appellant's Initial Brief* page 33). Again, Dr. Danziger advised counsel of the diagnosis of cannabis dependence in remission in the controlled environment of the jail. (PV6, 825). Trial counsel contradicted Dr. Danziger's testimony that was consistent with his trial deposition, by stating that "both he [Danziger] and I agreed that marijuana use in Ray's case would not be an effective mitigator." (PV5, 647). Dr. Danziger confirmed that "there's a history of cannabis dependence" in Jackson. (PV6,

818-820). Despite, Dr. Danziger's prevalent substance abuse findings known to counsel, counsel unreasonable testified that the only information he had was that Jackson smoked pot. (PV5, 640-641).

Dr. Danziger's diagnosis should have been further investigated and developed as positive mitigating evidence portraying Jackson as an individual plagued with addiction and not just a drug dealer. (PV6, 679) & *see State v. Larzelere*, 979 So.2d 195, 207 (Fla. 2008) ("The State argues that we should not find that Larzelere was prejudiced because this 'mitigation' evidence would have been more harmful than helpful to her case … While we agree the State could have presented rebuttal evidence during the penalty phase, this does not change our conclusion that Larzelere was prejudiced by counsel's penalty-phase performance.") & *see Sears v. Upton*, 130 S.Ct. 3259, 3264, 177 L.Ed.2d 1025 (2010) ("the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising, … given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency mitigation theory … This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts-especially in light of his purportedly stable upbringing. Because they failed to conduct an adequate mitigation

investigation, ***none*** of this evidence was known to Sears' trial counsel. It emerged only during state postconviction relief." (internal cites omitted and emphasis in original)).

The trial clearly portrayed Jackson as a prominent drug dealer through-out the trial. The Appellee on page 63 also makes reference that the evidence portrayed "*Jackson was as a drug dealer*, [who] kidnapped and killed Pallis Paulk because she stole from him." Also, as previously stated, trial counsel Bonamo agreed that at trial "[t]he scenario presented to the jury was that Jackson and Paulk had been using *drugs together before she robbed* him and also that "e*verything was about drugs and the drug community*." (RV3, p.336) & (*See Appellee's Answer Brief* page 15). This case is not a situation where trial counsel looked at all the evidence of substance abuse that was in the records, through witnesses, and through Dr. Danziger and then made a decision to not present the evidence. *See Parker v. State* , 643 So.2d 1032, 1035 (Fla. 1994); *see Clark* v. *State*, 609 So.2d 513 (Fla. 1992); *see Ragsdale v. State*, 798 So.2d 713 (Fla. 2001) & *see Mahn v. State,* 714 So.2d 391 (Fla. 1998). This mitigating evidence was obvious and available to trial counsel, but trial counsel ignored it and relied on the notion that Jackson was just a "pot smoker." *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991); *see Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991); *see Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Unrebutted evidence that a

defendant's "reasoning abilities were substantially impaired by his addiction to hard drugs" is "significantly compelling" mitigation. *Songer v. State,* 544 So.2d 1010, 1011 (Fla. 1989).

Trial counsel had an abundance of information as to Jackson's substance abuse history to present as a specifically requested mitigator. The hearing demonstrated that Jackson he suffered from a severe addiction, which should have been presented to mitigate the guilt phase characterization that he is just a drug dealer. Trial counsel could not make a strategic decision because there was no competent investigation done. Counsel either ignored or missed this weighty mitigator. The court's ruling should be reversed and the case remanded for a new penalty phase trial.

(E) ARGUMENT IN RESPONSE TO ISSUE II: THE GUILT PHASE INEFFECTIVE CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM14.

Jackson has fully argued and litigated this claim in the arguments in his Initial Brief from pages 72 to 78. However, in response to Appellee's statement that "Morris being an accomplice to the robbery of Jackson sentenced only to probation," Jackson wants to clarify that Morris was never charged as an accomplice. (RV25, 1332). Therefore, Morris was not sentenced to probation as to this case. It was Curtis Vreen who was sentenced to eighteen [18] months of probation on his unrelated felony case(s). (RV25, 1333-1334) (*See Appellee's*

Answer Brief pages 54).

(F) ARGUMENT IN RESPONSE TO ISSUE II: THE GUILT PHASE INEFFECTIVE CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM15.

The Appellee states that Jackson's brief does not identify the shortcomings in trial counsel's closing remarks and that there is no explanation of what should have been done, but was not. (*See Appellee's Answer Brief* page 56). Jackson's Initial Brief stated the following problems with trial counsel's closing remarks:

> Keating presented numerous ***implausible*** alternative theories of defense that include the serial killer defense, the catch and release defense, that "Montana" may have committed the crime, the defense that someone retaliated against Paulk for giving him/her AIDS, the defense that someone killed Paulk in another county and brought her body to Daytona Beach, and the defense that some unknown third party committed the crime because of Paulk's risky lifestyle. (RV25, 1313-1350). Specifically, the "catch and release" theory of defense ***undermined*** his own argument by admitting that Jackson may have committed the kidnapping. (RV25, 1323-1325, 1334, 1337 & 1339). Such a ***conflicted argument is not a reasonable tactical decision when Jackson can be convicted under the Felony Murder rule. It is not reasonable trial strategy to throw numerous unreasonable alternative theories of defense at the jury because it injures defense's credibility with the jury. Counsel did not address or argue for lesser offenses. Counsel incorrectly argued that independent act [jury instruction] was a defense***. (RV25,1324).
>
> …
>
> He failed to properly attack the credibility of the prosecution witnesses and focused too much on an elusive unknown third party who committed the crime because of Paulk's risky lifestyle.

(*See Appellant's Initial Brief* pages 78-79). Jackson argued that the deficient

performance prejudiced Jackson because it failed to persuade the jurors as to the weakness in the prosecution's case and why his client should not be found guilty. The closing remarks failed to effectively challenge the State's evidence because it focused on several theories of defense that were not coherent and consistent which prejudiced Jackson by undermining his credibility with the jury. *See Downs v. State*, 453 So.2d 756, 1108 (Fla. 1984) *quoting Strickland*, 466 U.S. at 694 & *see Strickland*, 466 So.2d at 688. The court's rulings should be reversed and a new trial be granted.

(G) ARGUMENT IN RESPONSE TO ISSUE II: THE GUILT PHASE INEFFECTIVE CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIMS16, 20, 21, 22, AND 23.

Jackson has fully argued and litigated these claims in the arguments in his Initial Brief from pages 79 to 82.

(H) ARGUMENT IN RESPONSE TO ISSUE III: THE "SUMMARY DENIAL" CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM 2.

With regard to the "summary denial" claims, Jackson has presented in his Initial Brief the Standard of Review from pages 82 to 83. *See McLin*, 827 So.2d at 954 *quoting Foster v. Moore*, 810 So.2d 910, 914 (Fla. 2002) & s*ee Mungin*, 932 So.2d at 996 *citing Freeman*, 761 So.2d 1055, 1061 (Fla. 2000); *see Lemon v. State* , 498 So.2d 923 (Fla. 1986); *see Hoffmann v. State*, 613 So.2d 1250 (Fla. 1987) & *see O'Callaghan v. State*, 461 So.2d 1354 (Fla. 1984). Jackson has fully argued

and litigated this claim in the arguments in his Initial Brief from pages 83 to 86.

(I) ARGUMENT IN RESPONSE TO ISSUE III: THE "SUMMARY DENIAL" CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM 5.

Jackson's Initial Brief was very specific as to the issue that counsel failed to contemporaneously object and move for a severance of Jackson's case ***when*** Michael Wooten (hereinafter referred to as "Wooten") testified about evidence of other crimes, wrongs, or acts which would have been inadmissible to show bad character or propensity, against Jackson. (PV11, 1493-1497 & PV1, 87-93). The non-refuted record on appeal shows a lack of diligent performance contrary to the court's finding to contemporaneously object and to move to severe the cases when inadmissible testimony was introduced via Wooten. *See Ford*, 825 So.2d 358. Specifically when Wooten testified Jackson had possessed a gun on a date other than the date of the offense. The mention of the guns was with regard to the murder of his cousin and is found at RV24, 1202, 1224, 1226 & 1228. Jackson has presented in detail the testimony that was not *contemporaneously* objected to by trial counsel on pages 88 to 89 of his Initial Brief. Wooten's testimony showed that Jackson has a propensity for violence and to seek revenge or retribution, which is highly prejudicial in this case. The prosecution's theory was that Jackson kidnapped and killed Paulk as retribution for her stealing money and drugs. *See Jackson v. State*, 25 So.3d 518, 522 (Fla. 2009). This inference does not pale in

comparison to the evidence that Jackson was a drug dealer who killed the victim because she stole from him. The inference that Jackson uses violence for retaliation supports the prosecution's theory. Trial counsel should have contemporaneously objected and moved for a mistrial and severance of the defendants once "the facts establishing the grounds are known to the defendant." *Cherry v. State*, 835 So.2d 1205, 1207 (Fla. 4th DCA 2003). Once Wooten testified about the guns and retaliation, that is when trial counsel had the facts establishing improper bad character evidence of Jackson and that is when the objections and/or motions should have been made to sever the defendants.

The Appellee stated that "Jackson moved to sever shortly thereafter, citing not only Wooten's threat to Morris, but also Wooten's testimony and the 'pour-over' effect to Mr. Jackson which was more prejudicial than probative." This motion had nothing to do with the testimony by Wooten that Jackson possessed a gun on a date other than the date of the offense with regard to the murder of his cousin cited at RV24, 1202, 1224, 1226 & 1228. Wooten's testimony had already concluded without an objection or motion to sever. At this juncture, witness Nancy Olbert is being sworn in to testify and Wooten has concluded his testimony. (RV24, p.1236-1237). At the motion to sever, trial counsel Keating made a motion to sever defendants because he "believe[d] that this witness [Olbert] is going to talk about hand signals made by co-defendant Michael

Wooten during the trial when he is sitting at table with his two attorneys." (RV 24, P. 1237). This motion to sever served no challenge to the testimony regarding the propensity to possess guns and for retaliation.

The record clearly shows that there was no contemporaneous objection or motion and the jury heard all of Wooten's highly prejudicial testimony. Wooten's testimony had a substantial influence on Jackson's verdict as it painted him as a "violent" person with guns and a retribution seeker, thus but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 So.2d at 694. The court's findings should be reversed and remanded for a hearing.

(J) ARGUMENT IN RESPONSE TO ISSUE III: THE "SUMMARY DENIAL" CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIMS 12 AND 18.

Jackson has fully argued and litigated these claims in the arguments in his Initial Brief from pages 93 to 96.

(K) ARGUMENT IN RESPONSE TO ISSUE III AND IV: THE "SUMMARY DENIAL" CLAIMS OF THE APPELLEE'S ANSWER BRIEF, CLAIM 7 AND THE DNA TESTING MOTION.

Jackson has always maintained his innocence in this case. The prosecution's main evidence at trial came from witnesses who have credibility issue. The evidence against Jackson is a clear example of circumstantial evidence. A defendant has the fundamental right to present potentially exculpatory evidence.

See Rivera v. State, 561 So.2d 536, 539 (Fla. 1990). Furthermore, Florida courts have determined that the purpose of the DNA testing statute is "to provide defendants with a means by which to challenge convictions where there is 'credible concern that *an injustice* may have occurred and DNA testing may resolve the issue.'" *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d DCA 2002) (*quoting In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*), 807 So.2d 633, 636 (Fla. 2001).

The prosecution brought the issue of the head hairs into play at the trial.(RV17, 193-194 & RV23, 1002-1013). The role of the head hairs was to instill theassumption that the Negroid hairs belonged to the African American defendants. Otherwise, there was no other relevant purpose for the introduction of the headhairs evidence. (*See Appellee's Answer Brief* page 72). This inference was highlyprejudicial. Jackson, through no fault of his own, was deprived of the testing of thehead hairs and in the interests of justice is requesting that this Court reverse thepost-conviction court's ruling and grant his reasonable motion for post-conviction

testing. Jackson was denied his Fourteenth Amendment procedural due process rights to test the hairs to determine the true assailant(s). *See Skinner v. Switzer*,[1] 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011). Moreover, a denial of his request to submit this DNA evidence for testing at his expense would also violate his rights under the due process and/or equal protection clauses of the Florida and United States constitutions. Provisions, like Rule 3.853, have long recognized a defendant's constitutional right to prove his innocence by introducing evidence that a third party committed the crime – rooted in the fundamental right to "present a defense." U.S. Const. amend. VI, XIV; Florida Const. Art. 1 §§ 9, 16. The post-conviction court's denial of post-conviction testing in Jackson's case pursuant to Florida Rule of Criminal Procedure 3.853 is fundamentally inadequate to vindicate Jackson's substantive constitutional rights to recognize his substantive constitutional right to establish his actual innocence. Jackson should be allowed access to the head hairs to perform testing.

[*Skinnner*] to decide a question presented, but left unresolved, in *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. ___ , ___ , 129 S. Ct. 2308, 174 L. Ed. 2d 38, 56 (2009): May a convicted state prisoner seeking DNA testing of crime-scene evidence assert that claim in a civil rights action under

1 The Supreme Court of the United States in *Skinner* "granted review in this case

42 U.S.C. § 1983, or is such a claim cognizable in federal court only when asserted in a petition for a writ of habeas corpus under 28 U.S.C. § 2254?" *Id*. at 1293. (*See Appellee's Brief* page 68). The Supreme Court in *Skinner* held for the first time that a defendant can bring a civil action under 42 U.S.C. § 1983 attacking a court's post-conviction denial of access to DNA evidence.

In response to the Appellee's argument on page 74 of his Answer Brief regarding the microscopic analysis of the head hairs, Jackson states that the issue regarding the microscopic analysis of the head hairs was raised under Claim 7 of his Motion to Vacate Judgment and Sentence as argued from pages 91 to 93 in Jackson's initial brief. These hairs were suitable for microscopic comparison but trial counsel never sought comparison or DNA testing of them to exclude Jackson and to potentially incriminate another individual. (RV23, 1004-1005 & 1013-1015).

Jackson has clearly denied that he committed the crime. Jackson has maintained his innocence as to the accusations brought forth by the State. Accusations that stem from Fred Hunt, who as previously discussed has credibility issues and a motive to lie. Even analyst May recognized that *the perpetrator could have easily transferred his head hair* to the grave site including a white Caucasian perpetrator. (RV23, 1019) (emphasis added). The State can speculate that the head hairs may be transient, but it was the prosecution that head hairs into play at trial to make the reference at the Negroid hairs belonged to Jackson, who is African-American. Jackson should be allowed to rebut this reference by his own

testing. Furthermore, as discussed in the Appellant's Initial Brief, Jackson is entitled to a post-conviction DNA analysis of the head hairs as a matter of due process. These head hairs can run be through a FDLE DNA database and a FBI DNA database, including CODIS, that is available for the DNA testing and comparison of the head hairs. (PV10, 1401-1411). Jackson had specifically requested for testing by the Bode Technology Group, Inc., 10430 Furnace Road Suite 107, Lorton, VA 22079. *See* http://www.bodetech.com/ in his Motion for Post-Conviction DNA testing. (PV10, 1371-1372 & 1414-1424).

CONCLUSION

As requested in the Initial Brief of the Appellant, the court improperly denied Jackson post-conviction relief by improperly denying Jackson's Motion to Vacate and Jackson's Motion for Post-conviction DNA testing. Jackson requests that this Court reverse the court's order denying relief, vacate his conviction and grant his a new trial; or grant him an evidentiary hearing on claims summarily denied; or grant such other relief as this Court deems just and proper. Jackson also respectfully requests that this Court reverse the court's denial for post-conviction DNA testing and remand this case to allow Jackson to conduct DNA testing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Appellant has been furnished by United States Mail to Ray Jackson, DOC # 973885, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 27th day of March, 2013.

I HEREBY CERTIFY that a PDF copy of the foregoing was served via electronic mail to **Kenneth Sloan Nunnelley**, Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, at ken.nunnelley@myfloridalegal.com and at CapApp@myfloridalegal.com on this 27th day of March, 2013.

I HEREBY CERTIFY that, in compliance with this Honorable Court's Administrative Order *In re: Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal*, dated February 18, 2013, a copy of the Microsoft Word document of the foregoing brief has been transmitted to this Court through the Florida Courts E-Filing Portal on this 27th day of March, 2013.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

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