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IN THE SUPREME COURT OF FLORIDA

CASE NO.:
LOWER TRIBUNAL NO. 16-2004-CF-006675

JOHN F. MOSLEY,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

Honorable Judge Michael R. Weatherby
Judge of the Circuit Court, Division CR-B

PETITION FOR HABEAS CORPUS

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TABLE OF CONTENTS

JURISDICTIONAL STATEMENT

The Florida Supreme Court (FSC) has original jurisdiction over this Petition for Habeas Corpus, Mr. Mosley was sentenced to the death penalty, and the instant Petition accompanies Petitioner/Appellant's Initial Brief from the lower tribunal's order on Appellant/Petitioner's denial of his 3.851 Motion for Post-Conviction Relief. Fla. R. App. P. 9.142(b).

THE FACTS UPON WHICH PETITIONER RELIES

STATEMENT OF THE CASE

On May 6, 2004, John Mosley was arrested for the murders of Lynda Wilkes and Jay-Quan Mosley, Ms. Wilkes' infant. (1 R 1.) On July 1, 2004, a Duval County Grand Jury indicted Mosley on two counts of premeditated murder. (1 R 11.)

Mr. Mosley proceeded to trial. Jury selection occurred on November 7-8, 2005. (10 R 4 – 12 R 554.) Opening statements occurred on November 9, 2005. (12 R 555, 576.)

The state called the following witnesses: Marquita Wilkes (13 R 614), the victim's daughter, who testified about her mother's plans on the day in question; Naquita Wilkes (13 R 638), the victim's daughter, who testified about Mosley's relationship with her mother and a conversation that she had with Mosley after her mother's disappearance; Shrailing Bryant (13 R 653) who lives with Marquita to

testify about the day the victims disappeared; Bernard Griffin (13 R 674) Mosley's teenage co-defendant who testified about Mosley's alleged involvement in the victims' murders; Jamila Jones (13 R 769) who testified about her relationship with Mosley and her interactions with him on the days in question; Craig Waldrup (13 R 797) a JSO homicide detective assigned to the case; John Holmquist (14 R 833) an FDLE crime scene analyst who processed the crime scene in Waldo; Margarita Arruza (14 R 876) the medical examiner; Ryan Bennett (14 R 894) a crime laboratory analyst with the State Fire Marshal Fire and Explosives Analysis Lab; Dennis Fuentes (14 R 906) a JSO patrol officer with the missing persons unit; Isaac Brown (14 R 937) a JSO patrol officer who communicated with Mosley following the disappearances of the victims; Hugh Eason (14 R 957) a JSO missing persons sergeant who spoke with Mosley following the victims' disappearances; John Gay (15 R 1015) a JSO detective who assisted in interviewing Mosley; Wesley Owens (15 R 1052) an attorney who handled Mosley's child support case for the Department of Revenue; Mark Roman (15 R 1076) lead JSO detective on the case; Gary Stucki (15 R 1196) with the JSO homicide unit; James Dale (16 R 1255) who worked at Pep Boys and put new tires on Mosley's SUV on April 24, 2004; Robert Williams (16 R 1269) a Verizon Wireless employee who testified about cell phone records; Larry Brown (16 R 1297) a Bell South employee who testified about phone records; Mike Knox (16 R 1302) a JSO crime scene

investigator; Kim Long (16 R 1314) an evidence technician with JSO; Dr. Tony Falsetti (16 R 1332) a director of the C.A. Pound Human Identification Lab at UF and associate professor of anthropology at UF who examined victim Wilkes' remains; Karen Smith (16 R 1347) with the JSO crime scene unit; David Jordan (16 R 1368) Mosley's boss at the time of the crimes; Terrence Forbes (16 R 1380) another of Mosley's bosses at the time of the crime; Rahnjeet Singh (16 R 1395) a co-worker of Mosley at the time of the crimes; Kenneth Shanks (17 R 1406) a relative of Mosley's who provided Mosley with some stain remover; Tom Hackney (17 R 1426) a JSO lieutenant who participated in the investigation of this case; Danny Muck (17 R 1468) a site manager for the Pecan Row Landfill; Gabe Caceras (17 R 1485) former FDLE DNA analyst; Dr. Martin Tracey (17 R 1551) the state's DNA expert.

The defense submitted a motion for JOA following the state's case in chief. (17 R 1582.) The defense presented the following witnesses: Kenneth Shanks (18 R 1608) to answer additional questions about the cleaning products he supplied to Mosley; JSO Officer Carney (18 R 1610) regarding Mosley's sprained shoulder; family Practitioner Dr. Christie Aston (18 R 1620) to verify that Mosley's wife brought their daughter, Amber, into her office at approximately 12:04 p.m. on April 22, 2004 because she was not feeling well. Jimmy Horton (18 R 1629), who runs a Quality Tire, testified that Mosley came to his shop on the morning of April

22, 2004 to have a flat tire repaired – Mosley was out of there in about an hour, leaving probably before 1:00 p.m. Mosley came back to the shop later that afternoon, but he does not recall what time. Gary Stucki (18 R 1637) testified that a K-9 unit alerted to an abandoned house near the JC Penney's where the victims' car was found – no evidence was found at the house. Lead Detective Mark Romano (18 R 1641) testified again and the defense entered Mosley's memo pad as an exhibit. Kesha Sutton (18 R 1651) victim Wilkes' niece testified that Wilkes weighed abut "190, 210" and was in "pretty good shape." She also testified about her prior knowledge of Bernard Griffin – she stated that she did not know him, but admitted that he played with her kids; Attorney Sharon Johnson (18 R 1676) testified about paternity lawsuits; Dr. M.W. Kilgore (18 R 1692), a clinical neurologist with Baptist Medical Center testified about treatment that Mosley received following a November 3, 2003 rear-end collision resulting in injuries that made it difficult for Mosley to lift things. Barbara McKinney (18 R 1717-27), Mosley's mother, testified that Mosley was supposed to help move his aunt into a nursing facility on April 23, but they ended up having to move her earlier; that he needed new tires because of a family vacation, and that he typically kept surgical gloves in his vehicle because he was a nursing assistant. Jim Jeanette (18 R 1743-48), a plumber, testified that Mosley called him to fix a toilet, that he finally made it to Mosley's house on April 23 around 3:00, 3:30, and Mosley had already gone

to work. Mosley did not seem out of sorts on the phone. Michael O'Connell (18 R 1763) is a graphic artist who worked with Griffin to sketch the area where the victim's body would be found; JSO officer Taft Thomas (18 R 1790) testified about some interactions with Mosley; Amber Mosley (19 R 1810) Mosley's daughter testified about his whereabouts on the days in question; Alexis Mosley (19 R 1822) testified about Mosley's whereabouts on the days in question; Alesha Jackon (19 R 1835) a girlfriend of Mosley testified about the day the police picked Mosley up from her house; Mike Hurst (19 R 1863); Carolyn Mosley (19 R 1881) Mosley's wife to testify about her interactions with law enforcement, Mosley's whereabouts and behavior, the condition of his car on the days in question as well as communications with Mosley while he was in jail.

The state called Lead Det. Mark Romano (19 R 1924) in rebuttal. The defense entered a motion for JOA. (19 R 1937.) Closing arguments occurred on November 17, 2005. (19 R 1953, 1989.) On November 18, 2005, the jury convicted Mr. Mosley on both counts of the indictment. (4 R 607-608.)

The penalty phase took place on November 30, 2005. The State called five victim impact witnesses. (21 R 2284-2293.) Mosley presented two witnesses: Mr. Mosley's mother, Barbara McKinney, who testified about Mosley's upbringing and social history. (21 R 2296-2347.) Through Ms. McKinney, trial counsel introduced photographs depicting Mosley's life. Jeff Pace, a Navy recruiter, also

testified on Mr. Mosley's behalf. Officer Pace testified that Mosley joined the Navy Reserves after September 11, 2001. Mosley received an age waiver to join. Mosley entered the Navy Reserves in a higher pay grade than normal candidates because of his civilian education and training. (22 R 2357.) During boot camp, Mosley held a leadership position and was cited for his leadership abilities. (21 R 2360.) Petty Officer Pace told the jury that Mosley was considered an asset in boot camp. (21 R 2360.) Mosley was honorably discharged after unsatisfactory participation due to his incarceration in this case. (21 R 2366.)

The jury recommended Life for the death of Ms. Wilkes and recommended Death for the murder of Jay-Quan Mosley by 8-4. (21 R 2489-2490.) Mosley presented, Ethel Taylor and Carolyn Mosley in Spencer hearing. (25 R 2530-2546.) The judge followed the jury's recommendations and sentenced Mosley to Death for the crime(s) to Jay-Quan Mosley. (27 R 2636.)

In so sentencing, the trial court found four aggravators: (1) the victim of a capital felony was a person less than 12 years of age, (2) CCP (3) the murder was committed for financial gain, and (4) the defendant was previously convicted of a prior violent felony, specifically, the contemporaneous murder of Lynda Wilkes. (27 R 2615-2622.) The court found no statutory mitigation but found and weighed thirty-one non-statutory mitigators.[1]

[1] (1) the defendant was raised in a broken home (little weight); (2) the defendant

Mr. Mosley filed a direct appeal to the Florida Supreme Court raising 13 issues: This Court denied relief and affirmed Mr. (1) The due process clause of the Florida Constitution provides more protection to criminal defendants than the United States Constitution and this court should apply the doctrine of primacy to

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was an above average achiever in high school (little weight); (3) the defendant was affected by seeing physical and sexual abuse at an early age (little weight), (4) the defendant has the love and support of his family (little weight), (5) the defendant was a good parent (little weight), (6) the defendant was good and respectful to his mother, grandmother and other family members (some weight), (7) the defendant was a good friend to many (some weight), (8) since his arrest the defendant has not been violent or exhibited homicidal behavior (little weight), (9) Mosley has the potential to be a productive inmate(some weight), (10) the defendant was a good worker and maintained steady employment through his adult life (some weight), (11) the defendant is a patriotic American citizen (little weight), (12) while in the Naval Reserves, Mosley was never reprimanded or disciplined (little weight), (13) Mosley earned a Emergency Medical Care certificate (some weight), (14) Mosley was a volunteer worker as Recreational Coordinator for the Tenant Advisory Council (little weight), (15) the defendant completed an extensive Volunteer Basic Course program and received a diploma certificate from the Division Fire Marshall (some weight), (16) Mosley completed the Certified Nursing Assistant Program (some weight), (17) Mosley was a mentor to teenagers and helped them with school activities, homework, moral values, sports activities, and other areas (little weight), (18) the defendant is an intelligent man (little to no weight), (19) the defendant is unlikely to endanger others when serving a life sentence (little to no weight), (20) the murder was aberrant behavior (little to no weight), (21) Mosley was mentally abused as a child (little weight), (22) Mosley was a Boy Scout (little weight), (23) Mosley successfully completed law enforcement training (some weight), (24) Mosley coached neighborhood sports and recreation (little weight), (25) Mosley was an active volunteer fireman (some weight), (26) Mosley was an active member of the PTA (little weight), (27) Mosley did not flee after the murders (no weight), (28) the offense occurred over a very short period of time (little to no weight), (29) Mosley has encouraged others to remain in school (little weight), (30) the defendant demonstrated appropriate courtroom behavior (little weight), (31) Bernard Griffin was only charged as an aide and a better (little weight). (6 R 984-993).

the case; (2) The prosecutor's improper and inflammatory remarks deprived the defendant of a fair trial; (3) The trial court erred in ruling that the recorded husband-wife jail conversations were admissible; (4) The trial court erred in denying the defenses' motion for continuance and for a mistrial based on a defense witness failing to appear at trial; (5) The trial court erred in including a videotape of the defendant in chains, shackles, and jail garb among the materials delivered to the jury room in violation of its own order; (6) The trial court erred in effectively ruling that a double murder automatically suffices as the "previously convicted of another capital felony" aggravating circumstance; (7) The trial court erred in denying the defendant's motion for judgment of acquittal because the state failed to prove its case beyond a reasonable doubt; (8) The trial court erred in denying the defendant's motion for a new trial because the guilty verdict was contrary to the weight of the evidence; (9) The trial court erred in denying the defendant's request for the standard jury instruction which concerns pressure or threat against a witness; (10) Florida's death penalty scheme violates due process, the Sixth Amendment, and Ring v. Arizona and its progeny; (11) This Court's comparative proportionality review of death sentences is unconstitutional; (12) The defendant's death penalty is disproportionate; (13) Lethal injection and Florida's lethal injection procedures are unconstitutional. Mosley v. State, 46 So. 3d 510 (Fla. 2009).

On December 22, 2009, Mr. Mosley filed a Petition for Writ of Certiorari with the United States Supreme Court. Cert was denied on October 4, 2010. Mosley v. Florida, 131 S.Ct. 219 (2010).

Mr. Mosley filed his initial 3.850 Motion with Special Request for Leave to Amend with the trial court on August 6, 2010. The state filed its response on August 23, 2010. Mr. Mosley filed a subsequent 3.850 Motions on October 4, 2011, December 19, 2011, April 6, 2012, and October 15, 2013. Evidentiary hearing was held on September 4, 2013 and October 14, 2013. The state filed a response on October 22, 2013. Mr. Mosley and the State filed written closing arguments on November 26, 2013. The trial court denied postconviction relief on January 14, 2014. This appeal follows.

STATEMENT OF THE FACTS

Pretrial Proceedings:

During a pretrial proceeding on December 15, 2004, the court entertained Mr. Mosley's pro se demand for speedy trial. (6 R 1081.) Mosley had filed numerous prior motions concerning his speedy trial rights and was adamant in not waiving them, and had made it "clear" to his attorney of this desire. (6 R 1057.)

The court noted he "indirectly discussed a similar motion a week or two weeks ago." (6 R 1081). The court heard from Mosley's counsel, who alleged Mosley's motion was a nullity because of a Florida Supreme Court opinion

disapproving hybrid representation. (6 R 1082.) The defense also explained he was not ready for trial, and there was "a great deal to be done." (6 R 1083-1084.)

Mosley understood his counsel's opinion and hybrid representation, but proclaimed his innocence and stated **"[I]f I have to represent myself, I will do that**," affirming he was ready to go to trial and the state had no evidence against him. (6 R 1084) (emphasis added). Mosley continued:

> Well, yes, sir, I fully understand what you are saying, but I mean, I have been sitting in jail for over eight months and nothing was done for my trial in September, October, November, three dead months, they could have done depositions then. **And you know, I have nothing to fear. So I am ready to go to trial. I am innocent and whatever they have, let them bring it**.

(6 R 1084-1085) (emphasis added). The court denied Mosley's demand for speedy trial, citing his counsel's concerns that he was not ready for trial, as well as its belief Mosley had no "authority at this stage in the proceedings" to file such a motion. (6 R 1083, 1085).

Mosley again respectfully requested to address the court, and when his request was granted, he unequivocally moved the court to allow him represent himself pro se:

> Mosley: Yes, sir. Well, **I want to petition the Court to go pro se.**
>
> Court: Well, when you have filed the appropriate motions setting forth the appropriate grounds, I will consider it. In the meantime, the matter is set to January the 19th for further pretrial.

(6 R 1087) (emphasis added). The court concluded this pretrial without holding a Faretta hearing.

ARGUMENT

CLAIM ONE

APPELLATE COUNSEL FOR MR. MOSLEY WAS DEFICIENT IN FAILING TO PRESENT ON DIRECT APPEAL THE TRIAL COURT'S VIOLATION OF MOSLEY'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY FAILING TO HOLD A FARETTA HEARING, PURSUANT TO FARETTA V. CALIFORNIA, 42 U.S. 806, 807 (1975), AFTER MOSLEY UNEQUIVOCALY REQUESTED TO REPRESENT HIMSELF PRO SE

I. A note about Mosley's direct appellate counsel

Mosley was represented on direct appeal by Ryan Truskoski. Shortly after the conclusion of Mosley's direct appeal, in a February 19, 2010 Administrative Order, the Florida Supreme Court removed Truskoski from the capital conflict court-appointment attorney lists, removed him from any capital cases he had pending, and removed him from the Capital Case Commission's list of qualified capital post conviction attorneys. See In Re: Ryan t. Truskoski-Death Penalty Cases Representation, No. AOSC10-6.

The Administrative Order was a result of Mr. Truskoski's "facially flawed advocacy" in numerous capital appellate cases. Id. This discovery arose from a review of Truskoski's written and oral presentations in at least two capital cases – cases that Truskoski was handling at approximately the same time as Mosley's. Id.

In the first case, Smith v. State, Justice Anstead's dissenting opinion called for discharging Truskoski and allowing the appellant to file a new brief:

> Because I find both the written and oral presentations of counsel for the appellant fundamentally lacking, I would strike the appellate briefs, discharge counsel, and direct the trial court to appoint new appellate counsel for the appellant. Capital cases represent the most serious category of cases reviewed by this Court and such cases require diligent and competent advocacy by counsel. While this Court has inherent responsibility to assure such representation, the Florida Legislature has explicitly called upon the courts to take responsibility for assuring such representation in capital litigation. We should honor that call here.
>
> By coincidence, the Clerk of this Court scheduled oral argument in this case and the case of Hunter v. State, No. SC06-1963, 2008 Fla. LEXIS 1615 (Fla. Sept. 25, 2008), for the same date. In examining the briefs for appellants in those two cases, I was struck by both the similarity in approach and the facially flawed advocacy contained in the briefs in both cases. The oral advocacy was similarly lacking in both cases. Of course, the appellants are represented by the same counsel in both cases, and I have come to the same conclusion in Hunter as I have here.

Smith v. State, 998 So. 2d 516 (Fla. Sept. 25 2008) (Anstead, J., dissenting). Anstead acknowledged that the Florida Supreme Court took appropriate action, and notified both the Florida Bar and the Executive Director of the Legislature's Commission on Capital Cases of concerns about the performance of counsel in the Smith and Hunter cases, "**as well as other filings by counsel in this Court**." Id. (emphasis added)

Similarly, Justice Anstead called for the same remedy in Hunter v. State, another capital case in which Truskoski was equally incompetent in his

representation:

> For the same reasons I have set out in my opinion in Smith v. State, No. SC06-1903, 998 So. 2d 516, 2008 Fla. LEXIS 1639 (Fla. Sept. 25, 2008), I would remove appellate counsel for appellant, strike the briefs he has filed, and direct the trial court to appoint new counsel to proceed on appeal.

Hunter v. State, 8 So. 3d 1052, 1076 (Fla. 2008) (Anstead, J., dissenting).

The Florida Bar also took action on February 26, 2009, **stripping Truskoski of his board certifications in criminal and criminal appellate law** because he was unprepared and his quality of representation was "lacking." This stern "Notice of No Probable Cause and Letter of Advice to the Accused" said the following:

> The grievance committee has found no probable cause in the referenced matter against you and the complaint has been dismissed. The committee was greatly concerned with your failure to present the level of competence and professionalism required of a board certified attorney. Your conduct in two death penalty cases and subsequent letter to the Court was carefully scrutinized as well as your petition against the Florida Department of Children and Families.
>
> The committee found your oral arguments to be unprepared and lacking in the quality expected and demanded of a board certified attorney. Nevertheless, the committee has concluded that a finding of no probable cause is appropriate at this time. You have advised the committee that your board certifications have been revoked in criminal appellate law. The committee feels that this is the appropriate disposition of this matter and that continued grievance proceedings are not appropriate at this time in view of that action.
>
> While your conduct in this instance did not warrant formal discipline, the committee believes it was not consistent with the high standards of our profession. The committee hopes that this letter will make you aware of your obligations to uphold these professional standards and you will adjust your conduct accordingly. This letter of advice does

> not constitute a disciplinary record against you for any purpose and is not subject to appeal by you. R Regulating Fla. Bar. 3-7.4(k). This complaint will be purged from the discipline records and the file destroyed one year from the date of the grievance committee action.
>
> The committee hopes that as a result of this letter of advice you will improve the following aspects of your professional activity:
>
> You are advised to strive to take the appropriate amount of time and effort necessary to prepare each and every case and be familiar with the particular facts of each case. It appears that at the time of these problems, **you undertook a particularly large amount of intricate and difficult death penalty cases. These cases require more than just pro forma legal arguments and basic preparation**. While it is acceptable to present good faith novel legal arguments, you are also expected to present any and all other legal arguments which would assist your client based upon the particular facts of each case. Further, it is never appropriate to make arguments which are not part of the legal record.
>
> Your letter to a justice of the Supreme Court of Florida, written shortly after your oral argument, was inappropriate and unprofessional. A letter of apology to the Court is expected, as appropriate for your poorly chose action.

(emphasis added).

Mosley's direct appellate briefs and oral advocacy was similarly lacking

One of the "intricate and difficult death penalty cases" that Truskowsi had a "particularly large amount" of was Mr. Mosley's case. Mosley v. State, 46 So. 3d 510 (Fla. 2009). Truskoski filed Mosley's initial brief on May 17, 2007, before the Florida Supreme Court's admonishment and the Florida Bar stripping him of his board certifications. See Amd. Initial Brief on Direct Appeal, March 4, 2008,

SC06-1408. Both Truskoski's initial and reply briefs[2] followed in the same footsteps of Smith and Hunter's "fundamentally flawed advocacy."

Indeed, the State's answer brief repeatedly criticized the issues alleged by Truskoski. See Appellee's Answer Brief, July 10, 2008, SC06-1408. The state alleged that claim one "did not present a claim of error," Id. at 36; claim five was refuted by the record[3]; claim six was without merit because of the Court's repeated precedent, Id. at 38; and claim nine was similarly refuted by the record.[4] Id. at 39-40.

Despite that claims five and nine in Truskoski's brief were clearly contradicted by the record, he did not concede this issue in his reply brief. See Appellant's Reply Brief, September 4, 2008, SC06-1408.

The oral argument was equally deficient and, respectfully, painful to watch. Truskoski began his oral argument by withdrawing claims five and nine, finally conceding that they were clearly refuted by the record. See http://www.wfsu.org/gavel2gavel/viewcase.php?eid=1994. Next, he discussed his claim that the state's closing arguments were improper. When the Court questioned

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[2] See Reply Brief, September 4, 2008, SC06-1408.

[3] In claim five, Truskoski alleged the trial court erred in allowing a videotape of Mosley in chains, shackles, and jail garb into the jury room during deliberations. The brief misrepresented the record, as the record establishes neither the tape nor a television to watch the tape was available to the jury during its deliberations.

[4] Again, in claim nine, Truskoski misrepresented the record in alleging the trial court failed to give a portion of a standard jury instruction. The record is clear that such an instruction was given to the jury. Id. at 40.

Truskoski as to this issue, he **conceded** that the state's closing was based on facts in evidence (the final moments of the victim's lives), implicitly withdrawing this claim. Counsel also conceded he did not have a case to support of his contention that the state's closing was erroneous.

As for another "improper" comment alleged to have been committed by the state in closing, counsel again conceded that the prosecutor's comments regarding Mosley's extramarital affairs were comments on facts in evidence – some of which was elicited through defense counsel. Despite this concession, counsel argued that although the comments were based on facts introduced at trial, they were still somehow improper. Id. at appx. 11:30.

As for claim three in Truskoski's brief, (a jail house call from Mr. Mosley to his wife), counsel conceded that the case law was against him before he began his argument. Regardless that the case law was against him, counsel argued the issue was valid because of "impermissible state action." Id. at appx 14:30, This unsupported assertion was met with scrutiny from the Justices, citing as one of their concerns that the common law husband-wife privilege was not created so that a couple could manufacture evidence in a criminal case.

Then, after submitting these arguments for two issues he conceded were utterly lacking in merit, Truskoski "rested," and attempted to sit down. However, Justice Lewis questioned counsel about Mr. Griffin, the only co-defendant in

Mosley's case and an "absolutely a critical piece" of evidence. Justice Lewis inquired as to whether the record contained any offers to Griffin in exchange for his testimony against Mosley, as well as information concerning Griffin's relationship with Mosley in in general.[5]. Id. at appx 17:50-19:00. Because of Truskoski's utter unfamiliarity with the record, he could not answer Justice Lewis's simple question, whereupon Justice Lewis informed Truskoski he would find the answer out himself – Truskoski thanked him. Id.

The Assistant Attorney General (AAG) filled in the facts for the Justices during her rebuttal. As to Truskoski's first issue, the AAG said the Golden Rule argument was "kind of blended together" with the another claims. Id. at 25:00. As for privacy of telephone call claim, the AGG correctly argued Truskoski's assertion that Mosley and his wife could not talk in private at the jail was unsupported by the record. Id. appx 36:20. The Court commended the AGG on her "absolute command" of the facts of the record, citing it as helpful to the Court. Id. at appx. 41:20.

Although Truskoski had time left for rebuttal, he declined to use it, leaving Mosley's case in the same position as in Smith in Hunter – impossibly abandoned.

Mosley, aware of his counsel's ineffectiveness, filed approximately twenty pro se motions before Truskoski's oral argument, raising his own claims and

[5] Justice Pariente was also alarmed about Griffin being a drug dealer at the age of 15. Id. at 20:00.

pleading with the Court to remove Truskoski from his case. [6]

It is not surprising, given counsel's poor advocacy in Mosley's case (which is clear from the briefs and the oral argument), that Truskoski missed the best, most obvious issue on direct appeal:[7] that after Mosley's unequivocal request to proceed pro se during a pretrial proceeding, the trial court's failure to hold a Faretta hearing was per se reversible error.

II. Applicable law

A. A new trial is required when a court fails to hold a Faretta hearing after a competent Defendant's unequivocal request to proceed pro se

Under the United States Supreme Court's (USSC) ruling in Faretta v. California, an accused has the right to self-representation at trial. A defendant's choice to invoke this right "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" 422 U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51(1970) (Brennan, J., concurring)).

The USSC in Indiana v. Edwards, 128 S. Ct. 2379 (2008), while giving more discretion to trial courts to examine a defendant's mental competency and mental capacity to represent himself, reaffirmed the core importance of Faretta. Referring

[6] This Court took Judicial Notice of Mosley's pro se pleadings for the purposes of Mosley's 3.851 Appeal on August 28, 2014.

[7] An appellant may raise a claim of ineffective assistance of appellate counsel in a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000).

to Faretta as the "foundational 'self-representation' case," the Court explained that the "Sixth and Fourteenth Amendments include a 'constitutional right to proceed without counsel when' a criminal defendant 'voluntarily and intelligently elects to do so.'" Edwards, 128 S. Ct. at 2383 (quoting Faretta, 422 U.S. at 807).

The Supreme Court stated in Faretta:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Faretta, 422 U.S. at 834.

Florida Rule of Criminal Procedure 3.111 also recognizes the right of an accused to represent himself, and sets forth certain requirements that must be met before waiver of counsel may be found by the trial court. The rule provides in pertinent part:

> (d) Waiver of Counsel.
> . . . .
> (2) A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.
> (3) **Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a**

determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

When a defendant indicates that he wishes to waive his right to counsel and represent himself, the trial court is obligated to conduct a Faretta inquiry to determine if he is knowingly and intelligently waiving his right to counsel and is "aware of the dangers and disadvantages of self-representation." Faretta v. Cal., 422 U.S. 806, 835 (1975); Fla. R. Crim. P. 3.111(d). **The failure to conduct an adequate Faretta inquiry constitutes *per se* reversible error**. See Tennis v. State, 997 So. 2d 375, 378; see also Case v. State, 865 So. 2d 557, 559 (Fla. 1st DCA 2003).

III. Facts – Mosley's unequivocal requests to proceed pro se

During a pretrial proceeding on December 15, 2004, the court entertained Mr. Mosley's pro se demand for speedy trial. (6 R 1081.) The court noted he "indirectly discussed a similar motion a week or two weeks ago." (6 R 1081). The court heard from Mosley's counsel, who alleged Mosley's motion was a nullity because of a Florida Supreme Court opinion disapproving hybrid representation. (6 R 1082.) The defense also explained he was not ready for trial, and there was "a great deal to be done." (6 R 1083-1084.)

Mosley understood his counsel's opinion and hybrid representation, but proclaimed his innocence and stated **"[I]f I have to represent myself, I will do that**," affirming he was ready to go to trial and the state had no evidence against

him. (6 R 1084) (emphasis added). Mosley continued:

> Well, yes, sir, I fully understand what you are saying, but I mean, I have been sitting in jail for over eight months and nothing was done for my trial in September, October, November, three dead months, they could have done depositions then. **And you know, I have nothing to fear. So I am ready to go to trial. I am innocent and whatever they have, let them bring it**.

(6 R 1084-1085) (emphasis added). The court denied Mosley's demand for speedy trial, citing his counsel's concerns that he was not ready for trial, as well as its belief Mosley had no "authority at this stage in the proceedings" to file such a motion. (6 R 1083, 1085).

Mosley again respectfully requested to address the court, and when his request was granted, he unequivocally moved the court to allow him represent himself pro se:

> Mosley: Yes, sir. Well, **I want to petition the Court to go pro se.**
>
> Court: Well, when you have filed the appropriate motions setting forth the appropriate grounds, I will consider it. In the meantime, the matter is set to January the 19th for further pretrial.

(6 R 1087) (emphasis added). The court concluded this pretrial without holding a Faretta hearing.

III. The court's failure to hold a Faretta hearing was per se reversible error

In failing to address Mosley's unequivocal request to proceed pro se, the trial court appeared to confuse the requirements to spur a Nelson hearing with the

requirements necessitating a Faretta hearing. Additionally, the trial court added an additional non-existent requirement to obtaining a Faretta hearing – that the defendant put his request in writing.

Concerning the court's confusion with Nelson and Faretta, the requirements of Nelson "depend on a clear and unequivocal statement from the criminal defendant that he wishes to discharge counsel." Logan v. State, 846 So. 2d 472, 477 (Fla. 2003). However, a Nelson hearing is unwarranted where a defendant presents general complaints about defense counsel's trial strategy and no formal allegations of incompetence have been made. Logan, 846 So. 2d at 477. Expressions of disagreement with trial counsel's strategy or complaints about lack of communication do not give cause for a Nelson hearing. Stephens v. State, 787 So. 2d 747, 758 (Fla. 2001).

The requirements of obtaining a hearing under Faretta are much more relaxed. A Faretta hearing is warranted if the Defendant makes an unequivocal assertion of the right to self-representation. See Tennis v. State, 997 So. 2d 375, 378. Insofar as the desire to proceed pro se is concerned, Mosley did not have to do anything more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person could say that the request was not made. Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986), cert. denied sub nom. Dugger v. Dorman, 480 U.S. 951 (1987).

Moreover, "it is generally incumbent upon the courts to elicit that elevated degree of clarity through a detailed inquiry. That is, **the triggering statement in a defendant's attempt to waive his right to counsel need not be punctilious; rather, the dialogue between the court and the defendant must result in a clear and unequivocal statement**." United States v. Proctor, 166 F.3d 396, 403 (1st Cir. 1999) (emphasis added).

Once a request to proceed pro se is made, the trial court is **obligated** to hold a hearing to determine whether the defendant knowingly and intelligently waived his right to court-appointed counsel. See Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1998). A failure to do so is **per se reversible error**. See State v. Young, 626 So. 2d 655, 657 (Fla. 1993) ("[T]he United States Supreme Court decision in Faretta and our rule 3.111(d) require a reversal when there is not a proper Faretta inquiry."); Rodriquez v. State, 982 So. 2d 1272, 1274 (Fla. 3d DCA 2008) (Holding court's failure to conduct Faretta hearing was reversible error); Goldsmith v. State, 937 So. 2d 1253, 1256-57 (Fla. 2d DCA 2006)(Holding that a denial of the right of self-representation is not amenable to harmless error analysis).

In Tennis v. State, a capital case with similar circumstances to Mosley's, this Court reversed a defendant's conviction because of the trial court's failure to hold a Faretta hearing upon defendant's unequivocal request to proceed pro se. 997 So.

2d 375 (Fla. 2008). Frustrated with attorney's performance and after numerous motions to dismiss his counsel, the Defendant in Tennis **orally** stated:

> I refuse to go to trial with him. I would like to go pro se, instead of having two prosecutors against me, I'll do it myself. Even though I don't know what I'm doing, I will have a better fighting chance.

Id. at 377. The trial court did not address Tennis's request to represent himself. Id. Tennis then requested a hybrid form of representation, and filed two pro se "motion[s] for leave to proceed as self counsel with appointment of standby counsel." Id. In the motions, Tennis again alleged that he and counsel had a conflict and that the cross-examination of adverse witnesses and the presentation of his defense would be impaired if he could not represent himself. The court still did not hold a Faretta hearing.

This Court, reversed Tennis' convictions, holding the trial court's failure to hold a Faretta hearing was per se reversible error. Id. at 379. The Court rejected the state's argument that Tennis' pro se request was properly denied because the request was an ongoing attempt to delay the proceedings, holding even if that were the case, it did not obviate the need for the trial court to hold a Faretta hearing:

> We understand that in criminal cases, and especially in a death penalty case where the stakes could not be higher, judges may become frustrated over what they perceive to be efforts on the part of a defendant to frustrate or delay the proceedings. We also recognize that presiding over death penalty cases is a difficult and challenging responsibility for a trial judge. **However, our cases make clear that when there is an unequivocal request for self-representation, a trial court is obligated to hold a *Faretta* hearing to determine if**

> **the request for self-representation is knowing and intelligent. Without taking the preliminary step of holding a hearing on Tennis's request to represent himself after denying his motion to dismiss counsel, the trial court reversibly erred.**
>
> **In sum, we conclude that the trial court had no proper basis for failing to conduct a *Faretta* inquiry and that a *Faretta* inquiry was mandated after Tennis's unequivocal request for self-representation. Accordingly, we reverse Tennis's conviction for first-degree felony murder and vacate his sentence of death and remand for further proceedings consistent with this opinion**.

Id. at 379-380 (emphasis added).

In Pasha v. State, another capital case, the defendant similarly stated that the trial court erred in denying his request to proceed pro se after determining that his request was equivocal. Pasha v. State, 39 So. 3d 1259, 1261 (Fla. 2010). On the morning of jury selection, Pasha filed a written motion and orally stated that he wanted to proceed pro se. Id. at 1260. The trial court then engaged in a Faretta inquiry. Toward the end of the inquiry, the trial court asked Pasha: "Do you have any questions of me with respect to your right to have counsel appointed to represent you? I guess what I'm getting at is do you want a lawyer to represent you?" The following exchange then took place:

> THE DEFENDANT: It is wiser to have a lawyer. My contention is that I'm against having an attorney. I don't think Sinardi put forth the effort in my situation.
>
> THE COURT: So are you telling me that you want a lawyer but you do not want Mr. Sinardi; is that correct?
>
> THE DEFENDANT: Yes, sir. But I don't have the choice to pick who

I want so it means obvious[ly] the only other alternative is to be pro se.

THE COURT: I have to make a comment now that based upon what you've just said to me I have to find that your request to represent yourself is equivocal, it's not an unequivocal request at this juncture but I'll continue. I've advised you of your right to counsel. The advantages of having counsel, the dangers and disadvantages of not having a lawyer.

The nature of the charges and that is that you could get death-a death sentence for either count and or you could receive a life sentence for either count.

Are you absolutely certain that you do not want to continue with an appointed lawyer?

THE DEFENDANT: As I stated I would love to have a lawyer definitely I would rather have a lawyer.

THE COURT: Okay.

THE DEFENDANT: But apparently I don't have that choice.

THE COURT: Okay. Well, again, we went, Mr. Pasha, through I guess it was last Wednesday what we call a [Nelson] hearing which I heard everything you had to say about your concerns and complaints about Mr. Sinardi. I heard from Mr. Sinardi. I heard from the State. I weighed all those things. I asked you--you did put it in writing and in fact we delayed it for a day from Monday to Wednesday and after weighing and assessing all those things I made a determination under [Nelson] that Mr. Sinardi was not being ineffective. In other words he was being effective in his representation of you.

Now by law you have a right to ask the Court to allow you to represent yourself and before I can allow that to happen, two things have to occur.

I have to make a finding that you [are] knowingly and voluntarily and intelligently waiving your right to counsel. But the more important

> thing is you have to tell me unequivocally that you want to represent yourself.
>
> I cannot make that finding because you've told me very candidly and very honestly under oath that you would rather proceed with counsel but that you simply do not feel comfortable with Mr. Sinardi so having gone through this [Faretta] inquiry I'll respectfully deny your request to represent yourself and will proceed with Mr. Sinardi as your counsel and that matter will have to be addressed if I'm ruling incorrectly it will have to be addressed with an appellate court if it reaches that stage. So anything else from counsel?
> Jury selection then commenced.

Id. at 1260-1261. This Court found the reasoning in Weaver v. State, 894 So. 2d 178, 191 (Fla. 2004) controlling, and held that the trial court erroneously determined that Pasha's statement that he preferred to have an attorney (but not his current counsel) negated his request to proceed pro se. Id. at 1262.

Pasha maintained both in a written motion and orally before and during the Faretta inquiry that he preferred proceeding pro se over representation by his current counsel. As the Court held in Weaver, at this point the trial court should have "presumed [that Pasha was] unequivocally exercising his right to self-representation." 894 so. 2d at 193; see also Jones v. State, 449 So. 2d at 258. This Court concluded:

> The trial court committed reversible error by determining that Pasha's motion to proceed pro se was equivocal. Where a trial court has denied a defendant's request for substitute counsel after a *Nelson* hearing and the defendant still maintains that he wants to discharge counsel and represent himself, the defendant's request is unequivocal--**even where the defendant states his continuing preference for substitute counsel**. We therefore reverse Pasha's convictions for first-

> degree murder, vacate his sentences of death, and remand for further proceedings consistent with this opinion.

Id. at 1262-1263. (emphasis added)

In Harden v. State, the appellate court considered with the trial court erred in delaying a Faretta hearing until the end of the discovery process upon request from a defendant to proceed pro se. Harden v. State, 39 Fla. L. Weekly D 2084 (Fla. 3d DCA Oct. 1, 2014). The defendant filed numerous motions with the trial court requesting-self representation. Like Mosley, Harden previously filed multiple motions for speedy trial, notice of expiration motions, and demands for discharge under the Florida speedy trial rule. All of the motions were denied either on the merits or because Harden's appointed counsel did not adopt them. Id. Sixteen months after Harden's initial request for self-representation, the trial court conducted a Faretta hearing.

In reversing for a new trial, the First DCA held that Harden's unequivocal request obligated the trial court to hold a Faretta hearing **earlier**, as there were several crucial stages in the proceedings over that period, and each crucial stage presented a missed opportunity for Harden to represent himself. Id.

In the present case, like Tennis, Pasha, and Harden, Mosley's request was unmistakably unequivocal. The record sets Mosley's rationale for his request in clear context – after having been repeatedly denied numerous demands to proceed

to trial, Mosley grew weary of the delays in his case, (which he concluded were the result of his counsel's inability to complete discovery). Upon counsel's request to continue trial, over Mosley's refusal to waive speedy trial rights,[8] Mosley exercised the only option left to him: the invocation of his right to self-representation.

Indeed, Mosley's comments display his correct understanding that if he continued to be represented by counsel he would wait for an undetermined period of time to go to trial due to his attorney's repeated requests for continuances; whereas, if he represented himself he could go to trial immediately to prove his innocence.

Regardless of whether this decision would be detrimental to Mosley, it was

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[8] Since the inception of Mosley's case, he was been adamant about not waiving his right to a speedy trial. Mosley filed numerous motions concerning his refusal to waive speedy trial, filing notices of expiration of speedy trial, motion for discharge, and notice of expiration of speedy trial. (1 R 25-29; 6 R 1076, 1092, 1103, 1107-1113, 1121). Mosley reiterated his repeated refusal to waive his speedy trial rights during a hearing on August 30, 2004, stating:

> I've made it clear to the Public Defender's Office and Mr. McGuiness I do not wish to waive my speedy trial rights. I want the murder trial to be held within the six-month period. I do not want to waive it. I made that very clear.

(6 R 1057.) Mosley filed at least three pro se motions to discharge his case, alleging his right to speedy trial was not honored. (6 R 1107-1113.) Each and every pro se motion was denied by the trial court, citing that defense counsel was not adequately prepared for trial because of need for additional investigation and depositions. (6 R 1081.)

Mosley's choice to make, and the court's duty to honor. Faretta, 422 U.S. at 834 (Although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (quoting Illinois v. Allen, 397 U.S. 337, 350-51, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (Brennan, J., concurring)); see also Flournoy v. State, 47 So. 3d 403 (Fla. 2d DCA 2010); Neal v. State, 132 So. 3d 949, 951 (Fla. 1st DCA 2014); Flowers v. State, 976 So. 2d 665 (Fla. 1st DCA 2008); Rodriguez v. State, 982 So. 2d 1272, 1274 (Fla. 3d DCA 2008) (holding that court's failure to conduct Faretta hearing was reversible error); Wilson v. State, 76 So. 3d 1085, 108, (Fla. 2d DCA 2011).

It is also undisputed that Mosley was competent with no mental infirmities. Indeed, he completed his former training in law enforcement and other professional endeavors, was holding a steady job at the time of the incident, and was active in the Navy Reserves. (22 R 2357). Certainly, the court did not indicate it would not consider Mosley's request because it doubted his mental capacity. Instead, the court's denial was based on its mistaken belief Mosley had to do or say something else to trigger his right to a Faretta inquiry. See Tennis, 997 So. 2d at 379.

Mosley's pro se request was not an attempt to delay the proceedings; quite the contrary: Mosley **wanted to go to trial as quickly as possible**. His request

was not deficient because it was made orally, instead of in writing. See United States v. Leggett, 162 F.3d 237, 249 (3d Cir. 1998) (A defendant need not " 'recite some talismanic formula hoping to open the eyes and ears of the court to his request' to invoke his/her Sixth Amendment rights under Faretta. Dorman, 798 F.2d at 1366. Indeed, such a requirement would contradict the right it was designed to protect as a defendant's Sixth Amendment right of self-representation would then be conditioned upon his/her knowledge of the precise language needed to assert it. Rather than placing such a burden on a defendant, the law simply requires an affirmative, unequivocal, request, **and does not require that request to be written or in the form of a formal motion filed with the court"**) (emphasis added).

Mosley's request also was not untimely, as it was made in pre-trial proceedings long before his eventual trial date. Nor was Mosley being unruly, antagonistic, or rude. Quite the contrary. He referred to the trial court as "sir," and requested the court's permission prior to addressing the court.

This is a simple decision for this Court. There is no reason for this Court to become analytically disoriented based on something Appellee argues in the answer brief. On the face of the record, "no reasonable person can say that the request [for self-representation] was not made." Dorman v. Wainwright, 798 F.2d 1358, 1366. (11th Cir. 1986) (Holding that district court did not err in finding petition properly

invoked his right to proceed pro se and he did not waive this right by acquiescing to the appointment of private counsel).

Because Mosley's unequivocal request to proceed pro se was ignored, his Sixth and Fourteenth constitutional rights were violated, resulting in per se reversal error. A new trial is required. Thus, Mosley has demonstrated the failure of his appellate counsel to raise this issue undermined confidence in the outcome of Mosley's direct appeal.

CONCLUSION

This error of the trial court requires reversal. "Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

Based this reason, Mr. Mosley requests that this court grant his petition for writ of habeas corpus and reverse that Mr. Mosley's convictions and sentences for new trial.

Respectfully submitted,

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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 Patrick.Delaney@myfloridalegal.com on this 28th day of October, 2014.

/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