Filing # 19936517 Electronically Filed 10/28/2014 05:14:12 PM

RECEIVED, 10/28/2014 17:18:45, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-436

LOWER TRIBUNAL NO. 16-2004-CF-006675

JOHN F. MOSLEY

Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

RICK A. SICHTA, ESQ.
Fla. Bar No. 0669903
301 W. Bay St. Ste. 14124
Jacksonville, FL 32202
Phone: 904.329.7246
rick@sichtalaw.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PRELIMINARY STATEMENT

This is an appeal of the Circuit Court's denial of Mr. Mosley's motions for post-conviction relief under Florida Rule of Criminal Procedure 3.851.

John F. Mosley will be referred to as "Mr. Mosley," "Mosley," or "Appellant." Rick A. Sichta, appointed to represented Mr. Mosley in his postconviction proceedings will be referenced as "undersigned." The record on direct appeal will be referenced as "R" for citation purposes, preceded by the volume number and followed with the page number: (1 R 1.) The record on appeal generated for 3.851 proceedings will be referenced as "PCR," and any supplemental record on appeal will be designated as "SR."

STANDARD OF REVIEW

ARGUMENTS I, II, V & VI – Brady, Giglio, and Strickland claims present mixed questions of law and fact. Where the trial court conducted an evidentiary hearing, the reviewing court will defer to the factual findings of the trial court supported by competent, substantial evidence, but will review the application of the law to the facts de novo. See e.g. Hurst v. State, 18 So. 3d 975, 988 (Fla. 2009), Pittman v. State, 90 So. 3d 794, 811 (Fla. 2011), Sochor v. State, 883 So. 2d 766, 771-772 (Fla. 2004).

ARGUMENT III – In reviewing the trial court's decision as to a newly discovered evidence claim following an evidentiary hearing, this Court must

determine whether the trial court's findings are supported by competent, substantial evidence. Hurst, 18 So. 3d at 993.

ARGUMENT IV – Where the circuit court denies 3.851 claims without evidentiary hearing, this Court reviews the circuit court's decision de novo, accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling only if the record conclusively shows that the movant is entitled to no relief. Howell v. State, 109 So. 3d 763, 777 (Fla. 2013).

ARGUMENT VII — Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007).

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: 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; Shrailing Bryant (13 R 653) who lives with Marquita; Bernard Griffin (13 R 674) Mosley's teenage co-defendant; 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; Robert Williams

(16 R 1269) a Verizon Wireless employee; Larry Brown (16 R 1297) a Bell South employee; 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; 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; 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 called: 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 going to move his aunt into a nursing facility on April 23, but that his assistance was ultimately not needed; 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 Jackson (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.)

Penalty phase occurred 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 (21 R 2296-2347) and Jeff Pace, a Navy recruiter. Officer Pace testified that Mosley joined the Navy Reserves after

September 11, 2001, upon age waiver. 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.) 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 Death for 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 recommendation and sentenced Mosley to Death. (27 R 2636.) In so sentencing, the trial court found four aggravators.[1] (27 R 2615-2622.) The court found no statutory mitigation but found and weighed thirty-one non-statutory mitigators. (6 R 984-993.)

Mr. Mosley filed a direct appeal to the Florida Supreme Court raising 13 issues. This Court denied relief and affirmed Mr. Mosley's conviction and sentence on July 16, 2009. 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.

[1] (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.)

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

Jury Selection: In jury selection, Juror "R" repeatedly stated that she "d[id] not know" whether she could be fair and impartial after viewing gory photographs of the deceased victim – she did not know what she "would take home with [her] and sleep with. I don't know." (10 R 154-155.) Reed was never rehabilitated. She sat on Mosley's jury. (12 R 515.)

Trial: The state's main witness, co-defendant, Bernard Griffin, testified against Mosley. He stated that he willingly agreed to testify truthfully against Mosley and that he had not been promised anything by the state. (13 R 675-76.) Griffin said that he was not hoping for a benefit in exchange for his testimony. (13 R 676.) On cross-examination, he stated that he only met with the assistant state

attorneys a couple times. (13 R 743; 756-57.) Griffin then clarified he met with the prosecutors only twice within the past thirty days. (13 R 756-57.) Although Griffin admitted to telling his aunt during a jail phone call that he would be coming home soon, he claimed that he only said that to make her feel good, and he denied that he was ever informed that he would not get prison time. (13 R 729-30.) Griffin stated that the prosecutors did not prep him for his trial testimony. (13 R 757.) Griffin said he had no idea what sentence he might receive, even though he thought about it every night. (13 R 753.)

In the prosecution's guilt phase closing argument the prosecutor opined that Mosley was telling the jury a "fantasy story," that he was a liar and "lived his life with the unfaltering belief that he could go on with complete impunity in every aspect of his life. Well, that stops today." (19 R 1968.) The prosecutor also said that Mosley's words were not those "of an innocent man. No." (19 R 1959) and his actions were not "the actions of an innocent man." (19 R 1978.)

In Mosley's penalty phase, the prosecutor informed the jury that they do not seek death in every case (22 R 2412), that the "easy thing to do" is to recommend a life sentence, and that a death recommendation, "may not be an easy thing to do but I submit to you it's the right thing to do."[2] (22 R 2423.)

[2] This Court found the former argument improper on direct appeal. See Mosley v. State, 46 So. 3d 510, 522-523 (Fla. 2009).

3.851 Evidentiary Hearing:

Bernard Griffin was called by the defense in evidentiary hearing. (10 PCR 1758.) He was charged with two counts of accessory to murder after the fact. (10 PCR 1758.) He did not sign a plea form until after testifying against Mosley. (10 PCR 1759.)

Griffin signed an affidavit on January 7, 2013 stating that he knew he would receive a lenient sentence if he testified favorably for the state against Mosley. (5 PCR 991-92.) He received non-jail food the night before Mosley's trial and that he was told by the prosecutor to answer "no" if asked by the defense at trial whether he got a deal in exchange for his testimony. (5 PCR 991-92.)

He admitted that although he did not know exactly what his sentence would be after testifying against Mosley, he "had a little idea that I wasn't going to get that much time." (10 PCR 1759.) He explained:

> A: Like through the process of going through everything I was going through I had – Ms. Libby Senterfitt and some other individuals said I wasn't going to get that much time. They promised me that.
>
> ***
>
> Q: Okay. And when you took the stand during Mr. Mosley's trial you knew you weren't going to get the maximum amount of time?
>
> A: Right.
>
> Q: Okay. And prior to trial, did Ms. Senterfitt tell you to say on the stand if you were asked if had to deal to tell the defense you did not have a deal?

A: Yes.

Q: And where did she say that?

A: One of the days I went to her office.

(10 PCR 1759-60.)

Q: Were you told that if you talked about your deal at Mosley's trial that it would harm the state's case?

A: Yes.

Q: Did Ms. Senterfitt tell you why it would harm the state's case?

A: No.

(10 PCR 1761.)

Q: At trial did you testify you did not have a deal?

A: Yes, sir.

Q: Was that accurate?

A: No, sir. That wasn't.

(10 PCR 1761.)

Q: Were you told by the State Attorney that you would receive probation or little jail time prior to testifying?

A: Yes, sir.

Q: Okay. And when I say prior to testifying, I mean prior to testifying in Mosley's trial.

A: [Nods head affirmatively.]

Q: Is that true?

A: Yes, sir.

Q: And was that Ms. Senterfitt that told you that?

A: Yes, sir.

***

Q: Do you remember calling your grandmother from the jail and talking to her about don't worry about me, I'm not going to do that much time? Do you remember that?

A: Yes, sir.

Q: Did you tell her that because you knew you had talked with the State Attorney and you had a deal in place?

A: Yes, sir.

Q: So the statement you made to your grandmother about you're going to be okay and you're not going to do prison time, that was a true statement?

A: That was a true statement.

(10 PCR 1763-64.)

Q: Do you remember saying at trial that you were hoping – you were not hoping for any type of benefit from your testimony at trial?

A: Yes, sir.

Q: Was that an accurate statement?

A: [shakes head negatively]

Q: Is that a no?

(10 PCR 1765-66.) The prosecutors also informed Griffin that he was eligible for

a lengthy sentence if he did not cooperate in the case. "At first it was 50 years on the table, I can get 50 years for this charge or something." (10 PCR 1769.) Then, he was informed that he was facing up to 30 years. (10 PCR 1770.)

Griffin also testified that the prosecutor worked with him on numerous occasions prior to testifying at Mosley's trial:

> Q: Did State Attorney tell you that you had some inconsistent statements made prior and did you guys go over how to deal with those inconsistent statements at trial?
>
> A: Yes, Sir.
>
> Q: What did she tell you? Do you remember?
>
> A: Just like things that didn't sound good to her she switched it up or whatever, get everything in order before trial start.
>
> Q: And how many times did you guys work on your testimony before trial?
>
> A: Several times. Every time I came over there to go to her office that was the main reason why I went over there.

(10 PCR 1765.) And even though Griffin was in jail for his involvement in this case, the prosecutor bought him dinner from a Chinese take-out restaurant the night before he testified against Mosley. John McCallum brought him the food. Griffin did not pay for it and did not have to eat it in the jail. He ate it in a room by himself "close to the courtroom." (10 PCR 1767, 1804.)

After Mosley's trial, Griffin wrote Judge Weatherby a letter declaring that

Ms. Senterfitt helped him get his life back – he was referencing to his plea deal in the instant case. (10 PCR 1778.)

Griffin violated the probationary term that he received for his involvement in this case three times. (10 PCR 1776-77.) He received 60 days for possession of a weapon on school grounds and 6 months for resisting arrest without violence. Mr. Guy and/or Ms. Senterfitt (Mosley's prosecutors in the instant case) were the prosecutors in those cases. In the third case, he received 20 years in prison – neither Guy nor Senterfitt were the prosecutors in that case. (10 PCR 1777.) He believes that Guy and Senterfitt helped him with the first two violations of probation. (10 PCR 1777.) He believes that they should have helped him with his last violation of probation as well. (10 PCR 1778.)

Investigators from the State Attorney's Office visited Griffin in prison prior to the evidentiary hearing to find out whether the affidavit he wrote was true. (10 PCR 1770.) Griffin verified that every statement within the affidavit, Defense exhibit 2, was true. (10 PCR 1772-73.)

Detective Mark Romano testified for the defense. (9 PCR 1555.) Det. Romano was the lead detective in Mosley's case. He ascertained that the homicides occurred between 12:57 and 1:21 p.m. on April 22, 2004. This timeframe was determined from reenacting driving distance and speaking to people. (9 PCR 1556-57, 1567.)

Det. Romano spoke to Mosley's co-defendant, Bernard Griffin, several times, once while he was in jail after his arrest in the present case. (9 PCR 1557, 1559-60.) Griffin's statements contained some inconsistencies. (9 PCR 1557.) The prosecutor, Ms. Senterfitt, got a sworn statement from Griffin after one of Romano's conversations with him. (9 PCR 1558.) Romano also spoke with Griffin's attorney, John Whited. Romano was never informed what Griffin's prison exposure was or what he was ultimately charged with. (9 PCR 1561-62.) He was never present when any suggested or promised Griffin what sentence he would receive. (9 PCR 1567.)

Romano conceded that he collected no evidence linking Mosley to the Armsdale Road location. (9 PCR 1569, 1572.)

Richard Kurtiz Mosley's defense counsel was called by the defense. (9 PCR 1573.) Kuritz enlisted investigator Mike Hurst and his assistant to help with the guilt phase investigation of the case. (9 PCR 1577.) Quentin Till was Kuritz's co-counsel, whose primary responsibility was the penalty phase. (9 PCR 1582-83.) The defense theory was that Mosley's co-defendant, Bernard Griffin was responsible for the murders, possibly with another unknown individual (not Mr. Mosley). (9 PCR 1583-84.) Mosley did not prohibit Kuritz from presenting that defense. (9 PCR 1585.)

Alibi defense: Kurtiz met with Assistant State Attorney Guy in preparation

for Mosley's 3.851 evidentiary hearing. The focus of that conversation was the alibi jury instruction claim. (9 PCR 1576.)

Kuritz testified that he would not use the word "alibi" to define his defense theory. However, he conceded that he called at least four witnesses to prove that Mosley could not have committed the crimes because he was somewhere else. "I was calling as many witnesses as I could to kind of close the window of time that he would have had the option and availability to do this this." (9 PCR 1586.) He said that he never considered this an "alibi case" because he "never had something where I say here's where he was when you say it happened." (9 PCR 1588.)

However, Kuritz recalls that Griffin called Mosley at 12:37 a.m. for a ride, Griffin stated that Mosley picked him up 20 minutes later, and the whole incident started at 12:57. (9 PCR 1588-89.) And he recalls that Mosley's wife and daughters testified that Mosley was home around 1:00 p.m. that day. (9 PCR 1589.) He conceded that where the state's theory of defense was that Mosley committed the crimes between 12:57 and 1:21 p.m., and testimony that Mosley was home at 1:00 accounts for "at least some of" the time the murders could have happened. (9 PCR 1589.) Kuritz actually drove the route from Armsdale Road two or three times to determine if it was "possible and what all fit into it." He determined that it would be a very small window for the murders to occur, and made that part of his defense at trial. (9 PCR 1588-89.)

Kuritz also recalled that the state's theory was that Mosley disposed of both bodies after midnight the same day. (9 PCR 1590.) Kuritz called Mosley's wife and daughter, Alexis, to testify that he was home at 11:30 p.m. on the 22nd, that he was in bed sleeping at 5:15 the next morning, and his SUV was in the driveway. (9 PCR 1591.) Kurtiz argued that Mosley was not present when the bodies were disposed of. (9 PCR 1594.)

According to Kurtiz's evidentiary hearing testimony, "I'm just saying he wasn't there and that's not necessarily an alibi because I don't necessarily have an alibi." (9 PCR 1594.) From Kuritz' perspective, he could not request an alibi jury instruction because he was arguing that Mosley was at "a variety of locations over a window of time," not at a "particular place at a specific time." (9 PCR 1673-74.) He felt that he needed something "rock solid" to show the jury for it to constitute an alibi defense and he did not think he had that. (9 PCR 1675.) However, he recalled that the state referred to his defense as an "alibi" in its argument to the jury. (9 PCR 1595.)

Griffin's recantation: Griffin was important to the state's theory of the case – he was "extremely critical." (9 PCR 1595, 1596.) "But-for" Griffin's testimony "it was probably a J.O.A." (9 PCR 1596-97.) However, Kuritz never spoke with Griffin. (9 PCR 1578.) He wanted to allege that Griffin was obviously there, either by himself or with a friend, because he knew so much about the events. (9 PCR

1957.) He tried to show inconsistencies in Griffin's statements through Mosley's testimony. (9 PCR 1597.) He tried to show that Griffin was biased or "had some type of relationship with the government and or the State Attorney's Office." (9 PCR 1598.) Kuritz discovered that Griffin told someone in jail that he was going to get a deal, so he pulled Griffin's phone records and discovered that Griffin told his grandmother that he had some sort of deal and that he was not going to get much jail time. (9 PCR 1598-99.) He found this call before trial and played it for the jury. (9 PCR 1599.) From Kuritz' experience in this Circuit the prosecutor will say "I can't tell you what it's going to be but you need to trust me and it's going to work out and that's what came from this case." (9 PCR 1599.)

As Kuritz expected, when he questioned Griffin about this at trial, Griffin said there was no deal in place and he was not promised anything. (9 PCR 1599.) Based on Kurtiz's experience it would be extremely rare for a defendant to take the stand and admit culpability to two capital murder charges without the protection of a plea deal in place. (9 PCR 1601.) Griffin got his "get out of jail free card" just like he indicated in the call to his grandmother – he went home and got probation. (9 PCR 1602.) Kuritz would have "loved" to have known that Griffin had a deal in place at the time of trial because he would have argued that Griffin would have "done anything in the world" to go from looking at 25 to life to probation. (9 PCR 1602-3.)

Similarly, if Kuritz had known that Griffin had been walked from jail to the State Attorney's Office to rehearse his testimony, and that the State ordered him special food the day before Mosley's trial, Kuritz "absolutely" would have used this information to bolster his theory that the state was "buying" Griffin's testimony. (9 PCR 1603.)

State's alleged improper trial tactics: Kuritz was asked whether the following questioning by the prosecutor of Det. Waldrup was improper:

> "Q[:] It was Bernard's demeanor and the way that he reacted to certain areas that led you to believe that he was being truthful?" Detective Waldrup.
>
> "A[:] Yes, it was."

(9 PCR 1620.) Kuritz responded that it was "close to being objectionable" and "it could be depending on the context." (9 PCR 1623-24.)

Kuritz conceded that the following comment was "close to objectionable" as "improper bolstering":

> "But at the same time back in Jacksonville another small army of good people was working just as hard that day and night uncovering a different kind of mountain, a mountain of evidence. They…found the truth and that's why we are here."

(9 PCR 1626, 1628.)

Kurtiz agreed that the following penalty phase closing argument was improper prosecutorial expertise:

> "We have told you that death is not an appropriate – we have told you that death is not appropriate and it's not sought in every first degree murder case but it is sought in this one."

(9 PCR 1636-37.)

Kuritz acknowledged that the following question was "dangerously close" to constituting a personal opinion of the prosecutor:

> "And I submit to you the easy thing to do is to say to yourself what difference does it make? John Mosley is going to die in prison no matter what he does or what we do. A recommendation for death on each of these murders may not be the easy thing to do, but I submit to you it's the right thing to do."

(9 CPR 1637-38.)

Quentin Till was called as a defense witness in evidentiary hearing. (9 PCR 1696.) Till was Kurtiz's co-counsel in Mosley's case. Till's involvement was limited primarily to the penalty phase. (9 PCR 1699-1700.)

Till considered Griffin crucial to the state's case. (9 PCR 1704.) He stated that it would be "rather unusual" (considering his representation of a thousand defendants over the course of his career) for an individual to testify about his culpability in a first-degree murder case without having entered a plea before the case. (9 PCR 1708-8.)

Mr. Till was "very curious" about whether Griffin had a deal in place with the prosecution prior to Mosley's trial. He found it "irritating" that the Griffin was being touted as the "golden boy," and being treated with "kid gloves." Mr. Till

knows how the system works, and although there might be no promises per se, there are little winks. Mr. Till is "sure" Griffin was treated favorably for his participation in Mosley's case. (9 PCR 1706-07.)

Mr. Till agreed that the defense put forward "could" be called an alibi defense. (9 PCR 1709.) Mr. Till did "not have an answer" for whether any possible harm arose from not requesting an alibi instruction. (9 PCR 1710.)

Mr. Till also acknowledged that several comments of the state were objectionable.

> Q: And what about this one, Mr. Till: "Mosley lived his life with the unfaltering belief that he could go on with complete impunity in every aspect of his life. Well, that stops today."
>
> A: That was in the guilt phase?
>
> Q: Yes, sir.
>
> A: Closing?
>
> Q: Yes, sir.
>
> A: Yeah. That would be objectionable.

(9 PCR 1715.)

> Q: Also in closing: "He gave false statements to David Jordan. It was a lie, and he told Terrance Forbes that he had made – that he had been up all night."
>
> And here's another one: "We know that's not true. We know that's not true. That was a lie. He was at Jamila's and look at that letter. He was at Jamilla Jones[']] about 6:00 o'clock. The

defendant tried very hard to make an alibi."

A: That would probably be objectionable, too, yeah.

(9 PCR 1715.)

Q: What about statements such as these: "These are not words of an innocent man. He's the victim of his own greed and desire, and those are not the actions of an innocent man."

A: Again – objectionable, okay. That's marginal. Probably – be on the safe side probably be objectionable.

(9 PCR 1717.)

Q: "We have told you death is not appropriate and it's not sought in every first degree murder case but it's sought in this case."

***

A: Right. This case is – you know, these are the right circumstances for the imposition and recommendation by you of the death penalty. I think that's I think that's highly improper.

(9 PCR 1718-19.)

Q: Mr. Till do you consider this following argument improper: "And I submit to you the easy thing to do is to say to yourself what difference does it make? John Mosley is going to die in prison no matter what we do. A recommendation for death on each of these murders may not be an easy thing to do but I submit to you it's the right thing to do."

A: I think that's improper argument.

Q: Okay.

A: Yeah. Objectionable.

Q: And do you agree now that those comments should have been

objected to at trial?

A: They should have.

(9 PCR 1719-20.)

John Mosley, the defendant/appellant, testified for the defense in evidentiary hearing. (10 PCR 1904.) Mosley was informed by his trial attorneys that they were putting on an alibi defense. (10 PCR 1911.) They discussed the alibi defense every time they visited Mosley in jail. (10 PCR 1911-13.) He gave his trial attorney a timeline to use for setting forth his alibi. (10 PCR 1912.) Mosley recalls that trial counsel actually used the word "alibi" in presenting his defense to the jury – he used it in opening statements. (10 PCR 1913.)

Mosley's concern with the murder investigation was not that he would be implicated in the murder, because he was not involved, but that his wife would find out he had been cheating. (10 PCR 1913-14.) He acknowledged that his concerns about the infidelity coming to light probably made him look suspicious. (10 PCR 1914.)

He wrote Jamilla Jones a letter encouraging her to be honest because he knew that she had strong feelings for him and was concerned that after finding out that she was not the only woman in Mosley's life, she would hold a vendetta and try to get back at him. (10 PCR 1914.)

Mosley never had a conversation with any of his family members about the

state's alleged "murder time." (10 PCR 1916-17.) In explaining his communications with his wife about what time he got home that evening, he states that women do not handle stress well, that his wife's memory is not very good, and that his daughters were just kids. He wanted to stress to them the importance of knowing what time he arrived home because it could come to be important. (10 PCR 1917.)

Investigator Michael Hurst was called as a defense witness. (10 PCR 1821.) Hurst was appointed to assist trial counsel in the investigation of Mosley's case. (10 PCR 1822.) Though Hurst recalls that Griffin was the most important witness in the case, he never spoke with Bernard Griffin, or assisted trial counsel in attempting to discredit his testimony. (10 PCR 1823, 1824-25.) Before Mosley's trial, Hurst interviewed an inmate named Hampton who indicated that Griffin told him he "was not going to get any prison time," and he had a "deal" for his cooperation with his testimony for the state." (10 PCR 1823.) Hurst listened to phone call between Griffin to his grandmother essentially telling her that he had a deal and that he was coming home.[3] (10 PCR 1825.)

Investigator Earnest Edwards testified at the evidentiary hearing for the state. (10 PCR 1807.) Edwards and a female investigator went to the prison where

[3] The defense also called Detective Gary Stucki. (10 PCR 1834); Officer Jennifer Kayter (9 PCR 1745-47); and Detective Kimberly Long (9 PCR 1748.)

Griffin was being held to question Griffin about his affidavit. They informed Griffin they were with the State Attorney's Office. Griffin told Edwards that when he met with "the lawyer" regarding his testimony at Mosley's trial (prior to signing an affidavit). He stated that he had not written anything down – that "the lawyer" was writing down what he said and that he did not read what "the lawyer" wrote. (10 PCR 1812.) He also stated that he signed the affidavit "but didn't read it." He told Edwards he "don't want nothing to do with this." (10 PCR1812-13.) Griffin "didn't want to participate" in the meeting with Edwards and "didn't want to be there." (10 PCR 1813.) Griffin never denied that the statements contained in the affidavit were true. (10 PCR 1816.) On cross-examination, the investigator admitted he drove three hours to see Griffin and three hours back but never asked him whether the statements in the affidavit were true. (10 PCR 1818.)

Fourth Judicial Circuit Judge Elizabeth Senterfitt was called by the state in evidentiary hearing. (10 PCR 1844.) She was the lead prosecutor in Mosley's case. (10 PCR 1846.) During the investigation she became aware of Bernard Griffin, who ultimately stated that he was present for the murders of the victims. (10 PCR 1847.) Griffin was instrumental to her case-in-chief. (10 PCR 1863.) His status at the time of Mosley's trial was as a testifying co-defendant—his charges to accessory-after-the-fact were pending at the time. (10 PCR 1847-48.) She met with Griffin prior to Mosley's trial, as was standard practice. (10 PCR 1848.)

Griffin's attorney was present for some, but not all, of the meetings she had with Griffin. (10 PCR 1848-49.) John McCallum was usually the investigator responsible for transporting Griffin from the jail to the State Attorney's Office. (10 PCR 1849.) She denied telling Griffin what his sentence would ultimately be. (10 PCR 1851.) She acknowledged that it is possible she ordered Griffin non-jail food the night before Mosley's trial. (10 PCR 1875.)

After testifying, Griffin's case was resolved for a disposition including two years of community control followed by eight years of probation. (10 PCR 1854.) She acknowledged that it "might not be right" to allow a co-defendant such as Griffin to come to court, testify against a defendant, admit culpability, then max him out on the charges he was facing. (10 PCR 1860.) According to Judge Senterfitt, Griffin's attorney would have had "every reason" to believe that if Griffin was cooperative she would let the know Court know or try to work out a deal based on Griffin's cooperation. (10 PCR 1861.) She stated "I would say certainly I had no intent of trying to give him 30 years, no. That would have been wrong, I think." (10 PCR 1876.) From her experience, a State Attorney's recommendation goes a long way with a judge in determining sentencing. (10 PCR 1861.)

Judge Senterfitt acknowledged that the meetings she had with Griffin occurred in her office. (10 PCR 1862.) John Guy, John McCallum, and Griffin's

attorney may have been present. (10 PCR 1863.) She would have gone over her questions and tried to prepare him for possible cross-examination questions. (10 PCR 1867-68.) She cannot recall any case where a flipped co-defendant had not entered into a plea prior to inculpating himself at a defendant's trial. (10 PCR 1873.)

STATEMENT OF THE ISSUES

I. WHETHER THE PROSECUTION COMMITTED A GIGLIO VIOLATION IN KNOWINGLY ALLOWING ITS MAIN WITNESS, BERNARD GRIFFIN, TO TESTIFY UNTRUTHFULLY AT MOSLEY'S TRIAL?

II. WHETHER THE PROSECUTION COMMITTED A BRADY VIOLATION IN FAILING TO INFORM THE DEFENSE THAT ITS MAIN WITNESS, BERNARD GRIFFIN, RECEIVED FAVORABLE TREATMENT PRIOR TO HIS TESTIMONY IN MOSLEY'S TRIAL AND WAS INFORMED THAT HE WOULD NOT RECEIVE A PRISON SENTENCE IF HE COOPERATED IN TESTIFYING AGAINST MOSLEY ?

III. WHETHER NEWLY DISCOVERED EVIDENCE EXISTS THAT BERNARD GRIFFIN KNEW THAT HE WOULD RECEIVE A NON-PRISON SENTENCE IN EXCHANGE FOR HIS TESTIMONY IN MOSLEY'S TRIAL AND RECEIVED PREFERENTIAL TREATMENT BY THE PROSECUTOR; AND WHETHER THIS NEWLY DISCOVERED EVIDENCE, IN ADDITION TO ALL OTHER ADMISSIBLE EVIDENCE, WOULD PROBABLY PRODUCE AN ACQUITTAL ON RETRIAL?

IV. WHETHER DEFENSE COUNSEL WAS DEFICIENT FOR FAILING TO STRIKE JUROR "R" AND MOSLEY WAS PREJUDICED WHERE JUROR "R" WAS ACTUALLY BIASED?

V. WHETHER TRIAL COUNSEL WAS DEFICIENT IN FAILING TO

REQUEST AN ALIBI JURY INSTRUCTION WHERE AN ALIBI DEFENSE WAS PRESENTED AT TRIAL, PREJUDICING MOSLEY?

VI. WHETHER TRIAL COUNSEL WAS DEFICIENT IN FAILING TO OBJECT TO NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT IN MOSLEY'S TRIAL AMOUNTING TO FUNDAMENTAL ERROR PREJUDICING MOSLEY?

VII. WHETHER MOSLEY'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE VIEWED AS HARMLESS WHEN CONSIDERED AS A WHOLE?

SUMMARY OF THE ARGUMENTS

I. The state committed a Giglio violation. As was established in Griffin's January 2013 sworn affidavit and Mosley's evidentiary hearing, Bernard Griffin lied numerous times at trial regarding his motives for testifying against Mosley and coaching that he receive prior to trial. The misstatements were not correct at trial. The prosecution knew that these statements were false. Indeed, the lead prosecutor acknowledged that many of Griffin's statements in evidentiary hearing (refuting his trial testimony) were true. Griffin's false testimony is not harmless to Mosley's case where Griffin is the most important witness the state's case, the other evidence was merely circumstantial in nature, and the jury could very well have found Griffin's bias compelling in weighing the evidence.

II. The state committed a Brady violation in failing to provide the defense with critical impeachment information concerning the circumstances of his testimony against Mosley, including Griffin's knowledge that he would be given a

lenient sentence if he testified favorably, and extensive witness coaching. The suppression of this impeachment information was material to Mosley's case because Griffin's testimony and credibility was absolutely essential to the state's case against Mosley, and Griffin's credibility had already been called into question due to his evolving statements.

III. The January 7, 2013 Affidavit of Griffin stating that he knew he was getting a deal with the state in exchange for his testimony against Mosley, that he was coached, that he met with the prosecutor numerous times to go over his testimony, that he was fed take-out food the night before trial, and other information constitutes newly discovered evidence that when considered with all other admissible information would probably produce and acquittal on retrial.

IV. Trial counsel was ineffective in striking Juror "R" who was never rehabilitated after revealing her actual bias by repeatedly indicating that she did not know if she could give Mosley a fair and impartial trial.

V. Trial counsel was deficient in failing to request the alibi jury instruction where he presented an alibi defense at trial. This failure prejudiced Mosley, where the jury did not have the single most important tool in considering the evidence in Mosley's case – the relevant instruction on how evaluate an alibi theory.

VI. Trial counsel was ineffective in failing to object to numerous improper remarks from the state and its witnesses, which singularly and cumulatively

amount to fundamental error.

VII. Mosley's trial must be reversed due to the cumulative errors that occurred in his case. Where the state withheld critical impeachment information concerning the state's main witness, allowed this witness to testify dishonestly at trial, and made repeated improper remarks in trial and penalty phase; and where trial counsel failed to remove a biased jury or request the single-most important jury instruction to the defense, Mosley was deprived of a fair and impartial trial as well as his rights to due process under the law resulting in a punishment that is cruel and unusual and arbitrary and capricious.

ARGUMENTS

GROUND I

THE PROSECUTION COMMITTED A GIGLIO VIOLATION IN KNOWINGLY ALLOWING ITS MAIN WITNESS, BERNARD GRIFFIN, TO TESTIFY UNTRUTHFULLY AT MOSLEY'S TRIAL RESULTING IN VIOLATIONS OF MOSLEY'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Bernard Griffin, was the state's most essential witness.[4] This essential

[4] Everyone involved in the case agreed that Griffin was critical to the state's case: lead defense counsel (9 PCR 1596-97), defense co-counsel (9 PCR 1704), defense investigator (10 PCR 1823, 1824-25), the prosecutor (10 PCR 1883, 1890). In fact, Justice Lewis noted that Griffin's testimony was an "absolutely critical piece of evidence" and inquired about any deals he had with the state during Mosley's direct appeal oral argument.
http://www.wfsu.org/gavel2gavel/viewcase.php?eid=1994, apprx.17:50-19:00.

witness lied at trial where he indicated that he had no idea what sentence he would get for his crimes; that he was not given favorable treatment for his testimony against Mosley; that he only met with the prosecutor a couple of times; that he was not testifying in hopes of getting a lenient sentence; and that he told his grandmother[5] that he would be home soon just to make her feel better, not because he knew what his sentence would be.

II. Applicable law

To establish a claim under Giglio v. United States, it must be shown that; (1) the testimony given at trial was false, (2) the prosecutor knew the testimony was false, and (3) the statement was material. 405 U.S. 150 (1972). Once the first two prongs are established, the false evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. Green v. State, 975 So.2d 1090, 1106 (Fla. 2008); Guzman, 941 So. 2d at 1050-51. "[T]he State has the burden to prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt. Thus…the Giglio test is more defense friendly than the test…applied to a violation under Brady." Davis v. State, 26 So. 3d 519, 532 (Fla. 2009) (citations omitted).

III. Analysis

A. The testimony given at trial was false

[5] At trial the person Griffin called from jail was referenced as his "aunt." In postconviction, this person was referenced as his "grandmother."

At Mosley's 2005 trial, Mr. Griffin testified that although he was currently charged with two counts of accessary after-the-fact to first-degree murder, he: (1) did not know the maximum sentence he was facing; (2) was not promised anything for his testimony; (3) was not told by the prosecution as to what sentence she might recommend to a Judge (4) was not hoping for any benefit from his testimony (5) when he was caught on a jail phone call telling his aunt he was not going to get prison time, he was only lying to make her feel good, and (6) the prosecution did not prep him for his testimony in Mosley's trial:

Q: What are you currently charged with?

A: Two counts of first-degree accessory murder.

Q: Is your case still pending?

A: Yes.

Q: What plea have you entered, Mr. Griffin?

A: Not guilty.

Q: Have you been sentenced yet?

A: No.

Q: **Do you know how much time you are facing on these two counts of accessory to commit first-degree murder**?

A: **No, I do not**.

(13 R 675) (emphasis added).

Q: **Have you been promised anything to get you to testify**?

A: **No**.

Q: **Have I ever told you or suggested to you what I might recommend to a Judge if at some point you were sentenced**?

A: **No**.

Q: Has Mr. Guy ever suggested to you what he might recommend when you were sentenced?

A: No.

Q: What about your – you're represented by an attorney, is that correct?

A: Yes, ma'am.

Q: Who is that?

A: John, John Whited.

Q: **John Whited. And has John Whited ever told you what you might get or promised you anything, what you might get if you testify in this case?**

A: **No, ma'am**.

Q: **Are you hoping to get some benefit out of testifying in the case against the Defendant here**?

A: **No**.

(13 R 676) (emphasis added).

Griffin's cross-examination:

Q: **Okay. You did not on a jail audiotape anywhere from the jail**

while on the phone tell anybody that your attorney told you that you were not going to get prison time.

A: **I said that because I wanted my mom – I mean my aunt or whoever I called that day don't worry about me. I just wanted to make them feel good.**

Q: **You were lying to them?**

A: **Yes, I was**.

(13 R 729) (emphasis added).

Q: How many times have you met with Ms. Senterfitt and Mr. Guy?

A: A couple times.

Q: A couple times in the last two days?

A: I don't remember

Q: How many times in the last 30 days?

A: Probably like two.

Q: **They talk to you about what's going to happen today?**

A: **No**.

Q: Have you ever sat in that chair before?

A: No.

Q: **They didn't practice with you and talk to you about what was going to happen**?

A: **No**.

(13 R 757) (emphasis added).

Griffin signed an affidavit on January 7, 2013 admitting that a**ll of the above statements from trial were untrue**. (Defense Evidentiary Hearing Exhibit 2) (5 PCR 991-992.) On September 4, 2013, Griffin testified under oath during Mosley's 3.851 evidentiary hearing that the contents of the affidavit were true. (10 PCR 1775.) Griffin testified that the lead prosecutor and others with the state promised him, before he testified in Mosley's trial, that he wasn't going to get much time. (10 PCR 1759; 1763-64.) Contrary to his trial testimony, Griffin's call to his grandmother informing her that he would be home soon was a true statement and he knew it at the time. (10 PCR 1764, 1799).

The lead prosecutor told him to say he did **not have a deal** with the state if the defense attorney asked him at the trial about whether he had received a promise from the state. (10 PCR 1770.) Griffin testified that he was transported from the jail more than four times to talk with the prosecutor. (10 PCR 1770.) Griffin admitted that, contrary to his trial testimony, he was hoping for a benefit in exchange for his testimony. (10 PCR 1761, 1766.)

Griffin, who has no reason to lie at this point,[6] has provided credible testimony, which was corroborated in many respects by the prosecutor's testimony, **confirming** that several of Griffin's statements at trial were false. According to

[6] Significantly, Griffin is currently incarcerated on a twenty-year sentence for a violation of the probation that he received for his participation in this case. (10 PCR 1778.) Now that he no longer has his plea agreement hanging over his head, he no longer has any motivation to appease the state.

the lead prosecutor's calendar, she met with Griffin on at least four occasions prior to Mosley's trial. (10 PCR 1849-52.) She would have written up her direct examination questions and gone over them with him. (10 PCR 1867.) She also prepped him for possible cross-examination questions. (10 PCR 1867.) She further acknowledged that she had a discussion with Griffin about what his response should be if he were asked on cross about whether he had a plea deal with the state. (10 PCR 1833.) She admitted that Griffin's defense attorney was not present for all of the meetings between she and Griffin. (10 PCR 1849.)

The prosecution also admitted that "***it might not [have been] right*" of her to let Griffin testify at Mosley's trial and incriminate himself, only to then give him the maximum sentence for his two charges**. (10 PCR 1860.) When questioned as to whether Griffin's attorney, Mr. Whited, had reason to believe the prosecution was going to be reasonable in their recommendation, she admitted that he "**had every reason to believe that we were going to be reasonable. We were going to be fair and we were going to tell the Court or try to work a deal based on his cooperation and he very much cooperated from the very beginning**." (10 PCR 1861.) She then admitted that she thinks a state attorney's recommendation goes a long way when a Judge decides a sentence. (10 PCR 1861.)

This prosecutor was "sure" Griffin asked her what his sentence was going to

be. (10 PCR 1871.) She agreed that it is common for a state witness to have some incentive prior to taking the stand and incriminating oneself in a double homicide case. (10 PCR 1872). She could not think of any case other than Griffin's that a state witness took the stand and voluntarily incriminated himself without protecting himself with a plea beforehand. [7] (10 PCR 1872-73).

Defense Investigator, Mike Hurst's 2013 evidentiary hearing testimony also corroborates Mr. Griffin's admissions that he knew he was going to receive a low sentence prior to Mosley's trial. Mr. Hurst spoke to Mr. Ernest Hampton, an inmate that Griffin conversed with while incarcerated prior to Mosley's trial. (10 PCR 1823-24). Hampton told Hurst that Griffin had "some kind of agreement with the state for his testimony." (10 PCR 1823). Griffin "was not going to get any prison time," and he had a "deal" for his cooperation with his testimony for the state. [8] (10 PCR 1830).

B. The prosecutor knew the testimony was false

As demonstrated in the lead prosecutor's evidentiary hearing testimony, she must have been aware that many of Griffin's statements were false when he made

[7] Mosley's attorneys, Mr. Kuritz and Mr. Till, never heard of this scenario ever happening in their 50+ years of combined legal experience. (9 PCR 1602, 1708.)

[8] Further evidence of a deal with the state is that neither the State nor Bernard Griffin's attorney filed a Motion for Severance which is always required when codefendants are not going to stand for trial unless one codefendant has a prearranged plea deal his attorney must sit for trial. Mosley was tried alone. Berger v. U.S., 295 U.S. 78 (1935).

them at trial, specifically:

- Q: Do you know how much time you are facing on these two counts of accessory to commit first-degree murder?

  A: No, I do not.

- Q: They talk to you about what's going to happen today?

  A: No.

- Q: They didn't practice with you and talk to you about what was going to happen?

  A: No.

- Q: How many times have you met with Ms. Senterfitt and Mr. Guy?

  A: A couple times.

- Q: Are you hoping to get some benefit out of testifying in the case against the Defendant here?

  A: No.

The prosecutor's testimony in evidentiary hearing establishes that she knew each of these statements were not true. Regardless of this knowledge, she did nothing to correct Griffin's false trial testimony.

C. The statements were material – the state's presentation of false testimony that went uncorrected was not harmless; there is a reasonable probability that the false testimony could have affected the jury's verdict

1. *Griffin and his credibility was critical to the state's case*

Everyone involved in Mosley's case stated that Griffin's testimony was the

most important evidence in the case: the lead prosecutor admitted that Griffin was instrumental to her case-in-chief (10 PCR 1863), "we knew we needed Mr. Griffin to testify" (10 PCR 1890); lead defense counsel knew that Griffin was essential to the state's case, stating that the case would not have survived JOA without Griffin's testimony (9 PCR 1596-97); co-counsel for the defense also acknowledged as much (9 PCR 1704); as did the defense investigator (10 CPR 1823, 1824-25.)

Without Griffin, all the state had on Mosley was some of the victim's DNA in his car, a place the victim had likely shed DNA before the day in question; some cell phone records; and Mosley's odd behavior, which he attributed to uneasiness about his wife's inevitable discovery of his multiple affairs.

If the jury's confidence in Griffin's credibility had been shaken with evidence substantiating his motivation for testifying, the manner in which he was coached, and the favoritism he received from the prosecutor, a conviction against Mosley would have been much less likely, and, as stated by defense counsel, the case could would not have survived a motion for judgment of acquittal. (9 PCR 1596-97.) This is particularly so where Griffin's credibility had already been called into question at trial due to his evolving testimony.[9]

[9] Griffin said he was sitting in the SUV (8 R 689) then he changed his testimony and said he was standing outside the SUV during the alleged murders (8 R 690). Through cross-examination (19 R 1868) Griffin's two sworn statements are

Impeachment evidence discovered after trial can be significant enough to establish Giglio's materiality prong. As stated by the U.S. Supreme Court, "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959).

Numerous cases involving postconviction discovery of impeachment material have hinged on whether the court found that the witness in question was critical and was the only person who provided a specific piece of crucial evidence for the state. See, e.g., Mordenti v. State, 894 So. 2d 161, 171 (Fla. 2004) (finding a Giglio violation, the court reasoned as follows: "We certainly recognize that the significance of impeaching Gail in the instant case was critical. Gail was a pivotal and weighty witness for the State."); Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986) ("Brown meets this materiality standard. Floyd's testimony was the keystone of the state's case. Only he placed Brown at the scene. Only he testified that Brown admitted killing and raping Mrs. Barksdale. Absent his testimony the state was left with Vinson's testimony of an arguably incriminating

---

completely different from his trial testimony. Detective Mark Romano admitted Griffin's story kept changing (15 R 1126-1128, 1155); and in police reports Griffin gave three additional statements about what occurred at 11600 Armsdale Road, the state's alleged murder site, which were also. In all of these statements, co-defendant Griffin gave a different story. (15 R 1142-1144.)

statement and inconclusive evidence concerning the pistol, possibly not even sufficient evidence to submit the case to the jury.").

Every party agrees that without Griffin, prosecution did not have a case against Mosley. Thus, Griffin's credibility is of the utmost importance, where he was the **only** witness to testify that Mosley was involved in the murders.

2. *Trial counsel's cross-examination of Griffin would have been significantly stronger with the new information*

Mr. Kuritz testified at Mosley's 2013 evidentiary hearing that had he would have "loved" to know that Griffin had a deal in place prior to Mosley's trial:

> **I would have loved to have know that and** – or him to have admitted to it because when you've got a witness who's doing reenactments and accepting culpability but still has not entered a plea for it and they're pointing a finger at your client you obviously as a defense lawyer want to say he'd push his grandmother down a flight of stairs to get out of this.
>
> He'll do anything to go from looking at 25 to life or actually on a first degree life to get probation he would say anything about anybody in the world is what I would try to convince the jury and with all of his inconsistent statements that he had been making along the way I would have – I would have love to have known that if that was indeed true. **I would have loved to have known at the time and I believe I could have used it a great deal at trial.**

(9 PCR 1602.) Kuritz would have "absolutely used" the undisputed fact that Griffin was being provided dinner on the prosecution's dime:

> If that were true and I had known about it **I would have absolutely used that to bolster the whole theory that they're buying his testimony. They're feeding him jail food. They're doing everything**

they can for him.

(9 PCR 1603.) Kuritz agreed that this information went to Griffin's impeachment and relationship or bias with a party. (9 PCR 1603-04.)

Kuritz further stated that this information would have been **crucial** for his impeachment of Griffin because there was no physical evidence tying Mosley to either crime scenes, and their case against Mosley was Mr. Griffin's testimony, "so every little bit would have been beneficial and the undisclosed facts 'would have been huge.'" (9 PCR 1684.)

Kuritz also stated these undisclosed facts would have been important to impeach the prosecutor's credibility and could have "offended the jury as they perceived the state's theory and argument and how they presented their case." Kuritz thinks this would have "benefitted Mr. Mosley greatly." (9 PCR 1684.)

3. *The impeachment material is powerful and alters the whole analysis of Griffin's credibility regarding his trial testimony*

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue, 360 U.S. at 269; Hunter v. State, 29 So. 3d 256, 271 (Fla. 2008); Mordenti, 894 So. 2d at 170-71; United States v. Sanfilippo, 564 F. 2d 176, 178 (5th DCA 1977) ("**A jury may very well give great weight to a precise**

reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself.")(emphasis added). These courts explain that where a witness can be impeached with specific information that was unknowable to the defense at trial, retrial is necessary because the jury may give the information "great weight" in ascertaining the witnesses' credibility. Id. Moreover, the USSC in Olden v. Kentucky explained the confrontation clause implications of a defendant's inability to properly cross-examine a witness:

> We emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Recently, in Delaware v. Van Arsdall, 475 U.S. 673 (1986), we reaffirmed Davis, and held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'"

488 U.S. 227, 231 (1988), citing Davis v. Alaska, 415 U.S. 308, 315-316 (1974) (internal citations omitted); see also Pointer v. Texas, 380 U.S. 400, 404 (1965).

At trial, the state portrayed Griffin as a naive, unintelligent child who was incapable of duplicitous behavior and was merely testifying against Mosley because it was the right thing to do. Now, it is clear that Griffin testified against Mosley because he was terrified that if he did not assist the state, he would receive up to 30 years in prison; whereas if he aided the state's case, he knew that he

would likely go home. This is precisely the type of information a jury would have found useful, and would have given great weight to in ascertaining Griffin's veracity at trial.

D. The state's misconduct resulted in constitutional violations

Due to the state's presentation of Griffin's known false testimony at trial and its failure to correct the testimony at trial, Mosley's Fifth and Fourteenth Amendments right to due process were violated resulting in an arbitrary and capricious sentence in violation of his Eighth Amendment rights. Townsend v. Burke, 334 U.S. 736, 741 (1948) (Holding a sentencing court's reliance on materially false information violates due process of law and observing that it is "a requirements of fair play" that a criminal sentence not be "predicated on misinformation"); United States v. Guajardo-Martinez, 635 F. 3d 1056, 1059 (7th Cir. 2011) (stating that the "Due Process Clause of the Fifth Amendment requires that information used for sentencing be accurate") (citing United States v. Tucker, 404 U.S. 443, 447 (1972)).

GROUND II

THE PROSECUTION COMMITTED A BRADY VIOLATION IN FAILING TO INFORM THE DEFENSE THAT ITS MAIN WITNESS, BERNARD GRIFFIN, RECEIVED FAVORABLE TREATMENT PRIOR TO HIS TESTIMONY IN MOSLEY'S TRIAL AND WAS INFORMED THAT HE WOULD NOT RECEIVE A PRISON SENTENCE IF HE COOPERATED IN TESTIFYING AGAINST MOSLEY RESULTING IN VIOLATIONS OF MOSLEY'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT

RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

As discussed at length in the preceding claim, Bernard Griffin, Mosley's juvenile co-defendant and only alleged eyewitness, was the state's most essential witness. The prosecution failed to disclose critical impeachment regarding Griffin's implied deal with the state, extensive witness coaching, and preferential treatment to the defense, undermining confidence in the outcome of Mosley's trial.

I. Applicable law – Brady

When a defendant alleges a Brady violation, he must prove: 1) The State possessed evidence favorable to the accused because it was either exculpatory or impeaching; 2) the State willfully or inadvertently suppressed the evidence; and 3) the defendant was prejudiced. Evans v. State, 995 So. 2d 933 (Fla. 2008); Brady v. Maryland, 373 U.S. 83 (1983).

III. Legal Analysis

E. The State possessed evidence favorable to the accused because it was either exculpatory or impeaching

1. *Factual support*

On September 4, 2013, Griffin testified under oath during Mosley's evidentiary hearing that the contents of January 7, 2013 affidavit were true.[10] (10

[10] Bernard Griffin stated in a sworn affidavit that: contrary to his sworn testimony at trial, he had met with the prosecutor dozens of times to meet with the assistant state attorneys in order to prepare his trial testimony. Griffin stated that on all

PCR 1775.) He testified that before testifying against Mosley, Ms. Senterfitt promised him that he wasn't going to get much time—specifically that he would get probation and only a little jail time—and Senterfitt reassured Griffin of this multiple times. (10 PCR 1759; 1763-64.) Griffin confirmed that Senterfitt told Griffin to say he did not have a deal with the state if the defense attorney asked him at the trial about whether he had received a promise from the state. Griffin testified that he was transported from the jail to the state more than four times to talk with Senterfitt. (10 PCR 1760.) Griffin admitted that his testimony at Mosley's trial that he did not have a deal with the state was not accurate, and that he was in fact hoping for a benefit in exchange for his testimony. (10 PCR 1761, 1766.) Griffin also confirmed that he was served Chinese food on one occasion by the prosecutor. (10 PCR 1767.)

The lead prosecutor corroborated many of Griffin's statements in evidentiary hearing that she had met with him at least five times, had in-fact prepared him to

---

occasions Senterfitt was present in the meetings, and that Guy was present four or five times. Griffin stated that Senterfitt was particularly concerned with all of Griffin's prior inconsistent statements. Griffin stated that the night before his trial he was offered a non-jail meal, and Griffin requested and received Chinese food, which he ate in Senterfitt's office. Griffin stated that he was told that if he cooperated with the state then he would either get a little jail time or only probation. Griffin stated that he was told that if Mosley's attorney asked him on cross-examination if Griffin had received a deal, Griffin should say no, because to say yes would hurt the case against Mosley. Griffin stated that he was told that if he failed to cooperate with the state the charges against him would be raised to First Degree Murder.

testify at Mosley's trial, spoke with him regarding his prior inconsistent statements, and talked with him about how to answer if he were cross examined about whether he had a deal with the state.[11] She also admitted it that the meal of Chinese food "rang a bell."

Defense Investigator Mike Hurst also corroborated Griffin's evidentiary hearing testimony. Specifically, Mr. Hurst spoke to Mr. Ernest Hampton, an inmate that Griffin had conversed with while they were incarcerated together prior to Mosley's trial. (10 PCR 1823-24). Hampton told Hurst that Griffin had "some kind of agreement with the state for his testimony." (10 PCR 1823). Griffin "was not going to get any prison time," and he had a "deal" for his cooperation with his testimony for the state. (10 PCR 1830).

2. *Legal support*

The type of information revealed by Griffin and the prosecutor in Mosley's evidentiary hearing, as set forth above, constitutes Brady. Evidence of witness coaching is Brady material. See Rogers v. State, 782 So. 2d 373, 384 (Fla. 2001) (When a particular witness is crucial to the State's case, evidence of coaching is especially material to that witness's credibility). Evidence of tacit agreements

[11] Further evidence of a deal with the state is that neither the State nor Bernard Griffin's attorney filed a Motion for Severance which is always required when codefendants are not going to stand for trial unless one codefendant has a prearranged plea deal his attorney must sit for trial. Mosley was tried alone. Berger v. U.S., 295 U.S. 78 (1935).

between a testifying witness and the state constitutes Brady material. See Reasonover v. Washington, 60 F. Supp. 2d 937, 973-74 (E.D. Mo. 1999) ("Understandings" between the state and a testifying witness are as critical to disclose as plea deals). A deal between the witness and the State must not be "ironclad," to be considered as Brady evidence. Id. Rather there must be a "tentative promise of leniency," by the State, "**which might be interpreted by [the] witness as contingent upon the nature of his testimony**." Porterfield v. State, 472 So.2d 882, 885 (Fla. 1st DCA 1985), quoting Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979).

Importantly, as missed by the trial court in its order denying 3.851 relief, "understandings" between the state and a testifying witness are as, if not more, important to disclose as actual plea deals:

> Under the Brady rule, a prosecutor has a constitutional duty to disclose "evidence of any understanding or agreement as to future prosecution" relating to any of its witnesses. Giglio v. United States, 405 U.S. 150, 154-155, 92 S. Ct. 763, 31 L. ed. 2d 104 (1972). This constitutional duty takes on added importance where the "reliability of a given witness may well be determinative of guilt or innocence." Id., at 154, 92 So. Ct. 763 (quoting Napue v. Illinois, 360 U.S. 265, 269, 79 S. Ct. 1173 (1959)). A prosecutor cannot insulate a witness from cross-examination by leaving out details of a plea agreement. See Giglio, 405 U.S. at 153-154, n. 4, 92 S. C. 763). Rather**, a prosecutor must disclose "evidence of any understanding or agreement as to future prosecution.**" Id., at 154-155, 92 So. S. Ct. 763. See also Brown v. Wainwright, 785 F. 2d 1457, 1464-65 (11th Cir. 1986)("**Giglio does not require that the word 'promise' is a word that must be specifically employed… It is constitution we deal with, not**

> **semantics**. 'The trust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony.")(quoting Smith v. Kemp, 715 F. 2d 1459, 1467 (11th Cir. 1983)).
>
> ***
>
> The fact that [the witness] was not aware of the exact terms of the plea agreement only increases the significance, for purposes of assessing credibility, of his expectation of favorable treatment…. **[A] tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony**. **Thus, there would be a greater incentive for the witness to try to make this testimony pleasing to the prosecutor**. That a witness may curry favor with a prosecutor by his testimony was demonstrated when the prosecutor renegotiated a more favorable plea agreement with [the witness] after [the defendant] was convicted.

Reasonover, 60 F. Supp. 2d at 973-74 (emphasis added). "Understandings" are more important to disclose that firm plea deals because a defendant may assume that the amount of consideration he receives for his testimony is proportionate to how helpful his testimony is to the state. Id. Brown, 785 F. 2d at 1464-65.

In the instant case, where Griffin and the state had an understanding that if he testified against Mosley, he would be given consideration by the state and likely not receive a harsh sentence (a fact denied by Griffin at trial), that he was coached prior to his testimony to resolve issues concerning his inconsistent statements, that he was told to answer "no" if asked if a deal was in place with the state, and was served a meal of his choice in the eve of Mosley's trial, this information unquestionably constitutes Brady material under the law and should have been

disclosed to the defense.

F. State willfully or inadvertently suppressed the evidence

Although the prosecutor conceded in Mosley's evidentiary hearing that Griffin had every reason to think that he would receive favorably treatment for his testimony (10 PCR 1861) the state did not, during the discovery process in Mosley's case, nor any time since, provide the defense with the details of the negotiations with Bernard Griffin. Further, the state never communicated to the defense impeachment material that the prosecutor met with Griffin numerous times to prepare Griffin for trial, contrary to the sworn testimony that Griffin gave at trial, and that Griffin was provided a Chinese dinner by the prosecutor and

G. The defendant was prejudiced

"The suppressed evidence is prejudicial if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280-81(1999) (citations omitted). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 289-90 (1999) (citations omitted).

This Court reversed a conviction and sentence in Cardona v. State where the state failed to give to the defense reports of interviews with a co-defendant. 826

So. 2d 968, 981 (Fla. 2002). This Court found that where there was evidence of witness coaching, this information was critical to the defense for impeachment purposes, was not redundant of other impeachment evidence, and was prejudicial to the defendant. Id. The court determined, "because of the State's reliance on Gonzalez as its key witness, both to obtain its conviction of first-degree murder and to argue for the death penalty, we conclude that impeaching Gonzalez as to these material inconsistencies could have further undermined Gonzalez's credibility before the jury, and thus bolstered the defense's [theory]…." Id. Critically, this court found that the impeachment evidence of the conversations with the co-defendant, that the state withheld, ultimately may have affected not only the guilt phase, but also the jury's death recommendation:

> If the jury had disbelieved Gonzalez, this could have affected not only the jury's evaluation of guilt, but also its recommendation of death. **Even without this devastating impeachment evidence, the vote was only eight to four in favor of death.**

Id. (emphasis added.); see also Rogers, 782 So. 2d at 38 (When a particular witness is crucial to the State's case, evidence of coaching is especially material to that witness's credibility). Just like Cardona, even without this devastating impeachment evidence, the jury voted for Life as to the death of Lynda Wilkes and Death for the murder of Jay-Quan by only 8 - 4.

Similarly, the Second DCA in Marrow v. State, 483 So. 2d 17 (Fla. 2d DCA

1987) reversed the defendant's conviction where there was a reasonable probability that the result of the trial would have been different had the State disclosed evidence of a favorable deal between the state's witnesses and the state in exchange for the witnesses cooperation. Mosley's case is very similar to Marrow, 483 So. 2d 17, where the prosecution's main witness had an understanding that he would receive consideration for his testimony against Marrow. In reversing Marrow's case for a new trial, the Second DCA held:

> This impeachment evidence meets the *Bagley* standard of materiality. This case presents a unique situation--without Reichert's testimony the jury in appellant's first trial was unable to reach a verdict. Other than undercover officers, the only witnesses who claimed to have heard conversations between appellant and Detective Hill about the purchase of marijuana were Reichert and his wife. *Cf. Porterfield*. Without question, Reichert's testimony was vital to the prosecution. **Any evidence which could be used to impeach Reichert would obviously be crucial to appellant**. We believe that there is a reasonable probability that the result of appellant's trial would have been different had the state disclosed to appellant the evidence which could have been used to impeach Reichert. The state's error in failing to disclose the existence of this impeachment evidence was compounded by the state's failure to correct on redirect Reichert's trial testimony that he had not previously discussed the case with law enforcement officials. Consequently, we must reverse and remand for a new trial. (emphasis added)

Id. at 20 (emphasis added). Like Cardona and Marrow, the impeachment evidence in Mosley's case (including that the state met with Griffin four or five times to prepare him for trial, correct inconsistencies in his prior statements, and ready him for cross-examination, and that Griffin was given food) would have been critical to

Mosley's case where Griffin was the most critical witness to the state's case and his credibility was essential.

This is especially so with respect to evidence that Griffin had an understanding with the state that he would receive some benefit from the state depending on how his trial testimony went. (e.g. 5 PCR 991-92.) If the jury had heard that he would be given a deal based on how much he helped the stated in Mosley's trial, the veracity of his testimony would have been questioned. See Reasonover, 60 F. Supp. 2d at 973-74.

H. The state's misconduct resulted in constitutional violations

Due to the state's failure to inform the defense that Griffin had an understanding with the state that we would receive consideration in exchange for his testimony against Mosley, that he was coached on numerous occasions prior to trial, and that he was given preferential treatment, Mosley's Fourteenth Amendment right to due process were violated resulting in an arbitrary and capricious sentence in violation of his Eighth Amendment rights. See Cone v. Bell, 556 U.S. 449, 449 (2009) (The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on states certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions. When a state suppresses evidence favorable to an accused that is material to guilt or to punishment, the state violates

the defendant's right to due process, irrespective of the good faith or bad faith of the prosecution); Arizona v. Youngblood, 488 U.S. 51, 57 (1988).

GROUND III

NEWLY DISCOVERED EVIDENCE EXISTS THAT BERNARD GRIFFIN KNEW THAT HE WOULD RECEIVE A NON-PRISON SENTENCE IN EXCHANGE FOR HIS TESTIMONY IN MOSLEY'S TRIAL AND RECEIVED PREFERENTIAL TREATMENT BY THE PROSECUTOR; THIS NEWLY DISCOVERED EVIDENCE, IN ADDITION TO ALL OTHER ADMISSIBLE EVIDENCE, WOULD PROBABLY PRODUCE AN ACQUITTAL ON RETRIAL AND THE FAILURE TO GRANT A NEW TRIAL ON THIS CLAIM WILL RESULT IN VIOLATIONS OF MOSLEY'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Mosley learned in late 2012 that Bernard Griffin, his co-defendant, and main witness in his case revealed that he was given preferential treatment, promised leniency in exchange for his testimony against Mosley, and was coached over a period of multiple days in preparation for Mosley's trial. Griffin signed an affidavit stating as much on January 7, 2013. (5 R 991-92.)

I. Applicable law – Newly Discovered Evidence

"To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: (1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence must be of such nature that it would

probably produce an acquittal on retrial. Jones v. State (Jones II), 709 So.2d 512, 521 (Fla.1998)." Reed v. State, 116 So. 3d 260, 264-65 (Fla. 2013). To conclude that the evidence will probably produce an acquittal on retrial or reduce a defendant's sentence, the trial court is required to consider all newly discovered evidence which would be admissible at trial and evaluate the weight of both the newly discovered evidence and the evidence that was introduced at trial. Robinson v. State, 770 So. 2d 1167, 1170 (Fla. 2000).

II. Legal Analysis

A. The trial court, defense counsel, and the jury were unaware of Griffin's true motivation for testifying against Mosley

As explained by the First DCA in Burns v. State, 858 So. 2d 1229, 1230 (Fla. 1st DCA 2003), a defendant can only know of a witness' recantations when the witness chooses to make them known.[12] Mosley properly presented this claim to the trial court within one year of learning the information from Griffin. Fla. R. Crim. Pro. 3.851(d)(2); (5 PCR 991-92.)

B. The newly discovered evidence regarding Griffin's secret deal with the prosecution and the favorable treatment he received is of such a nature that it will probably produce an acquittal or yield a less severe sentence on retrial

[12] In Davis v. State, 26 So. 3d 519, 533 (Fla. 2009), where a state witness later declared that she testified because she was threatened, the Florida Supreme Court held that the issue could not be presented as an ineffective assistance of counsel claim; counsel cannot be found ineffective for failing to discover a witness' true motivation for testifying because the truth cannot be learned until a witness chooses to reveal it.

To reach a conclusion as to the probability of acquittal on retrial or the likelihood of a reduced sentence, the trial court is required to consider all newly discovered evidence that would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence that was introduced at trial. Robinson, 770 So. 2d 1167 (Fla. 2000); Nordelo v. State, 93 So. 3d 178, 186 (Fla. 2012); Mazzara v. State, 51 So. 3d 480, 485 (Fla. 1st DCA 2010). As this Court held in Lightbourne v. State, a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal. 742 So. 2d 238, 247 (Fla. 1999).

As explained in some length in the preceding claims, if defense counsel had been armed with the extensive impeachment evidence now available, Griffin's credibility would have been destroyed and Mosley would probably be acquitted on retrial. Although Griffin's credibility as to his own involvement in the crimes is verified by the fact that he led law enforcement to one of the victims' remains, his credibility as to whom was with him when the crimes occurred has never been verified and must merely be assumed by the jury. The jury would not have been so quick to assume Griffin's veracity in this regard had he been impeached with all of

the available information that has come to light in postconviction.[13]

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue, 360 U.S. at 269. Hunter, 29 So. 3d at 27 (In determining whether prejudice has ensued, this Court must analyze the impeachment value of the undisclosed evidence…); Mordenti, 894 So. 2d at 170-71; Sanfilippo, 564 F. 2d at 178 ("**A jury may very well give great weight to a precise reason to doubt credibility** when the witness has been shown to be the kind of person who might perjure himself."); see also Brown, 785 F.2d at 1464.

It is now clear, years after Mosley's trial, that Griffin testified against Mosley, not because he felt compelled to do the right thing, but because he wanted to go home rather than get 30 years in prison. Griffin's current assertions are worthy of believability for numerous reasons. Most importantly, the lead prosecutor's evidentiary hearing testimony corroborates many of his assertions; second, at the time of trial Griffin was telling his grandmother and Ernest Hampton the same thing he is now admitting to Mosley; third, Griffin, who is serving 20 years for a violation of probation, has no motivation to make up this story at this

[13] After all, Griffin had reason to dislike Mosley and use him as a scapegoat where Mosley was allegedly having a sexual relationship with Griffin's underage sister. (10 PCR 1877.)

point.

The new information concerning Griffen's understanding with the state in exchange for his testimony, in addition to the fact that Griffin was coached prior to giving his trial testimony, and given preferential treatment such as take-out food, must be considered by a new jury. If Griffin's testimony against Mosley is sufficiently challenged on retrial, the remaining circumstantial evidence, that defense counsel doubts was strong enough to survive a motion for JOA (9 PCR 1596-97), will be probably be insufficient to convict Mosley.

GROUND IV

DEFENSE COUNSEL WAS DEFICIENT FOR FAILING TO STRIKE JUROR "R" AND MOSLEY WAS PREJUDICED WHERE JUROR "R" WAS ACTUALLY BIASED RESULTING IN VIOLATIONS OF MOSLEY'S, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

During voir dire, the following dialogue took place:

> State: [I]s there anybody who feels as though they would be so bothered or so disturbed by having to look at those photographs [of the victim's burned, decomposed body] **that you could not be fair and impartial in this case**? Does anybody feel that way?
>
> Jury Pool: (Indicating)
>
> ***
>
> State: All right. Anybody else on that side. I see a couple of hands.

Court: Ms. R's hand was up.

State: Yes, Ms. R?

Ms. R: I'm not sure how I would respond. **I think the timing of when we see them *might* determine how I might feel. *I just don't know*.**

State: Okay.

Ms. R: In terms of other evidence that would come before it.

State: Okay. Well, I can tell you that type of evidence comes through the crime scene investigators as well as the Medical Examiner, and again it's not something that you would need to study but it is part of the case. **With that understanding do you feel as though you could sit fairly and impartially in this case?**

Ms. R: ***I don't know*. I *think* I would try but I don't know what I would take home with me at night and sleep with. *I don't know*.**

(10 R 154-155) (emphasis added) Despite that Ms. R repeatedly stated on the record that she "did not know" if she could be fair and impartial upon viewing gory photographs of the victim's burned, decomposing body, Ms. R was not struck by defense counsel. Ms. R was on the jury that convicted Mosley and sentenced him to death.

I. Evidentiary hearing was not granted on this sufficiently pleaded claim

As a preliminary matter, where the trial court summarily denied this claim without evidentiary hearing (7 PCR 1242-45), Mosley now requests that this Court

reverse and remand for a hearing.[14] Factually based, capital, postconviction claims generally require an evidentiary hearing. Troy v. State, 57 So. 3d 828, 834 n. 4 (Fla. 2011) (citing Amends. to Fla. Rules of Crim. Pro. 3.851, 3.852, & 3.993, 772 So. 2d 488, 492 n.2 (Fla. 2000))

Moreover, clear precedent also indicates that claims of jury bias require evidentiary hearing to determine, among other things, trial counsel's rationale, or lack thereof, for failing to strike the questioned juror. See Thompson v. State, 796 So. 2d 511 (Fla. 2001) (reversing for evidentiary hearing on ineffective assistance of counsel to strike biased juror claim because "we cannot foreclose the possibility that counsel's failure to challenge juror Wolcott for cause was the product of some reasonable tactical decision. Accordingly, we remand for an evidentiary hearing to permit the trial court to evaluate any evidence as to why, if for any reason, defense counsel did not seek this jurors removal."); Titel v. State, 981 So. 2d 656, 659 (Fla. 4th DCA 2008).

II. Applicable law

A claim of ineffective assistance of counsel is determined under the Strickland standard: The defendant must show that counsel's performance was

[14] The state initially conceded that evidentiary hearing was required. (2 PCR 246.) August 19, 2010 Response to Mosley's 3.851 Motion. However, the state argued in Huff hearing that this claim should be summarily denied because Mosley had not demonstrated actual bias. (8 PCR 1497).

deficient. Second, the defendant must show that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove prejudice in the context of counsel's failure to strike a biased juror, a defendant must show a juror was "actually biased." See Owen v. State, 986 So. 2d 534, 550 (Fla. 2008); Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007).

III. Analysis

A. Deficient performance

Defense counsel was deficient in failing to strike Ms. R for cause and/or peremptorily strike her. Although all the other jurors who expressed reluctance regarding the photos were struck for cause or otherwise did not sit on the jury (12 R 482), defense counsel did not attempt to strike Ms. R for this reason. (12 R 478-513.) The trial court specifically pointed to one juror's statements about the gory photos as additional reason to grant one of the state's cause challenges:

> State: Your Honor, number 31, Ms. C.
>
> Court: I'm also concerned about her statements about the death penalty **and or photographs** and her religious beliefs and her statement that she probably can't obey the law.

(12 R 482) (emphasis added).

Because evidentiary hearing was not granted on this claim, trial counsel has offered no explanation for his failure to strike Juror R.

B. Actual bias

> Actual bias means bias-in-fact that would prevent service as an impartial juror. Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial—i.e., that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record.

Johnston v. State, 63 So. 3d 730, 744 (Fla. 2011) (citing Carratelli, 961 So. 2d at 324) (emphasis original)

Mr. Mosley has demonstrated actual bias on the face of the record in this case, where upon questioning by the state **whether anyone could not be fair and impartial after viewing graphic photos of the deceased victim**, **Juror R stated**: "***I just don't know***," "***I don't know.*** **I *think* I would try but I don't know what I would take home with me at night and sleep with.** ***I don't know***." (10 R 154-155.) She was never rehabilitated.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee due process and the right to a fair and impartial trial. As long explained by the United States Supreme Court, an unbiased jury plays a pivotal role in this process:

> The jury is an essential instrumentality— an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.

Sinclair v. United States, 279 U.S. 749, 765 (1929); see also Smith v. Phillips, 455 U.S. 209, 210, 102 S.Ct. 940, 942 (1982) ("Due process mean[s] a jury capable and

willing to decide the case solely on the evidence before it."); Morgan v. Illinois, 504 U.S. 719, 727 (1992) ("if a jury is to be provided the defendant. . . . the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.")

This Court in Mantarraz has recently expounded on this principle, reaffirming that when a juror's strongly held personal belief creates any reasonable doubt that s/he possesses an impartial state of mind, the juror must be excused for cause. Matarranz v. State, 133 So. 3d 473 (Fla. 2013). Matarranz distinguished the different types of juror bias: a strongly held personal belief versus a belief based on a misunderstanding of the applicable rules and procedures. Id. Bias based on a strongly held personal belief may not be overcome even upon rehabilitation. Id. at 492.

Juror R's repeated response that she "did not know" whether she could be fair and impartial in the case upon viewing graphic photographs of the victim's charred, decomposing remains reveals her actual bias, not based upon some misunderstanding of the law, rules or procedure, but based on a personal aversion to graphic imagines and her admitted inability to separate her feelings about the defendant from the horrendous nature of the photos. This bias resulted in violations of Mosley's rights to due process and a fair and impartial jury.

An "I don't know" response is not an agreement that one can be fair; the

Fifth DCA in Ivey held that where a prospective juror was asked whether she could be fair and impartial and she responded that she "did not know," these words could not be converted to an "affirmative response or support the State's claim of rehabilitation." Ivey v. State, 855 So. 2d 1169, 1170 (Fla. 5th DCA 2003).

Furthermore, contrary to the trial court's finding below, the **entire jury pool's group-affirmation** that they could be fair when asked whether "all of you"[15] could be fair did not cure Juror R's specific, individual, honest answers that she "did not know" if she could be fair. See Leon v. State, 396 So. 2d 203, 205 (Fla. 3d DCA 1981) (juror should have been excused where she did not know whether she could be fair and impartial, even though she ultimately stated that she could render an unbiased verdict), review denied, 407 So. 2d 1106 (Fla. 1981); Perea v. State, 657 So. 2d 8, 9 (Fla. 3d DCA 1995) ("The juror at issue turned in a questionnaire answer indicating that he was unsure whether he could give defendant a fair trial. This was partly because of a sexual molestation experience of one of the juror's family members. As was true in the Bryant case, the prospective juror indicated that he would follow the court's instructions, but his other

[15] Prosecutor: One thing His Honor is going to tell you – and we talked about the verdict being based on the law and the evidence. One thing he's going to ask you not to bring into the jury room with you are feelings of bias or prejudice. Can all of you do that?

Jury Pool: Yes.
(11 R 243.)

responses on the ability to give a fair trial were equivocal. We conclude that there must be a new trial.")

Here, as in Mantarraz, Juror R gave a: "fairly expressed, honestly held belief that [] she cannot be fair" based on her inability to separate her feelings about gruesome photographs from her decision making process "and not simply based on a misunderstanding of the law." Matarranz, 133 So. 3d at 492. As such, her bias was not, and could not be overcome by a general question to the jury posited by the prosecutor in voir dire.

The trial court below cited Busby for the proposition that a mere equivocal response does not indicate that a juror is unfit for service; instead, one must consider whether there is a reasonable doubt about the juror's fitness. (7 PCR 1244.) However, in Busby, **this Court reversed, finding that the juror in question should have been struck for cause based on his equivocal responses**:

> Lapan's **equivocation on multiple sensitive and material questions regarding his ability to be impartial raise reasonable doubt about his fitness to serve as a juror in this type of case, and should have resulted in his being excused from the panel for cause**. Importantly, Lapan responded that the fact that the accused had been convicted of prior crimes (as Busby had) might cause him to automatically vote for the death penalty. When asked whether he believed life imprisonment was severe enough punishment for a person convicted of premeditated murder, he answered, "No." Lapan also stated that because the homicide occurred inside a prison, his ability to serve as an impartial juror might be compromised. In a further response, Lapan indicated that he might construe such a fact as an aggravating circumstance, even beyond those aggravating circumstances as might be instructed

> by the trial judge. **When specifically asked whether learning that the crime had taken place in a correctional institution would factor in his consideration of the case regardless of what the judge said, he voiced a highly suspect response of "I don't know."** When asked whether he could comply with the trial court's instructions to set his personal feelings aside, Lapan could only muster a very weak "I believe I can." The nature of the case and the sentencing possibilities elevate our concern.

Busby v. State, 894 So. 2d 88, 96 (Fla. 2004). Like Juror Lapan in Busby, Juror R in the instant case "equivocated on the very issue most crucial to [her] ability to deliberate in an unbiased manner to reach the appropriate verdict and sentencing recommendation" where she indicated that she "did not know" whether she could be "fair and impartial" to John Mosley.[16]

As such, Mosley was unquestionably prejudiced by this juror's presence on his jury and his counsel was ineffective in failing to strike her.

GROUND V

TRIAL COUNSEL WAS DEFICIENT IN FAILING TO REQUEST AN ALIBI JURY INSTRUCTION WHERE AN ALIBI DEFENSE WAS PRESENTED AT TRIAL, PREJUDICING MOSLEY AND RESULTING IN VIOLATIONS TO MOSLEY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

[16] Clearly, the bias demonstrated by Juror R was against Mosley rather than the prosecution where the impartiality centered on horrific photographs of the deceased victim.

Whether or not he wants to admit it **now**,[17] defense counsel in Mosley's trial presented an alibi defense, then failed to request an alibi jury instruction, prejudicing the outcome of Mosley's trial where the jury was not provided the law relevant to Mosley's defense theory in determining his guilt or innocence.

I. Applicable law

A claim of ineffective assistance of counsel is determined under the Strickland standard: The defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 686.

Upon request, a defendant is entitled to a jury instruction on any theory of defense the substantive evidence supports, however weak or improbable his testimony may have been. Trial courts are to decide whether to give a particular jury instruction without weighing the evidence because doing so is the sole prerogative of the jury. Mathis v. State, 973 So. 2d 1153, 1155 (Fla. 1st DCA 2006).

A defense counsel's failure to request a jury instruction "has been deemed to

[17] Trial counsel acknowledged that the only specific claim that he discussed with the state in preparation for Mosley's 3.851 evidentiary hearing was Mosley's "alibi claim." (9 PCR 1576.) Non-coincidentally, despite having called several witnesses at trial to show that Mosley could not have committed the crimes because he was in other places at the relevant times, trial counsel, in evidentiary hearing, refused to admit that it was an alibi defense and claimed that his failure to request the alibi instruction was "strategic." ." (e.g. 9 PCR 1673-74.)

be an 'unreasonable omission which severely prejudiced his client's case' where the error complained of 'negated the only defense put forth by trial counsel.'" Id. at 1157 (citing Platt v. State, 697 So. 2d 989, 991 (Fla. 4th DCA 1997)); see also Cabrera v. State, 766 So. 2d 1131, 1134 (Fla. 2d DCA 2000).

II. Analysis

A. Introduction

This Court has defined an "alibi" as follows:

> The defense known in law as an "alibi" is that, at the time of the commission of the crime charged in the indictment, the defendant was at a different place, so that he could not have committed it…
>
> "**An 'alibi' in law simply means that the defendant was not there; or, to state it more definitely, a defendant who sets up an alibi shows such a state of facts surrounding his whereabouts at that particular time as would make it practically improbable or impossible for him to have committed the offense charged**." *State v. Child*, 20 Pac. 275, 276, 40 Kan. 482.

See Blackwell v. State, 79 Fla. 709, 720 (Fla. 1920) (emphasis added) (some internal citations omitted).

Trial counsel repeatedly used the word "alibi" in his opening statement to the jury, indicating that at the time of trial, he believed he was proceeding under an alibi theory:

> Defense: [Y]ou'll hear from the plumber, Mr. Jannette…He's not going to say Mr. Mosley was trying to set up an **alibi**. He's not going to say he was trying to get me in a perfect window of time to look good.

(12 PCR 583) (emphasis added).

> Defense: And you'll hear from their tower expert…/and the cell records are going to show that that's where he's at. That is where he is. Everybody knows it. Nobody is crunching for **alibis**. Nobody is squeezing time frames.

(12 PCR 585) (emphasis added).

> Defense: [T]here's going to be a woman by the name of Gwendolyn Lamb who's going to testify that she was on the phone with Ms. Wilkes during that time frame…See, her call goes about another 11 minutes…That's her phone. Her phone records are going to show that supporting the time frame, not us making up an **alibi**. Her phone records are going to show that.

(12 PCR 586) (emphasis added).

> Defense: So around 8:00, 9:00, or 10:00 o'clock while Mr. Mosley is still at work the bodies are right here…Mr. Mosley knows he's going to work. That's his **alibi**? Leave a suburban in the normal spot where he normally parks, but that's what the evidence will show because that's where he went.

(12 PCR 599) (emphasis added).

Counsel then called at least 6 witnesses at trial to verify that "[Mosley's] whereabouts at that particular time…would make it practically improbable or impossible for him to have committed the offense charged":

Dr. Christy Aston: Dr. Aston testified that Carolyn Mosley brought Amber Mosley in to her office on April 22, 2004 because she was not feeling well. Dr. Aston's testimony corroborated Carolyn Mosley's testimony that Carolyn picked

Amber up from school because she was sick, visited the doctor for a short period of time sometime around 12:04 for a 15 minute appointment, and was home with Mr. Mosley around 1:00 p.m. the day Lynda Wilkes and Jay-Quan were allegedly killed. (18 R 1621-28.)

Jimmy Horton: Mr. Horton runs Quality Tire. He recalled Mosley coming to his store on the morning of April 22, 2004. Mr. Horton testified that Mosley had a flat tire; that they fixed it and him out before 1:00 p.m. Mr. Horton also testified that he recalled Mosley coming back into the shop later for something and that he had previously sworn in deposition that Mosley stopped back by the shop around 1:00 p.m. This testimony corroborated Mosley's story that he left the house, noticed that he had a flat tire, and went to Quality Tire to have the flat repaired. It also substantiates Mosley's claim that he went back to Quality Tire to retrieve his valve cap around 1:00 p.m. (18 R 1629-37.) Most importantly, Mr. Horton testified that when Mosley returned to Quality Tires around 1:00 p.m. there were no bodies and no tarps in Mosley's SUV. (18 R 1636.)

Jim Jeanette: Mr. Jeanette testified that Mosley called him from work one evening and informed him that his toilet was leaking and that he had attempted to repair it himself. Mosley indicated that it was an emergency and requested that Jeanette come by the house to fix the plumbing that night. Mr. Jeanette informed Mosley that he would be by the next day. (18 R. 1743-62.) Although Mr. Jeanette

did go by Mosley's house on April 22 around 3:00 to 3:30 to make repairs, Mosley was not there—he was at work. The toilet was broken. The water was off. There were wet towels around the area. He spoke with Mosley on the phone and Mosley did not sound out of sorts. This testimony substantiates Mosley's claims that he had been having problems with his plumbing; that Mosley would have had the necessity of trying to fix the plumbing himself and run errands to retrieve plumbing supplies because his toilet was leaking and the water in his house had to be turned off until the toilet was repaired; that he spoke with Mr. Jeanette on the phone; that he was late for work on April 22, 2004 because he was waiting for Mr. Jeanette to arrive; and that he ultimately missed Mr. Jeanette, because he had to leave for work. (18 R 1743-62.)

Amber Mosley: Amber Mosley testified that on April 22, 2004, she went home from school early because she was not feeling well. Her mother picked her up from school, visited Amber's physician, stopped by the Food Lion, and arrived home around 1:00 p.m. She says that she saw her father at home that day and that there was a problem with the bathroom. She says her father later left for work. This testimony corroborated Mosley's story that he was at home on April 22, 2004 around 1:00 p.m. (19 R 1810-21.)

Alexis Mosley: Alexis Mosley testified that her father arrived home around 11:30 p.m. on April 22, 2004. She says that her sister, Amber, was there when

Mosley arrived home, but that she had not been feeling well that day and was not awake when Mosley arrived. Alexis says that her mother, Carolyn, was also there when Mosley arrived home. Alexis also says that she saw her father asleep in his bed the next morning around 5:15 a.m. when she awoke for school. When she left the house, Mosley's Suburban was parked in the driveway. (19 R 1822-34.)

Carolyn Mosley: Carolyn Mosley testified that the Suburban owned by she and her husband had tire problems that were repaired. She testified that on April 22, 2004 her daughter was sick, so Carolyn picked her up from school and brought her to the doctor. Carolyn testified that they arrived home around 12:30. Mosley arrived home shortly thereafter. Carolyn also verified that they had plumbing problem at the house on the 22nd. They arranged to have Mr. Jeanette fix the plumbing. Mosley was not home when Mr. Jeanette finally arrived. Carolyn put Mosley on the phone with Mr. Jeanette when he arrived to fix the toilet. She testified that Mosley came home from work on April 22, 2004 wearing his work attire, that she retrieved groceries from the Suburban, yet did not notice any bodies or foul smell. She and Mosley went to bed around 1:00 p.m. Mosley did not leave the house after they went to bed that night. Mosley was still at home when she woke up the next morning around 5:30 a.m. This information corroborated Mosley's sequence of events as to where he was on the day(s) that the victims were allegedly murdered and disposed of. (19 R 1881-1922.)

On trial counsel's cue, the state also referred to Mosley's defense as an alibi defense in closing arguments:

State: I was at work. That's his first attempt at an alibi.

(20 R 2085.)

State: He was at Jamila's, and look at that letter. He was at Jamila Jones at about 6:00 o'clock. The defendant tried very hard to make an alibi.

(20 R 2086).

Even co-counsel for the defense admitted in evidentiary hearing that it could have been an alibi defense (9 PCR 1709) and that he could not think of any harm it would have done to request an alibi jury instruction:

Q: [I]f the defense is putting forward witnesses to say defendant – defendant Mosley was somewhere else, what's the harm in not [sic] requesting an alibi defense?

A: I don't have an answer for that. It's something they could have considered, yeah.

(9 PCR 1710.) Despite that everyone (including lead counsel in opening statements of trial) is in agreement that Mosley presented an alibi defense, lead trial counsel refused to admit this point in postconviction.

B. <u>Deficient performance</u>

Where counsel presented an alibi defense, and this was the only defense presented at trial, counsel was deficient in failing to request the alibi instruction that would have given the jury the tools to determine Mosley's guilt or innocence

in the case. Mathis, 973 So. 2d at 1157. Had the instruction been requested, the court would have been compelled to so instruct the jury.[18] Hudson v. State, 381 So. 2d 344, 346 (Fla. 3d DCA 1980). ("It is not the function of the trial judge to weigh the evidence and select some cases in which to give the alibi instruction. The instruction should be given in every case where there is sufficient evidence to take the issue to the jury.")

In attempting to explain away the deficient act of failing to request an alibi jury instruction, trial counsel repeatedly distinguished his theory at trial from an alibi defense, stating that his defense was to put Mosley in various times and places to show that it would have been impossible or impracticable for him to have committed the crimes. On the other hand, posited counsel, an "alibi defense," means that the defendant was in a definite, single place, other than the crime scene when the crimes were committed. (9 PCR 1673-74.) He felt that he needed

---

[18] This so even where counsel neglected to file a Notice of Alibi with the State pursuant to Florida Rule of Criminal Procedure 3.200:

> It is well settled that a defendant is entitled to have a jury instructed on the law applicable to his or her theory of the defense. In Ramsaran v. State, 664 So. 2d 1106, 1107 (Fla. 4th DCA 1995), we held that it was reversible error to fail to instruct the jury on the theory of alibi where evidence was presented supporting the defense, despite the defendant's noncompliance with Rule 3.200. Failure to follow the notice provision of the rule does not authorize a trial court to refuse to instruct on the alibi defense as a sanction.

Ivory v. State, 718 So. 2d 233, 233-34 (Fla. 4th DCA 1998).

something "rock solid" to show the jury for it to constitute an alibi defense and he did not think he had that. (9 PCR 1675.)

Counsel cannot insulate himself from this deficient performance upon a claim of "strategy." As aptly stated by the Ninth Circuit, "We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to 'deliberately omit' his client's only defense…" U.S. v. Span, 75 F. 3d 1383, 1390 (9th Cir 1996). This is especially so where trial counsel's "strategy" was based on a misunderstanding of the law. See Lawhorn v. Allen, 519 F.3d 1272, 1295 (11th Cir. 2008) ("Tactical or strategic decisions based on a misunderstanding of the law are unreasonable."); Hardwick v. Crosby, 320 F.3d 1127, 1163 (11th Cir. 2003) ("a tactical or strategic decision is unreasonable if it is based on a failure to understand the law"); Butler v. State, 84 So. 3d 419, 421 (Fla. 5th DCA 2012); State v. Williams, 127 So. 3d 890, 896 (Fla. 1st DCA 2013).

As set forth in Blackwell, above, despite trial counsel's claims to the contrary, the defense theory fits the exact definition of an alibi: "a state of facts surrounding [Mosley's] whereabouts at that particular time [or timeframe] as would make it practically improbable or impossible for him to have committed the offense charged." Blackwell, 79 Fla. at 720. The Fourth DCA in Rostano v. State, 678 So. 2d 1371 (Fla. 4th DCA 1996) reversed where trial court refused to give an alibi jury instruction because it misunderstood the definition of "alibi." The

appellate court found:

> In the instant case, the trial court concluded that Rostano's claim to be in another part of his house away from his garage did not provide an alibi to the charges against him:
>
> > I don't find that to be an alibi. *To me an alibi is I couldn't have been in this part of town, I was in another part of town at the same place and time.*
>
> (Emphasis added). In this case, Rostano offered evidence that he was on the third floor of the building. By evidence adduced at trial, Rostano was entitled to have the jury consider whether he was "precisely at the scene of the crime."

Id. at 1372. Where as in in Rostano, defense counsel misunderstood the definition of an "alibi" (as set forth in Blackwell), his declaration of strategy on this point must fail. Hardwick, 320 F.3d at 1163.

Trial counsel's claim that he would have "lost credibility with the jury" (e.g. 9 PCR 1595, 1675) had he requested an alibi jury instruction is also specious where he argued an alibi defense throughout trial, actually used the word "alibi" on numerous occasions, and the state attorney repeatedly referred to his defense as an alibi defense. It is unreasonable to think counsel would have "lost credibility" with the jury by giving them an alibi jury instruction where his entire defense theory from his first utterances in opening statement was an alibi theory. If an alibi defense was really going to damage his credibility, the damage to was certainly already done when he presented **six alibi witnesses**.

C. Prejudice

The murders at issue were committed between 12:57 and 1:21 p.m. on April 22, 2004. (9 PCR 1556-57, 1567.) Defense counsel presented several alibi witnesses at trial including Mosley's wife and daughters to testify that he was home around 1:00 p.m. that day, making it all but impossible for him to have participated in the crimes. (19 R 1810-21, 1822-34, 1881-1922.)

Mosley was prejudiced by his counsel's failure to request the alibi instruction and his Sixth and Fourteenth Amendment right to due process and effective assistance of counsel were violated where his attorney failed to request the most basic tool to ensure that his jury had the information it needed to render a not guilty verdict: instructions informing the jury that they should find him not guilty if they had reasonable doubt that he may not have been there.

> ALIBI: An issue in this case is whether defendant was present when the crime allegedly was committed. If you have a reasonable doubt that the defendant was present at the scene of the crime, it is your duty to find the defendant not guilty.

Fla. Std. Jury Instr. § 3.6(i) (2010).

Obviously, where counsel failed to request the alibi jury instruction, the instruction was not presented to the jury. While the jury likely understood that Mosley put on evidence that he was not at the scene(s) of the crime(s), the jury was not instructed as to how to weigh and consider the alibi information and how this

information should be evaluated. In Hudson v. State, where a defendant argued on direct appeal that the trial court erred in refusing to give an alibi jury instruction, the reviewing court found that the error of the trial court was not harmless:

> The state argues that since the jury received an instruction on presumption of innocence, the court's failure to give the alibi instruction was, at most, harmless error. We disagree. **In the absence of an instruction delineating the burden of proof required of the defendant, the jury could well have held the defendant to a standard beyond that required by law.** Where evidence is inconclusive, the trial judge has a duty to provide standards for the jury to follow.

381 So. 2d at 346 ; see also Williams v. State, 395 So. 2d 1236, 1238 (Fla. 4th DCA 1981) ("Obviously, the evidence of alibi was sufficient to raise a reasonable doubt as to appellant's presence at the scene of the sexual battery. Therefore, the trial court committed reversible error in failing to instruct the jury on alibi pursuant to appellant's request.")

Similarly, this Court should find that there is a reasonable probability that the outcome of Mosley's trial would have been different but-for counsel's failure to request the necessary jury instruction.

GROUND VI

TRIAL COUNSEL WAS DEFICIENT IN FAILING TO OBJECT TO NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT IN MOSLEY'S TRIAL AMOUNTING TO FUNDAMENTAL ERROR PREJUDICING MOSLEY AND RESULTING IN VIOLATIONS OF MOSLEY'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND

CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

I. Applicable law

Prosecutorial misconduct has "long been recognized" as grounds for reversal. Berger v. United States, 295 U.S. 78 (1934) ("it is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertion of personal knowledge, are apt to carry weight against the accused when they should proper carry none.") In Greer v. Miller, 483 U.S. 756, 765 (1987) the Supreme Court stated:

> This Court has recognized that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.

Id., citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); United States v. Bagley, 473 U.S. 667, 676 (1985).

Because the following claims of prosecutorial misconduct were not preserved with objections at trial, Strickland is the appropriate standard for ascertaining error. Brooks v. Kemp, 762 F.2d 1383, 1402 (11th Cir. 1985) (The "Strickland v. Washington test, requiring an assessment of errors to determine whether there is a reasonable probability that they changed the outcome of a case,

is applicable to our analysis of whether improper closing arguments delivered by the prosecuting attorney rendered the capital sentencing hearing fundamentally unfair.") However, Strickland's prejudice analysis must now ask whether the complained of comments constituted fundamental error. See Hendrix v. State, 908 So. 2d 412, 426 (Fla. 2005) ("Appellate counsel may not be deemed ineffective for failing to challenge an unpreserved issue on direct appeal unless it resulted in fundamental error.")

I. Deficient performance

Counsel was deficient in failing to object to the following improper comments of the prosecution:

A. Guilt Phase

Improper Vouching

The Florida Supreme Court in Gorby v. State, 630 So. 2d 544 (Fla. 1993), held, "It is improper to bolster a witness' testimony by vouching for his or her credibility." See also Parker v. Allen, 565 F.3d 1258, 1274 (11th Cir. 2009) ("A prosecutor's comments constitute improper 'vouching' if they are 'based on the government's reputation or allude to evidence not formally before the jury.'"); United States v. Young, 470 U.S. 1, 7, 9 (1985) (counsel have a duty to refrain from commenting on their personal views on a defendant's guilt and the evidence).

Trial counsel for Mosley failed to object to Detective Craig Waldrup's

bolstering and vouching for Bernard Griffin upon questioning from the prosecutor:

> State: **Was it Bernard's demeanor and the way he reacted to certain areas that led you to believe he was being truthful**?
>
> Waldrup: Yes, it was.

(14 R 826.) Trial counsel conceded in evidentiary hearing that this comment was "close to being objectionable" and "it could be depending on the context." (9 PCR 1623-24.)

Trial counsel again failed to object to Detective Mark Romano bolstering and vouching for Bernard Griffin's testimony.

> Defense: Without telling me, was there yet still another version?
>
> Romano: I think he gave me – **the final version is the truth, sir**. I mean he was minimizing his involvement. No doubt about it.

(15 R 1127) (emphasis added). Trial counsel failed to object again to Det. Romano bolstering and vouching for Bernard Griffin's testimony.

> Romano: He [Griffin] had said that. **I didn't have any reason to believe that he was lying about that**.

(15 R 1145) (emphasis added). Throughout the guilt phase closing argument, the state vouched for the credibility of the work conducted by the police during investigation:

> State: [B]ut at the same time back in Jacksonville another small army of good people was working just as hard day and night

uncovering a different kind of mountain, a mountain of evidence…

They (police) found the truth, that is why we are here.

(19 R 1955) (emphasis added). Trial counsel conceded, in evidentiary hearing, that this comment was "close to objectionable" as "improper bolstering." (9 PCR 1626, 1628.)

State: **Gabe Caceras did not quit…Gabe Caceres was diligent in his work. Remember Dr. Tracy? The "expert of experts?"**

(19 R 1955-56) (emphasis added).

State: They tried and you saw how they tried. They didn't do it. They didn't find him. That's not a reasonable doubt. **That's good work**.

(19 R 1984) (emphasis added).

State: **Well, you heard Gary Stucki has about 18 years on. That's no rookie**.

(20 R 2071) (emphasis added).

State: You heard from Detective Romano and Detective Stucki. **These are not rookie officers**.

(20 R 2073) (emphasis added).

State: The police told you, Detective Romano and Detective Stucki told you the recap on May 5th was leading. **They weren't trying to cover anything up**…and if they were trying to feed Bernard they really didn't do a good job.

(20 R 2074) (emphasis added.)

The preceding statements were made by the state in the attempt to use the government's reputation and experience to bolster the credibility of Griffin and the investigation in the case. This is not a case where an isolated comment was made in closing argument. The record reflects that the prosecution's vouching was pervasive.

Denigration of Defendant and Defense

It is improper for a prosecutor to refer to the accused in derogatory terms, in such manner as to place the character of the accused in issue. Pacifico v. State, 642 So. 2d 1178, 1182 (Fla. 1st DCA 1994); Lewis v. State, 377 So. 2d 640 (Fla. 1979); Donaldson v. State, 369 So. 2d 691 (Fla. 1st DCA 1979); see also Slagle v. Bagley, 457 F.3d 501, 522 (6th Cir. 2006) ("for purposes of this appeal, we consider five of the statements denigrating the defense to have been improper."); United States v. Carter, 410 F.3d 1017, 1026 (8th Cir. 2005) ("Mr. Carter objects to the prosecutor's description of Mr. Carter as a "con man" and "deviate [sic]," among other things, during closing argument. Such name-calling is improper…")

Prosecutorial denigration and name calling has long been condemned by Florida's Courts. It is patently improper for the prosecution to refer to a defendant in derogatory, vituperative, or pejorative terms. Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989); Urbin v. State, 714 So. 2d 411 (Fla. 1998) ("ruthless killer", "brutal and vicious character"); Brooks v. State, 762 So. 2d 879 (Fla. 2000) ("true-

deep seeded, violent character", "vicious violent men"); Pacifico, 642 So. 2d 1178 ("sadistic selfish bully", "criminal", "slick fraternity boy"); Biondi v. State, 533 So. 2d 910 (Fla. 2d DCA 1988) ("slime"); Duque v. State, 498 So. 2d 1334 (Fla. 2d DCA 1986) ("scumbag"); Izquierdo v. State, 724 So. 2d 124, 125 (Fla. 3d DCA 1998) (reference to a defendant's testimony as a "pathetic fantasy" was improper). In Brooks, 762 So. 2d 879, the Florida Supreme Court reversed the death sentence and held that it was improper to denigrate the defense's case as "flimsy", "phantom", or "excuses."

The state in guilt phase closing argument attempted to paint Mr. Mosley as a despicable person whose actions were merely an attempt to avoid facing charges:

> State: [T]hat he goes over, he meets with Lynda and he gives this story, **his fantasy story**, about getting oral sex from her and then according to him he goes right back home to rush back to his toilet.

(20 R 2083.)

> State: [Mosley] lived his life with the unfaltering belief that **he could go on with complete impunity in every aspect of his life**. Well, that stops today.

(19 R 1968.) Co-counsel acknowledged in evidentiary hearing that this comment was improper. (9 PCR 1715.)

> State: He gave false statements to David Jordan….**It was a lie**, and he told Terrance Forbes that he had been up all night.

(20 R 2085-86.) Co-counsel admitted in evidentiary hearing that this comment

"would probably be objectionable, too, yeah." (9 PCR 1715.)

> State: We know that's not true. We know it's not true. **That was a lie**. He was at Jamila's, and look at that letter. He was at Jamila Jones at about 6:00 o'clock.
>
> The defendant tried very hard to make an alibi.

(20 R 2086.)

> State: He's a victim of his own greed and desire.

(19 R 1969.) When asked in evidentiary hearing whether this comment should have been objected to, co-counsel admitted: "That's marginal. Probably – be on the safe side probably be objectionable." (9 PCR 1717.)

> State: Nothing about the grandmother, nothing, **he lied to them**.

(19 R 1969.)

As was the case with the prosecution's impermissible witness vouching comments, the denigration of the defendant and the defense presented at trial were numerous, repetitive, and invasive throughout the guilt phase closing argument.

B. Penalty Phase

The impermissible comments by the prosecution continued into the penalty phase of defendant's trial. Trial counsel objected to none of the listed impermissible statements and arguments.

Prosecutorial "Expertise"

The prosecution engaged the jury with an irrelevant argument that was

meant to bolster the legitimacy of the state's case and to reassure the jury that because the State was seeking death it meant that Death was therefore the appropriate penalty. Specifically, the prosecution stated:

> State: [W]e have told you death is not appropriate and it's not sought in every first degree murder case but it is sought in this one.

(22 R 2412.) Trial counsel agreed that this argument constituted improper prosecutorial expertise. (9 PCR 1636-37.) Co-counsel enthusiastically agreed that this remark was "highly improper," stating:

> A: Right. I think that whole series of cases, and I think it's gotten stronger for the defense since I think it was Urban…
>
> ***
>
> A: Right. This case is – you know, these are the right circumstances for the imposition and recommendation by you of the death penalty. **I think that's I think that's highly improper**.
>
> **To paint the prosecutorial expertise, you know. You may not know about this, folks, but, you know, we know what we're doing. We're the experts and we decided that this is the case where the death penalty needs to be imposed. That's not – that's not their job.** That's – that's you taking that away from the jury and you giving – just like a law enforcement officer can't get up there and say that – a lot of times they'll try to do that.

(9 PCR 1718-19) (emphasis added).

The state soon after offered another assurance to the jury that the defendant's case was one necessitating the Death Penalty:

> State: **Today its justice we're asking you to deliver**, and I submit to you that **justice not only means accountability, it means full accountability**….and I submit to you that John Franklin

> Mosley has been given his day in Court and had a fair trial and **these are the right circumstances for the imposition and recommendation by you of the death penalty**.

(22 R 2422) (emphasis added). This similar line of argument used by a prior Fourth Judicial Circuit prosecutor whose conduct was condemned by this Court in Brooks, 762 So. 2d 879, and Davis. Davis v. State, 136 So. 3d 1169, 1206 (Fla. 2014) ("Davis contends that appellate counsel should have challenged the following argument: 'As we talked about in jury selection, you know the State of Florida does not seek the death penalty in every case, because it's not just proper in every case. But I submit to you, in this case, it most certainly is.' Davis is correct that this prosecutorial expertise argument is improper.")

This Court has already considered these statements on direct appeal, finding "These comments come close to our prohibition against prescreening comments as to the selection process for first-degree murder cases condemned in Brooks." Mosley, 46 So. 3d at 522. Although this Court determined that the comments did not rise to fundamental error, Mosley now argues that where these comments are considered in conjunction with the other improper comments discussed in this claim, fundamental error occurred.

State Mischaracterization of the Requirements of Law and "Easy Way Out" Arguments

During penalty phase closing argument, the prosecution improperly

instructed the jury on the requirements of justice under Florida law:

> State: **Today its justice we're asking you to deliver**, and I submit to you that **justice not only means accountability, it means full accountability**….and I submit to you that John Franklin Mosley has been given his day in Court and had a fair trial and **these are the right circumstances for the imposition and recommendation by you of the death penalty**.

(22 R 2422) (emphasis added). This statement served to impermissibly instruct the jurors that the interests of justice could only be served through a recommendation of death for both convictions. A death sentence is never required under Florida law. Similar statements were made in Urbin, 714 So. 2d at 421 which were ruled impermissible by the court: "The prosecutor also misstated the law as we have defined it regarding the jury's obligation to recommend death." Citing Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996) (stating that "a jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors"); and Garron v. State, 528 So. 2d 353, 359 n.7 (Fla. 1988) (misstatement of the law to argue "that when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty").

In addition to mischaracterizing the law, the prosecution improperly instructed the jury and insisted that any vote for life would be a violation of the juror's duty:

> State: [A]nd I submit to you the easy thing to do is to say to yourself what difference does it make? John Mosley is

> going to die in prison no matter what we do….a recommendation for death on each of these murders may **not be an easy thing to do but I submit to you it's the right thing to do**.

(22 R 2423). Kuritz acknowledged that this comment was "dangerously close" to constituting a personal opinion of the prosecutor. (9 CPR 1637-38.) His counsel admitted that the comment should have been objected to. (9 PCR 1719-20.)

Again, a very similar argument was offered by the prosecutor in Urbin in which the court stated:

> To aggravate matters further, the prosecutor asserted that any juror's vote for a life sentence would be irresponsible and a violation of the juror's lawful duty. The prosecutor argued that "**my concern is that some of you may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life**." The prosecutor continued, "I'm going to ask you not be swayed by pity or sympathy. I'm going to ask you what pity, what sympathy, what mercy did the defendant show Jason Hicks. I'm going to ask you to follow the law. I'm going to ask you to do your duty."

Urbin, 622 So. 2d at 421. The court in Urbin, relying on Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988) and Garron, 528 So. 2d at 359 n.10 (finding prosecutor misstated law when he exhorted the jury that it "is your sworn duty as you came in and became jurors to come back with a determination that the defendant should die for his actions") found that the above-quoted comments of the state were **"an impermissible attempt by the prosecution to instruct the jury as to the its**

duties and functions." Id. (emphasis added.)

C. Discussion

The trial court rejected Mosley's prosecutorial misconduct assertions relying on lead counsel's rationale that he failed to object for "strategic" reasons. (7 PCR 1253.) This conclusion is erroneous for at least two reasons: first, there is no indication that trial counsel even considered objecting to any of the above-listed comments at trial, let alone that he failed to object for strategic reasons.

Additionally, this claim of strategy, and the trial court's reliance on it, must fail where, had counsel lodged proper objections, the comments would have amounted to reversible error. See Hodges v. State, 885 So. 2d 338, 367 (Fla. 2003) ("in my view Hodges has demonstrated that trial counsel's failure to object was deficient and could not be deemed a reasonable strategic decision because the argument was clearly improper and, if objected to, would have constituted reversible error.") (Pariente, C.J., dissenting). In Eure, the Second DCA found:

> If we could determine that in any way the defense counsel's failure to object was a strategic move, we would not find ineffectiveness; however, in light of the egregious arguments made by the prosecutor, we conclude that counsel's failure to object fell below any standard of reasonable professional assistance. Moreover, there is a reasonable probability that the outcome would have been different because, had an objection and motion for mistrial been made and denied by the trial court, the error would have been preserved.

Eure v. State, 764 So. 2d 798, 801 (Fla. 2d DCA 2000). As in Eure, counsels'

failure here to enter contemporaneous objections to the numerous egregious comments of the prosecutor in this case fell below any reasonable standard of professional assistance.

II. Prejudice – the failure to object to numerous instances of improper prosecutorial remarks resulted in fundamental error

Although the comments above may not constitute fundamental error when considered singularly, the cumulative affect of the state's improper comments tips the scale in favor of reversal. Sireci v. State, 587 So. 2d 450, 452 (Fla. 1991).

Aside from the testimony of a scared teenager, who received probation for his role in two grizzly murders in exchange for testifying against Mosley, there was no direct evidence correlating Mosley to the crimes. All the state had were some cell phone records (of a phone that Mosley says he lent to Griffin), the victim's DNA in his truck (a truck that Mosley and the victim had sexual relations in), and Mosley's odd behavior (plausibly related to his wife's impending realization of numerous extramarital affairs). The prosecutor in evidentiary hearing all but admitted that the evidence against Mosley was weak, stating that Griffin's testimony was crucial to the state's case and that she "needed Griffin's testimony." (10 PCR 1883, 1890.) Furthermore, the prosecutor knew that Griffin had given conflicting accounts of the events in question and that his credibility was a concern. (10 R 1765, 1864, 1867.) In an effort to tidy up this case and enhance

the significance of the marginal evidence, the state bolstered the investigators in the case, vouched for the credibility of law enforcement officers and Griffin, and belittled Mosley and his testimony. Then in penalty phase, the prosecutor instructed the jury that they must recommend death or else justice would not be served. (22 R 2422.)

The guilty verdicts and death recommendation in this case could not have been secured absent the repeated prosecutorial improprieties in this case.

GROUND VII

MOSLEY'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE VIEWED AS HARMLESS WHEN CONSIDERED AS A WHOLE. THE COMBINATION OF ERRORS DEPRIVED MOSLEY OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Because of the uniqueness and severity of the death penalty, the United States and Florida Supreme Courts have held that errors, when viewed as a whole, can amount to cumulative error that requires a reversal in convictions even if the errors would not require a reversal if viewed individually. See e.g. Berger, 295 U.S. at 88-89 ("[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. ");

Jones v. State, 569 So. 2d 1234 (Fla. 1990) (remanding for new penalty phase due to "cumulative errors").

It is Mosley's position that the various errors in his trial individually and cumulatively resulted in a violation of his right to a fair trial under the United States and Florida Constitutions and are sufficient to require reversal of his guilt and penalty phase. This is especially true the state committed a Giglio violation, a Brady violation, and made numerous improper prosecutorial remarks during trial. Had the state's improprieties not occurred, had counsel rendered a constitutionally sound performance, and had an actually biased juror not sat on Mosley's panel, it is more likely than not that he would not have been convicted, and at the very least, he would not have received a death sentence, especially in light of the Life recommendation for Jay-Quan and an 8-4 recommendation for death as to Lynda Wilkes.

The cumulative affect of these errors resulted in violations to Mosley's Sixth Amendment rights to a fair and impartial trial, Sixth Amendment right to counsel, Fifth and Fourteenth Amendment rights to due process and ultimately in an Eighth Amendment violation of his right against arbitrary and capricious and cruel and unusual punishments.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Mosley respectfully requests

this Honorable Court reverse and remand the trial court's denial of his 3.851 Motion for Postconviction relief for a new trial.

Respectfully submitted,
THE SICHTA FIRM, LLC.,

/s/ Rick Sichta
RICK SICHTA, ESQUIRE
Fla. Bar No.: 0669903
301 W. Bay St. Suite 14124
Jacksonville, FL 32202
Phone: 904-329-7246
Email: rick@sichtalaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via email to the Office of the Attorney General at capapp@myfloridalegal.com and 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