IN THE SUPREME COURT OF FLORIDA

JOHN F. MOSLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC14-436

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JOHN F. MOSLEY, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (2014), this brief will refer to a volume according to its respective designation within the Index to the Record of Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

Standard of Review

Arguments I, II, V, and 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 that are supported by competent, substantial evidence, and will review the application of the law to the facts de novo. *See Lynch v. State*, 2 So.3d 47, 83 (Fla. 2008) (citing *Sochor v. State*, 883 So.2d 776, 785 (Fla. 2004)); *Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012). The reviewing court should not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses, as well as the weight to be given to the evidence by the trial

court. *Lowe v. State*, 2 So.3d 21 30 (Fla. 2008) (quoting *Blanco v. State*, 702 So.2d 12, 1250, 1252 (Fla. 1997).

Argument III

In reviewing a trial court's decision as to a newly discovered evidence claim following an evidentiary hearing, the reviewing court must determine whether the trial court's findings are supported by competent, substantial evidence. The reviewing court should not substitute its judgment for that of the trial court on questions of fact, credibility of the witnesses, or the weight to be given to the evidence by the trial court. *Jones v. State*, 709 So.2d 512, 532 (Fla. 1998) "[A]bsent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence [including a witness's newly recanted testimony] will not be overturned on appeal." *Lowe*, 2 So.3d at 39 (brackets in original) (quoting *Mills v. State*, 786 So.2d 547, 549 (Fla.2001)).

Argument IV

Where the trial court denies a postconviction claim without conducting an 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 if the record conclusively shows that the movant is entitled to no relief." *Gore v. State,* 91 So.3d 769, 774 (Fla.) (quoting *Walton v. State,* 3 So.3d 1000,

1005 (Fla.2009)), *cert. denied,* --- U.S. ----, 132 S.Ct. 1904, 182 L.Ed.2d 661 (2012).

Argument VII

There is no standard of review for this issue, as the Court is not reviewing any particular ruling or action by the trial court.

STATEMENT OF THE CASE AND FACTS

This is a postconviction appeal of the trial court's denial of an initial postconviction motion in a capital case. Mosley was convicted of two counts of first-degree murder for the killings of Lynda Wilkes and the baby she and Mosley had conceived, Jay-Quan. The jury was presented with evidence establishing that he was the last one with the victims; that he had recently been ordered to pay Ms. Wilkes child support; Mosley's cell phone records placed him at the scene, where Ms. Wilkes' body had been disposed of and burned, at the time of the disposal; Ms. Wilkes' blood was found in the back of Mosley's Suburban; his accomplice, Bernard Griffin's testimony that he was with Mosley at the scenes of the murders and body disposals; and Mosley's attempts to convince witnesses (consisting of a girlfriend and his family) to alter their testimony in order to provide him an alibi.

Mosley v. State, 46 So.3d 510, 514-18 (Fla. 2009).

On appeal to the Florida Supreme Court, Mosley raised thirteen issues.[1] At oral argument, Mosley abandoned claims five

[1] The claims included:(1) the due process clause of the Florida Constitution provides more protection to criminal defendants than the United States Constitution; (2) the prosecutor made improper and inflammatory remarks that deprived Mosley of a fair trial; (3) the trial court erred in admitting the recorded husband-wife jail calls; (4) the trial court erred in denying Mosley's motion for a continuance and for a mistrial based on a

and nine, as they were not supported by the record. *Id.* at 518. The Florida Supreme Court rejected the remaining claims, affirmed the convictions and death sentence. *Id.* at 529.

Mosley then sought certiorari review in the United States Supreme Court raising five issues.[2] The United States Supreme

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defense witness who failed to appear at trial; (5) the trial court erred in allowing a videotape of the defendant in shackles and jail garb to be delivered to the jury room; (6) the trial court erred in effectively ruling that a double murder automatically suffices as the "previously convicted of another capital felony" aggravating circumstance; (7) the trial court erred in denying Mosley's motion for judgment of acquittal; (8) the trial court erred in denying Mosley's motion for a new trial because the guilty verdict was contrary to the weight of the evidence; (9) the trial court erred in denying Mosley's request for the standard jury instruction which concerns pressure or threat against a witness; (10) Florida's death penalty scheme violates the Sixth Amendment and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (11) this Court's comparative proportionality review of death sentences is unconstitutional; (12) Mosley's sentence of death is disproportionate; and (13) lethal injection and Florida's lethal injection procedures are unconstitutional.

[2] The issues included:(1) Mosley's right to due process was violated when the Florida Supreme Court affirmed his convictions and death sentence; (2) ineffective assistance of trial counsel for failing to file a motion for rehearing and to raise a number of fundamental errors on appeal; (3) Mosley's right to a fair trial was violated by prosecutorial misconduct at trial and on direct appeal; (4) ineffective assistance of appellate counsel for failing to adopt Mosley's pro se pleadings and to raise other claims alleging constitutional and plain error; and (5) the trial judge's errors violated Mosley's right to a fair trial.

Court denied certiorari review on October 4, 2010. *Mosley v. State*, 131 S.Ct. 219, 178 L.Ed.2d 132, 79 USLW 3200 (2010) (No. 09-11555).

On December 19, 2011, Mosley filed a motion for postconviction relief which was later heard by the trial court. It did not conform with Rule 3.851 because it exceeded the rule's seventy-five page limit. On January 5, 2012, Mosley filed a motion to exceed page limitations. On January 19, 2012, that motion was granted. It raised seventeen claims: (1) trial counsel was ineffective for failing to request an alibi instruction; (2) trial counsel was ineffective for failing to strike Juror Reed; (3) trial counsel was ineffective for failing to present Dr. Baum, a DNA expert, at trial; (4) trial counsel was ineffective for failing to move to exclude the DNA evidence from trial and failing to request a *Frye* hearing; (5) trial counsel was ineffective for failing to object to incidences of prosecutorial misconduct; (6) the State committed a *Brady* violation when it failed to provide monitoring logs of a GPS device placed on Mosley's car after the murder, as well as surveillance videos; (7) certain public records had been withheld, precluding Mosley from drafting an adequate 3.851 motion; (8) cumulative error deprived Mosley of a fair trial; (9) the State committed a *Brady* violation by failing to disclose

that Bernard Griffin received a plea deal in exchange for his testimony; (10) the State committed a *Giglio* violation by knowingly presenting the false testimony of Bernard Griffin; (11) trial counsel was ineffective for failing to call certain witnesses and to present evidence that would have raised reasonable doubt as to Mosley's guilt; (12) trial counsel was ineffective by opening the door to damaging character evidence of Mosley's extra-marital affairs; (13) trial counsel was ineffective for failing to file a motion for disclosure of the grand jury transcripts and to file a motion to dismiss; (14) whether the evidence was sufficient to sustain Mosley's conviction; (15) trial counsel was ineffective for failing to file motions to suppress irrelevant evidence and for failing to object to the admission of irrelevant evidence; (16) trial counsel was ineffective for failing to challenge the variance in the indictment and to demand that co-defendant, Griffin, stand trial with him; and (17) the State violated Mosley's constitutional rights by claiming Bernard Griffin as a co-defendant, but not indicting him and requiring him to stand trial alongside Mosley. The State timely responded and a *Huff* hearing was subsequently held on May 4, 2012 before Senior Circuit Judge Michael R. Weatherby, who also presided over Mosley's trial. The trial court held a hearing on claims one,

three, four, five, nine, ten, and eleven on September 4-5, 2013, and October 14, 2013. Mosley was represented by Richard Sichta, Esquire and the State was represented by Assistant Attorney General Mitchell D. Bishop and Assistant State Attorney John I. Guy. Mosley called Mark Romano, a homicide detective with the Jacksonville Sheriff's Office; Richard Kuritz, Mosley's trial counsel; Quentin Till, Mosley's trial counsel; Jennifer Kayter, a police officer with the Jacksonville Sheriff's Office; Kimberly Long, a detective with the Crime Scene Unit at the Jacksonville Sheriff's Office; Michael Hurst, a private investigator; and Gary Stucki, a detective with the Jacksonville Sheriff's Office. Mosley also testified. The State called Ernest Edwards, an investigator for the State Attorney's Office, and Circuit Court Judge Elizabeth Senterfitt, who prosecuted Mosley as an Assistant State Attorney.

At the hearing and as it relates to the claims in Mosley's brief, specifically alleging *Giglio* and *Brady* violations as well as newly discovered evidence, the trial court heard testimony from Griffin, whose testimony varied; he testified about an affidavit he signed in the months preceding the hearing and vouched for its veracity, specifically concerning allegations that he had lied at trial when he testified that he had not been promised leniency by the State in exchange for his cooperation

against Mosley. He reiterated this position on direct, although he could not testify to having been given a specific sentence. On cross-examination by the State, Griffin conceded that his trial testimony had been truthful and that he did not have a plea deal before testifying at Mosley's trial. (PCR/10 1757-1804)

The court also heard from the prosecutor who had tried Mosley's case, now-Judge Elizabeth Senterfitt. She categorically denied making any plea deals or promises to induce Griffin to testify against Mosley and furthermore, stated it was not necessary because he had been cooperative all along, beginning with his voluntary contact with law enforcement. (PCR/10-1844-1892) The State also presented the testimony of its investigator, Ernest Edwards, who testified that he paid Griffin a visit after receiving his affidavit. Edwards told the trial court that Griffin told him he had not read the affidavit before signing it and did not want anything to do with this. (PCR/10 1809-13)

Richard Kuritz, Mosley's trial counsel, also testified. Although he suspected that Griffin had received a deal for his testimony, he contacted Griffin's attorney, who was a personal friend of his, and Griffin's attorney denied that any deals had been reached. (PCR/9 1599-1600, 1670-71)

Detectives Romano and Stucki, both with the Jacksonville Sheriff's Office, denied offering Griffin assistance in finding a job upon release from incarceration or having any knowledge as to any plea deals or promises. (R/XV 1157; R/XVI 1233)

As it relates to the claim of ineffectiveness for failing to request the alibi instruction, the trial court was presented the testimony of Richard Kuritz. Kuritz testified that he never considered Mosley's case a case involving an alibi because he did not have any evidence or witnesses to put Mosley at a specific place or with people for the entire time frame, during which the State alleged the murders and disposals occurred. His strategy was simply to poke holes in the State's case and argue to the jury that there was reasonable doubt. This was a strategy with which Mosley agreed. Consequently, he never sought the instruction. (PCR/9 1573-1694)

Regarding the claim of ineffectiveness for failing to object to alleged instances of prosecutorial misconduct as a result of testimony elicited and comments made in closing, Kuritz once again testified. He testified that his trial strategy is typically to object less than other attorneys. He does not want to object and highlight the objectionable testimony or comments for the jury, if he can, instead, argue it against the State in his closing. He also did not feel as if

most of the comments at issue were objectionable as they were based on facts in evidence. (PCR/9 1623-54)

After both parties filed their post-hearing briefs, the trial court denied Mosley's motion in an eighty-nine page order. This appeal follows.

SUMMARY OF ARGUMENT

ISSUE I

Mosley asserts that the prosecutor violated *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) by presenting the testimony of co-defendant, Bernard Griffin. At the time of trial, Griffin had maintained his not guilty pleas. At trial, he testified that he agreed to testify truthfully, he did not know how much time he was facing, no one promised anything in exchange for his testimony, and the prosecutors never suggested what sentence the trial court should impose. The trial court also heard from Judge Senterfitt, who testified that in her capacity as the prosecutor assigned to Mosley's case, she met with Griffin approximately four times before trial to discuss his testimony, that he was always cooperative, and she did not tell Griffin what sentence he would receive. The trial court found that Judge Senterfitt's testimony was both more credible and more persuasive than Mosley's allegations and that Griffin's trial testimony was not false. Therefore, Mosley was

unable to satisfy the first prong of the *Giglio* analysis. The trial court properly denied the *Giglio* claim following an evidentiary hearing on the matter.

ISSUE II

Mosley asserts that the prosecutor violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to disclose, prior to trial, that Bernard Griffin received favorable treatment in exchange for his testimony. Relying on the same evidence it relied on deciding Issue I, the trial court found that Judge Senterfitt's testimony was both more credible and more persuasive than Mosley's allegations. As the trial court found, Mosley was unable to establish that Griffin's trial testimony, in denying favorable treatment from the State, was false. The trial court properly denied this claim.

ISSUE III

Mosley submits that newly discovered evidence exists that Bernard Griffin knew he would receive a non-prison sentence in exchange for his testimony at trial, in the form of an affidavit executed by Mr. Griffin post-trial, and that this newly discovered evidence, when considered in conjunction with all other admissible evidence, would likely result in an acquittal on retrial. The trial court found that Judge Senterfitt's

testimony at the evidentiary hearing that Griffin did not have a plea deal, along with Griffin's trial testimony to the same effect, was more credible and persuasive that Griffin's testimony at the evidentiary hearing, as well as the statements contained in his affidavit. The trial court properly denied this claim.

ISSUE IV

Mosley contends that trial counsel was ineffective for failing to strike Juror "R" because she was actually biased against him, relying on statements she made in response to a question concerning gruesome photographs of one of the victim's bodies. As the trial court found, her answers showed that she may have experienced difficulty in looking at the photographs, but in no way established that she had an actual bias against Mosley or that she could not render a verdict solely upon the evidence presented at trial and the instructions given by the Court. The trial court properly denied this claim.

ISSUE V

Mosley submits that trial counsel was ineffective for failing to request an alibi jury instruction. The trial court found that trial counsel's strategic decision not to request an alibi jury instruction, when trial counsel testified that he could not show that Mosley was in a particular place at a

specific time and feared that such a defense would have lost credibility with the jury, was within the broad range of reasonably competent performance. The trial court properly denied this claim.

ISSUE VI

Mosley contends that trial counsel was deficient in failing to object to numerous instances of prosecutorial misconduct during the trial. The trial court found that trial counsel's strategic use of objections was reasonable because the objections would have lacked merit and/or the errors complained of were insubstantial and/or Mosley was unable to prove prejudice as a result of the comments. The trial court properly denied this claim.

ISSUE VII

Mosley alleges the cumulative effect of the errors in his trial deprived him of a fair trial. As the trial court found, Mosley failed to prove deficiency on any of his claims of ineffective assistance of counsel or any error as to his substantive claims, thus his cumulative claim failed. The trial court properly denied this claim.

ARGUMENTS

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE *GIGLIO V. UNITED STATES*, 405 U.S. 159, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) CLAIM FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Mosley claims that the prosecutor violated *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), by presenting the testimony of his co-defendant, Bernard Griffin. As the trial court found, Griffin's testimony was not false, thus Mosley was unable to establish a *Giglio* violation. The trial court properly denied this claim following an evidentiary hearing on the matter.

Applicable Law

To establish a *Giglio* violation, a defendant must show that (1) a witness's testimony was false; (2) the prosecutor knew the testimony was false; and (3) the false testimony was material. *Guzman v. State*, 868 So.2d 498, 505 (Fla. 2003); *Suggs v. State*, 923 So.2d 419, 426 (Fla. 2005).

Trial testimony

The State called Mosley's co-defendant, Bernard Griffin, during its case-in-chief. Griffin testified on November 9, 2005. Griffin testified that he had been housed at the Duval County Jail for eighteen months; he was charged with two counts of

accessory to commit first degree murder; his case was still pending; he had entered a plea of not guilty; he did not know how much time he was facing on the two counts of accessory; he agreed to testify truthfully; he had not been promised anything in order to testify; the prosecutors had not told him or suggested to him what sentence they might recommend to his judge; his attorney had not told him what sentence he might get and had not promised him anything in exchange for his testimony; and he was not hoping to get a benefit out of testifying against Mosley. (R/XIII 675-76)

The State later called Mark Romano, a detective employed by the Jacksonville's Sheriff's Office, who had developed a good rapport with Griffin. (R/XV 1077, 1105) During cross-examination, Detective Romano was asked whether he had discussed getting Griffin a job "when he [got] out," to which he replied, "No."(R/XV 1156-57) That was followed by the question: "You talk to him about don't worry, we're going to take care of you?" Again, Detective Romano replied, "No." When pressed with the question, "Never?" Romano unequivocally replied, "Never." (R/XV 1157) Lastly, Romano was asked whether he had any conversations with the prosecution about taking care of Griffin. Again, Detective Romano replied, "No." (R/XV 1157)

The State also called Detective Stucki, with the Jacksonville Sheriff's Office. (R/XV 1196) On cross-examination, while being questioned about Griffin, trial counsel posed the following question, "And he's anticipating going home relatively soon, isn't he?" Detective Stucki, apparently surprised and confused, responded, "Do what?" Again, trial counsel asked, "And he's planning on going home soon, is he not?" Detective Stucki replied, "I have no idea." (R/XVI 1233)

Evidentiary hearing testimony

On September 4, 2013, Griffin testified at the evidentiary hearing as a witness for the defense. (PCR/10 1757-1804) He testified that he had not signed any plea agreement prior to testifying in Mosley's trial and did not know what sentence he was going to receive after testifying, although he suspected he was not going to get that much time. (PCR/10 1759) He further testified that the prosecutor, ASA Senterfitt, promised him he was not "going to get that much time," but he never asked her what sentence he would receive. *Id*. He clarified that "not much that time" did not mean he was given a specific number of months. He was not sure how much time he would receive. *Id*. Griffin stated that he had been in the prosecutor's office "probably more than four times" prior to Mosley's trial. (PCR/10 1760) He stated that his attorney, John Whited, was present for

the conversation between he and the prosecutor, during which he was instructed not to tell anyone he had a deal. He thought others may have been present, but couldn't remember, as it was "so long ago." He told the court that the prosecutor told him it would harm the state's case if the jury were to learn that he received a deal in exchange for his testimony, but that the prosecutor did not tell him how it would harm the State's case. (PCR/10 1761) Despite previously testifying that he did not know how much time he would receive, Griffin, minutes later, testified that the State told him he would receive probation or little jail time. (PCR/10 1763) Although Griffin was on probation at the time he was charged with two counts of Accessory to First Degree Murder and consequently faced a violation of probation in addition to the two new charges, he testified that he and ASA Senterfitt never discussed a disposition for his pending violation of probation case. (PCR/10 1766) He also testified that when he was with ASA Senterfitt, they discussed "several topics ain't got nothing to do with the case." (PCR/10 1765) Griffin stated that he had been fed Chinese food by the State Attorney's Office. He ate the Chinese food, which had been provided by ASA Guy, by himself, in a room close to the courtroom. (PCR/10 1767-68) He testified that he was transported to the State Attorney's Office by "the transport

– the people that work down there in the sally port. . . .” (PCR/10 1768) When questioned about State Attorney’s Office Investigator John McCallum, Griffin couldn’t remember his involvement or whether he promised him anything, simply saying his name sounded familiar, but he wasn’t sure. (PCR/10 1768-69) Griffin’s testimony then turned to an affidavit he executed earlier in the year on Mosley’s behalf. He testified about the contents of the affidavit and vouched for its veracity, despite it contradicting the testimony he gave earlier during the evidentiary hearing. (PCR/10 1770-1775, 1779-1804) He stated that he wrote a draft, which was taken by Investigator Wildes, hired by Mosley’s appellate counsel, and said Investigator Wildes later returned with a typed version, which he signed. (PCR/10 232-4) In that affidavit, Griffin swore that he was brought to the State Attorney’s Office “dozens of times;” the majority of the time, State Attorney Investigator John McCallum transported him (PCR/10 1772); he and ASA Senterfitt “always talked about Mosley’s case” (PCR/10 1773); that he was repeatedly assured by ASA Senterfitt that he was going to get “little jail time and probation or only probation” (PCR 10/1773); and, he ate the Chinese food in ASA Senterfitt’s office (PCR 10/1774). On cross-examination by ASA Guy, Griffin conceded that he had not been to the State Attorney’s Office for

pre-trial preparations "dozens of times" as he indicated in his affidavit and when pressed for a specific number, didn't "remember the exact number." (PCR 10/1785-88) When questioned about why he stated in his affidavit that ASA Guy, the same ASA questioning him on cross-examination, was the one to provide him with Chinese food, Griffin appeared confused and replied, "Mr. Guy – you Mr. Guy?" (PCR 10/1789) He followed that with, "You ain't the one who got me the food." (PCR 10/1790) Griffin then maintained that another prosecutor, named Mr. Guy, from the State Attorney's Office brought him the food. (PCR/10 1790-91) Griffin later admitted that the Chinese food did not have anything to do with his testimony at Mosley's trial. (PCR/10 1792) Griffin stated that he was currently serving a 20-year prison sentence for violation of the probation he was initially sentenced to on the accessory charges. He also stated that this was his third violation of probation on those charges and he felt as if ASAs Senterfitt and Guy did not help him and they should have. (PCR/10 1776-78) On cross-examination, Griffin admitted to testifying to "[t]he truth" at Mosley's trial; that he did not have a plea deal, as reiterated in the following statement, "I ain't have no plea deal like on exact what time I was going to get" (PCR/10 1795-96); and that he "didn't lie at all, sir." (PCR/10 1796)

On September 5, 2014, Circuit Judge Elizabeth Senterfitt, formerly ASA Senterfitt, was called by the State Attorney's Office. (PCR 10/1844-1892) She testified that Griffin was a "testifying co-defendant" by the time of Mosley's trial, who had maintained his previously-entered pleas of not guilty. (PCR/10 1849) She stated that her calendar revealed four meetings between she and Griffin during 2005, as well as Griffin's deposition. (PCR 10/1850-51, 1863) She denied telling, or witnessing anyone in her presence, telling Griffin what sentence he would receive if he testified against Mosley. (PCR/10 1851) It was her practice not to promise a cooperating co-defendant/witness a specific sentence because they would inevitably lose credibility with the jury. (PCR/10 1852) She also stated that she would not have put Griffin on the stand if she did not believe he was being truthful. (PCR/10 1852) She was further convinced he was being truthful because his statements were corroborated by physical evidence, phone records and the location of one of the victim's bodies. (PCR/10 1853) Judge Senterfitt also testified that the plea recommendation reached in Griffin's case was a result of his cooperation from the inception of the case, Griffin's young age of fifteen years, the level of his involvement in the case, and his prior record. (PCR/10 1854-56, 1891) Judge Senterfitt categorically denied

threatening Griffin and testified that it was not necessary as he had been cooperative from the first day he came forward. (PCR/10 1865, 1871-72) She testified that she, along with Griffin's attorney, likely told Griffin of the sentencing range he faced of probation through thirty years in prison. (PCR/10 1868) She stated that she was sure Griffin asked her what he was facing and her response would have been 'I don't know,' 'I can't tell you that,' 'concentrate on being truthful.' (PCR/10 1871) Judge Senterfitt unequivocally denied telling Griffin that he would get little jail time or probation in exchange for his testimony and further commented, that she could not tell him what he was going to get if she did not know. (PCR/10 1882) She also denied knowledge of anyone else at the State Attorney's Office making similar promises. (PCR/10 1882)

The State also called its investigator, Ernest Edwards on September 5, 2013. (PCR/10 1807-1821) He testified that he paid Griffin a visit on August 5, 2013, at the Appalachee State Prison, to discuss the affidavit he had signed. (PCR/10 1809-10) He did not record his conversation, but did take notes, sometimes quoting Griffin verbatim. He relied on his notes in later preparing a report for his office. (PCR/10 1811) Concerning his affidavit, Griffin divulged that an attorney came to see him and took notes as they spoke. He did not see what the

attorney was writing and Griffin denied writing anything himself. (PCR/10 1812) Investigator Edwards specifically asked Griffin whether he had read the affidavit before signing it and Griffin responded "I remember signing the paper but I didn't read it. I don't want anything to do with this." (PCR/10 1812-13)

Mosley's guilt phase trial counsel, Richard Kuritz, also testified. Kuritz testified that he had been practicing criminal law and trying cases since 1993. (PCR/9 1640, 1646) He approximated trying seventy-five to one hundred cases, fifteen to twenty which were capital. (PCR/9 1646-47) He also agreed that at the time of Mosley's trial, he was one of the most experienced capital defense attorneys in Jacksonville. (PCR/9 1648) Based on his significant experience as a criminal defense attorney, he suspected Griffin had received some plea deal or promise in order to testify against Mosley. Griffin's defense attorney, John Whited and he were "personal friends," so he called Whited to inquire "whether the state has passed on any information to him and he said no promises were made to his client." (PCR/9 1599-1600, 1670-71)

Trial court's ruling

After hearing the testimony presented at the evidentiary hearing, the trial court denied Mosley's claim alleging a *Giglio*

violation, finding that Mosley failed to prove that Griffin's trial testimony was false. Consequently, the trial court did not address the other two prongs of the *Giglio* analysis.

Analysis

For the trial court, at the evidentiary hearing, this became a credibility contest. The court had testimony from the prosecutor that no plea deal had been made or reached and Griffin contradicting himself, while on one hand testifying that he had a deal and on the other, saying that he had not been given a specific amount of time as to either probation or prison. The trial court also had the testimony of Investigator Edwards, who spoke with Griffin after the State had been provided with a copy of his affidavit. Investigator Edwards' testimony put into question the reliability of Griffin's affidavit, based largely in part, on Griffin's statement to Investigator Edwards that he had not read the affidavit before signing it and didn't want any part of this.

The facts of *Hurst* closely resemble the facts of this case. In *Hurst,* a state witness, Williams, to whom Hurst admitted guilt, testified at trial as to Hurst's statements and then recanted at the evidentiary hearing, stating that he lied at trial because the prosecutor assured him that he would take care of him in exchange for his testimony. *Hurst*, 18 So.3d 975, 991

(Fla. 2009). The prosecutor also testified at the evidentiary hearing and denied making Williams any promises, stating that he "never give[s] them any indication that I'm going to do anything." The trial court denied Hurst's claim finding that Williams' testimony was not credible, noting that he had waited over two years to report that Hurst had not made admissions to him. The court also found no *Giglio* or *Brady* violations because, based on the prosecutor's testimony, no promises were made. *Id.*

Here, Griffin waited over eight years to report that he received a benefit from testifying against Mosley.

Davis v. State, 928 So.2d 1089, 1115-16 (Fla. 2005) is also helpful. In *Davis*, he alleged that a state witness, Stevens, had been promised leniency in exchange for his testimony and that the State had suppressed this agreement, committing both *Giglio* and *Brady* violations. Stevens testified at the evidentiary hearing, stating "I believe I was told they would see what they could do," regarding what the prosecutor had told him concerning his gain time. At the hearing, collateral counsel also introduced a letter written by the State on behalf of Stevens wherein the State noted that "[i]n light of [Stevens'] cooperation [in Davis's case], I told Mr. Stevens our Office would request the Department of Corrections to retain, if at all possible, any gain time he has accrued. We would appreciate any

consideration you can give in this matter." The trial court denied both claims, finding that there was no evidence that a deal was in fact made or a promise extended. *Id.* at 1115. The testimony that the State 'would see what they could do,' without more, does not establish that there was an agreement between the State and Stevens. *Id.* at 1116. This Court affirmed.

There is no evidence in this case that the State sought preferential treatment for Griffin after his testimony, much less evidence of a plea agreement or promise for leniency before his testimony.

"In determining whether a new trial is warranted due to recantation of a witness's testimony, a trial judge is to examine all the circumstances of the case, including the testimony of the witnesses submitted on the motion for the new trial." *Armstrong v. State*, 642 So.2d 730, 735 (Fla. 1994) (quoting *Bell v.* State, 90 So.2d 704, 705 (Fla. 1956). "Moreover, recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. Especially is this true where that recantation involves a confession of perjury." *Bell*, 90 So.2d at 705.

In *State v. Woodel*, 145 So.3d 782, 806-07 (Fla. 2014), the trial court also denied the defendant's postconviction claims of

Giglio and *Brady* violations concerning an alleged suppressed plea agreement with a State witness, White, a habitual offender who had been in and out of prison for most of his life. Woodel claimed that White's prison terms were to be followed by a moderate probation period. Woodel argued that the inexplicable leniency shown in White's sentencing proved that White had a deal with the State to testify against Woodel, but was unable to present any evidence of that to the trial court. Woodel bore the burden of persuasion that White's testimony at issue was false, and that the State knowingly presented White's false testimony to a jury, however, Woodel failed to carry his burden. Thus, the trial court's denial of the claims was affirmed. *Id.*

In *Wyatt v. State*, 71 So.3d 86, 107 (Fla. 2011), a key State witness, McCoombs testified at trial that Wyatt had confessed to him while both were in custody and that he had not received anything in exchange for his testimony and did not expect to as he was serving a federal sentence and did not believe state authorities had any control over federal sentencing. *Id.* at 106. Between trial and the postconviction hearing, the prosecutor wrote the federal authorities about McCoombs' cooperation in Wyatt's cases and asked that it be given consideration. Wyatt filed his postconviction motion, alleging both *Giglio* and *Brady* violations. At the evidentiary

hearing, two inmates who had been housed with McCoombs testified that McCoombs admitted to them that his trial testimony had been fabricated. Both McCoombs and the prosecutor testified at that the hearing and denied that any promises had been made or agreements reached. The trial court denied the claims, finding that Wyatt failed to show that the prosecutor's letter rendered McCoombs' testimony false. The trial court's decision was affirmed on appeal. *Id.* at 107. *See Rodriguez v. State*, 39 So.3d 275, 289-90 (Fla. 2010) (denying defendant's claims of *Giglio* and *Brady* violations arising from jailers allegedly allowing cooperating co-defendant to engage in sexual relations with his wife while incarcerated in exchange for his testimony against Rodriguez. At the evidentiary hearing, jailers testified that they did not know or permit co-defendant to have sex with his wife. The trial court found the jailers' testimony more credible than that of the co-defendant because co-defendant's testimony conflicted with his trial testimony as well as statements he made during the hearing).

This Court's decision in *Sochor v. State*, 883 So.2d 766 (Fla. 2004) is also instructive on this matter. Not unlike the facts in the instant case, Sochor alleged *Brady* and *Giglio* violations in his state postconviction motion for the State's failure to disclose that it gave his brother, Gary Sochor,

immunity in exchange for his testimony. *Id.* at 785. At the evidentiary hearing, Gary testified that he had been offered immunity by the police officer who escorted him into the courtroom. However, on cross-examination, he testified that, at trial, he never thought he had been considered a suspect. The prosecutor assigned to Sochor's case also testified; he stated that he never offered Gary immunity and that police officers did not have the power to grant witnesses immunity. *Id.* In denying Sochor's postconviction motion, the trial court found Gary's evidentiary hearing testimony "unreliable and not credible" and found the prosecutor's testimony to be "candid, trustworthy, and credible." *Id. See Kight v. Dugger*, 574 So.2d 1066 (Fla. 1991) (denying Kight's postconviction claim alleging a *Brady* violation concerning the State's failure to disclose information concerning concessions which had been made to informants; the trial court heard conflicting testimony as to whether the state made the concessions, but it was within the trial court's discretion to find the state witnesses more reliable than the defense witnesses); *McClesky v. Kemp*, 753 F.2d 877 (11th Cir. 1985) (finding that a detective's recommendation that he would speak on behalf of Evans, a state witness, regarding his criminal charges in exchange for Evans' cooperation in McClesky's prosecution, was insufficient to trigger the

applicability of *Giglio*). In the instant case, like *McClesky*, the prosecutor denied making any pleas with Griffin, and furthermore, Griffin was never told that anyone would put a good word in on his behalf in his case.

In this case, although Griffin tried to minimize his involvement, his testimony was consistent from the time of his first voluntary visit to the police department through the conclusion of trial. His testimony was also corroborated by most of the evidence submitted in the case. His testimony did not change until over eight years after the murders. When it did change, as reflected in his affidavit and some of his evidentiary hearing testimony, it was contradictory and he had difficulty remembering a number of facts as what transpired happened "so long ago." (PCR/10 1761) Most importantly, Griffin, on cross-examination, revealed that he did not have a plea deal (PCR/10 1795-96), and that he didn't lie at Mosley's trial. (PCR/10 1796)

Judge Senterfitt testified that she believed Griffin's testimony to be truthful at the time of trial. She categorically denied making Griffin any plea deals before Mosley's trial has concluded (PCR 10/1851); she denied threatening Griffin to testify, as it was unnecessary because he had always been

cooperative (PCR/10 1865, 1871-72); and she repeatedly testified that she always told Griffin to tell the truth. (PCR/10 1871)

The trial court was correct in reaching its decision that Mosley failed to satisfy the first prong of *Giglio,* in showing that Griffin's trial testimony concerning favorable treatment in exchange for his testimony was false, when it found Judge Senterfitt more credible than the allegations posited by Mosley, as well as the postconviction testimony of Griffin.

Furthermore, Mosley is unable to satisfy the second prong of *Giglio*, in showing that the prosecutor, Judge Senterfitt, knew that Griffin's testimony was false. She testified that no plea deals had been made, much less accepted by Griffin, by or at the time of his testimony in Mosley's case. There is no evidence to rebut this allegation.

Lastly, Mosley is unable to satisfy the third prong, that the false testimony Griffin provided was material. Griffin may have hoped for a benefit in exchange for his cooperation, but without any evidence that he had actually been offered a plea in exchange for his cooperation, there is nothing material about his testimony. *See Hurst v. State*, 18 So.3d 975, 990-92 (Fla. 2009). ("Once the first two prongs [of the *Giglio* analysis] are established by the defendant, the false evidence is deemed

material if there is any reasonable possibility that it could have affected the jury verdict.")

Griffin's testimony about what transpired at the time of the murders and body disposal was corroborated by physical evidence at the scene, phone records, and DNA evidence. Under *Giglio*, where the prosecutor knowingly uses perjured testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Guzman v. State*, 868 So.2d 498, 506 (Fla. 2003) (quoting *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Although the State does not concede that Griffin's trial testimony, about having received leniency in exchange for his cooperation was false, had it been, it cannot be argued that it would have affected the jury's verdict based on the other evidence presented.

Mosley cites *Mordenti v. State*, 894 So.2d 161 (Fla. 2004) to support his position. Mordenti's prosecution consisted mainly of one witness, Gail Milligan, Royston's former wife, who testified about a conspiracy with Royston to hire a third person, Mordenti, to kill Royston's current wife. *Id.* at 165. In post-conviction, Mordenti raised a *Brady* claim regarding a date planner belonging to Gail that, if available to the defense at trial, could have served as impeachment to Gail's testimony

about certain events and dates. *Id.* at 168. While the court found that the planner was impeaching and that the State willfully suppressed it, it did not find that any prejudice resulted from said suppression. *Id.* at 170. This case is clearly distinguishable from Mosley's because *Mordenti* involved actual evidence withheld by the state. In Mosley's case, there is no evidence of a plea deal, only speculation of the part of Mosley.

In *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986), another case on which Mosley relies, Brown was convicted of a murder and rape, which hinged largely on the testimony of a co-perpetrator, Ronald Floyd. *Id.* at 1458. Eight months prior to Brown's trial, Floyd entered a plea to an unrelated robbery and the State had yet to file charges against him for his involvement in the crimes involving Brown. *Id.* at 1461. The glaring distinction between Brown's case and that of Mosley's is that the star witness in Brown, Ronald Floyd, had entered a plea and an agreement had been reached between Floyd and the State, which had not been divulged prior to Brown's trial. In fact, the prosecutor even commented, at the postconviction hearing, about the recommendation. In Mosley's case, the State has continued to maintain that no plea recommendations were ever made nor any agreements reached prior to Mosley's trial.

Because the factual findings made by the trial court were supported by competent, substantial evidence, this court should defer to those findings. Mosley is unable to satisfy the *Giglio* analysis, specifically that Griffin's trial testimony was false; that the now-Judge Senterfitt knew it was false; and that the testimony was material. Consequently, this Court should affirm the trial court's decision in denying this claim.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE *BRADY V. MARYLAND*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) CLAIM FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Mosley claims that the prosecutor violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) by failing to disclose, prior to trial, that Bernard Griffin received favorable treatment in exchange for his testimony. As established through Griffin's trial testimony and Judge Senterfitt's evidentiary hearing testimony and as the trial court found, Griffin did not receive favorable treatment in exchange for his testimony, thus Mosley was unable to establish a *Brady* violation. The trial court properly denied this claim following an evidentiary hearing on the matter.

Applicable Law

To establish a *Brady* violation, a defendant has the burden to show prejudice when (1) the State possessed favorable evidence for the defense – either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed that evidence; and (3) the evidence was material. *Mungin v. State*, 79 So.3d 726, 734 (Fla. 2011).

Trial testimony

Bernard Griffin testified at Mosley's trial on November 9, 2005. Griffin testified that he had been housed at the Duval County Jail for eighteen months; he was charged with two counts of accessory to commit first degree murder; his case was still pending; he had entered a plea of not guilty; he did not know how much time he was facing on the two counts of accessory; he agreed to testify truthfully; he had not been promised anything in order to testify; the prosecutors had not told him or suggested to him what sentence they might recommend to his judge; his attorney had not told him what sentence he might get and had not promised him anything in exchange for his testimony; and he was not hoping to get a benefit out of testifying against Mosley. (R/XIII 675-76)

Mark Romano, a detective employed by the Jacksonville's Sheriff's Office, also testified for the State. (R/XV 1077,

1105) Detective Romano denied offering Griffin assistance in getting a job when he was released from incarceration.(R/XV 1156-57) he denied assuring Griffin that he would be taken care of and also denied speaking to the prosecution about taking care of Griffin. (R/XV 1157)

Detective Stucki, also with the Jacksonville Sheriff's Office, testified that he did not have any idea as to whether Griffin was going to be released from incarceration in the near future. (R/XVI 1233)

Evidentiary hearing testimony

On September 4, 2013, Griffin testified at the evidentiary hearing as a witness for the defense. (PCR/10 1757-1804) He testified that he had not signed any plea agreement prior to testifying in Mosley's trial and didn't know what sentence he was going to receive after testifying, although he suspected he was not going to get that much time. (PCR/10 1759) He further testified that the prosecutor, ASA Senterfitt, promised him he was not "going to get that much time," but he never asked her what sentence he would receive. *Id.* He clarified that "not much that time" did not mean he was given a specific number of months. He was not sure how much time he would receive. *Id.* Griffin's discussed the affidavit he executed earlier in the year on Mosley's behalf. He testified about the contents of the

affidavit and vouched for its veracity, despite it contradicting the testimony he gave earlier during the evidentiary hearing. (PCR/10 1770-1775, 1779-1804) He stated that he wrote a draft, which was taken by Investigator Wildes, hired by Mosley's appellate counsel, and said Investigator Wildes later returned with a typed version, which he signed. (PCR/10 232-4) On cross-examination, Griffin admitted to testifying to "[t]he truth" at Mosley's trial; that he did not have a plea deal, as reiterated in the following statement, "I ain't have no plea deal like on exact what time I was going to get" (PCR/10 1795-96); and that he "didn't lie at all, sir." (PCR/10 1796)

On September 5, 2014, Circuit Judge Elizabeth Senterfitt, formerly ASA Senterfitt, was called by the State Attorney's Office. (PCR 10/1844-1892) She testified that Griffin was a "testifying co-defendant" by the time of Mosley's trial, who had maintained his previously-entered pleas of not guilty. (PCR 10/1849) She denied telling, or witnessing anyone in her presence telling, Griffin what sentence he would receive if he testified against Mosley (PCR 10/1851), as this was not her practice. (PCR 10/1852) She also stated that she would not have put Griffin on the stand if she did not believe he was being truthful. (PCR 10/1852) Judge Senterfitt also testified that the plea recommendation reached in Griffin's case was a result of

his cooperation from the inception of the case, Griffin's young age of fifteen years, his involvement in the case, and his prior record. (PCR 10/1854-56, 1891) Judge Senterfitt categorically denied threatening Griffin and testified that it was not necessary as he had been cooperative from the first day he came forward. (PCR/10 1865, 1871-72) Judge Senterfitt unequivocally denied telling Griffin that he would get little jail time or probation in exchange for his testimony and further commented, that she could not tell him what he was going to get if she did not know. (PCR/10 1882) She also denied knowledge of anyone else at the State Attorney's Office making similar promises. (PCR/10 1882)

The State also called its investigator, Ernest Edwards on September 5, 2013. (PCR/10 1807-1821) He testified that he spoke with Griffin on August 5, 2013 at the Appalachee State Prison, to discuss the affidavit he had signed. (PCR/10 1809-10) Griffin divulged that an attorney came to see him and took notes as they spoke. He did not see what the attorney was writing and Griffin denied writing anything himself. (PCR/10 1812) Investigator Edwards specifically asked Griffin whether he had read the affidavit before signing it and Griffin responded "I remember signing the paper but I didn't read it. I don't want anything to do with this." (PCR/10 1812-13)

Mosley's guilt phase trial counsel, Richard Kuritz, also testified. He and Griffin's defense attorney, John Whited, were "personal friends," so he called him to inquire "whether the state has passed on any information to him and he said no promises were made to his client." (PCR/9 1599-1600, 1670-71)

Trial court's ruling

After hearing the testimony at the evidentiary hearing, the trial court found Judge Senterfitt's testimony more credible than Mosley's allegations and Griffin's testimony. Consequently, it denied this claim.

Analysis

In order to succeed on this claim, Mosley must show that the State possessed material evidence that Griffin has been given favorable treatment to induce his cooperation against Mosley, which the State suppressed.

Mosley is unable to prove that that evidence was possessed by the State, much less that it existed at all. Without the existence of the evidence, it cannot be argued that the State suppressed it. *See Gore v. State,* 846 So.2d 461, 466-67 (Fla.2003) (holding that the *Brady* claim was insufficiently pled in the postconviction motion because the defendant presented no factual basis that the disputed item ever existed or contained exculpatory information); *Beasley v. State*, 18 So.3d 473 (Fla.

2009) (affirming trial court's order denying Brady claim where Beasley only speculated on the existence of an exculpatory voicemail); *Wright v. State,* 857 So.2d 861, 870 (Fla. 2003) (holding that there was no *Brady* violation because the exculpatory effect of the disputed documents was merely speculative). The trial court was in a greater position to make this determination. It had the benefit of seeing and hearing the witnesses testify, as well as their demeanor. After hearing and viewing same, it made a credibility call in determining that the state witnesses were more credible and persuasive.

While previously undisclosed evidence of a witness' favorable treatment in exchange for cooperation against a defendant may constitute a *Brady* claim, the reviewing court should defer to the factual findings of the trial court that are supported by competent, substantial evidence. *Sochor v. State*, 883 So.2d 776, 785 (Fla. 2004). The reviewing court should not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses, as well as the weight to be given to the evidence by the trial court. *Lowe v. State*, 2 So.3d, 21 30 (Fla. 2008) (quoting *Blanco v. State, 702 So.2d 12, 1250, 1252 (Fla. 1997).*

In Lightbourne v. State, 841 So.2d 431 (Fla. 2003), the trial court denied claims alleging *Brady* and *Giglio* violations

based on recently-filed affidavits of jail house informants who had previously testified against Lighthouse at trial, now stating that they had lied in exchange for promises of leniency by the State. After hearing from the informants and the police, who denied making any promises or deal, the trial court chose to believe the officers in denying Lightbourne's claims. The denial of Lightbourne's claim was affirmed by this Court.

The trial court determined that the State's witnesses were more credible than Mosley's. The trial court fulfilled its obligation. *See Armstrong v. State*, 642 So.2d 730 (Fla. 1994) (trial judge should examine all the circumstances of the case, including testimony of witnesses submitted on a motion for new trial, in determining whether a new trial is warranted due to recantation of a witness' trial testimony).

After conducting an evidentiary hearing, it chose to find the testimony of the state witnesses more credible than that of Mosley's witnesses. This finding was clearly grounded in the record. As such, this Court should defer to the trial court's factual findings.

Griffin's testimony about what transpired at the time of the murders and body disposal was corroborated by physical evidence at the scene, phone records, and DNA evidence. Under *Brady*, the undisclosed evidence is material "if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Mordenti v. State*, 894 So.2d 161, 175 (Fla. 2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1995). "A criminal defendant alleging a *Brady* violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict." *Id.* (quoting *Strickler v. Greene,* 527 U.S. 263, 281 n. 20, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). Based on the evidence presented, in addition to Griffin's testimony, Mosley cannot meet his burden in showing a reasonable probability that had the jury heard Griffin received a plea deal, they would have reached a different verdict.

Mosley cites a string of cases standing for the proposition that even a tentative promise or an understanding of leniency constitutes *Brady* evidence if not revealed to the defense pre-trial. However, and once again, there is no evidence that a tentative promise, a full-blown promise was made or an understanding was reached in Mosley's case. The only witness to come close to such as an allegation is Griffin and even he

contradicted himself and ended his testimony with a statement indicating that he had been truthful at trial.

Because the factual findings made by the trial court were supported by competent, substantial evidence, this court should defer to those findings. Mosley is unable to satisfy the *Brady* analysis, specifically that the State possessed impeaching evidence (*e.g., G*riffin's alleged plea deal); that the now-Judge Senterfitt willfully suppressed the plea deal; and that the evidence of the plea deal was material. Since a plea deal was never reached and evidence of same does not exist, Mosley remains unable to establish that the State possessed information regarding a plea deal and suppressed it. He also falls short of establishing that evidence of a plea deal was material, in that it would have resulted in the jury reaching a different verdict. Consequently, this Court should affirm the trial court's decision in denying this claim.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE NEWLY DISCOVERED EVIDENCE CLAIM FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Mosley alleges that newly discovered evidence exists that Bernard Griffin knew he would receive a non-prison sentence in exchange for his testimony at trial, in the form of an affidavit executed by Mr. Griffin post-trial, and that this newly

discovered evidence, when considered in conjunction with all other admissible evidence, would likely result in an acquittal on retrial. The trial court found that Judge Senterfitt's testimony at the evidentiary hearing that Griffin did not have a plea deal, along with Griffin's trial testimony to the same effect, was more credible and persuasive than Griffin's testimony at the evidentiary hearing, as well as the statements contained in his affidavit. The trial court properly denied this claim.

Applicable Law

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. *See Jones v. State,* 709 So.2d 512, 521 (Fla. 1998) (*Jones III*). Newly discovered evidence satisfies the second prong of the *Jones III* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones III,* 709 So.2d at 526 (quoting *Jones v. State,* 678 So.2d 309, 315 (Fla.1996) (*Jones II*)).

"When a newly discovered evidence claim relies on an admission of perjury, the critical issue of credibility necessarily arises. This Court is highly deferential to a trial court's judgment on the issue of credibility." *Archer v. State*, 934 So.2d 1187 (Fla. 2006) (quoting *Johnson v. State,* 769 So.2d 990, 1000 (Fla. 2000) ("This Court will not substitute its judgment for that of the trial court on issues of credibility."); *Robinson v. State,* 865 So.2d 1259, 1262 (Fla.2004) ("The trial court has made a fact-based determination that the recantation is not credible. In light of conflicting evidence we must give deference to that determination."). "As this Court observed in *Spaziano,* 'the trial judge is there and has a superior vantage point to see and hear the witnesses presenting the conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective'" *State v. Spaziano,* 692 So.2d 174, 178 (Fla. 1997). "Thus, a trial court's determination of a recantation's credibility will be affirmed as long as it is supported by competent, substantial evidence." *Marquard v. State*, 850 So.2d 417, 424 (Fla. 2002).

Trial testimony

Bernard Griffin testified at Mosley's trial on November 9, 2005. Griffin testified that he had been housed at the Duval County Jail for eighteen months; he was charged with two counts

of accessory to commit first degree murder; his case was still pending; he had entered a plea of not guilty; he did not know how much time he was facing on the two counts of accessory; he agreed to testify truthfully; he had not been promised anything in order to testify; the prosecutors had not told him or suggested to him what sentence they might recommend to his judge; his attorney had not told him what sentence he might get and had not promised him anything in exchange for his testimony; and he was not hoping to get a benefit out of testifying against Mosley. (R/XIII 675-76)

Mark Romano, a detective employed by the Jacksonville's Sheriff's Office, also testified for the State. (R/XV 1077, 1105) Detective Romano denied offering Griffin assistance in getting a job when he was released from incarceration.(R/XV 1156-57) he denied assuring Griffin that he would be taken care of and also denied speaking to the prosecution about taking care of Griffin. (R/XV 1157)

Detective Stucki, also with the Jacksonville Sheriff's Office, testified that he did not have any idea as to whether Griffin was going to be released from incarceration in the near future. (R/XVI 1233)

Evidentiary hearing testimony

On September 4, 2013, Griffin testified at the evidentiary hearing as a witness for the defense. (PCR/10 1757-1804) He testified that he had not signed any plea agreement prior to testifying in Mosley's trial and didn't know what sentence he was going to receive after testifying, although he suspected he was not going to get that much time. (PCR/10 1759) He further testified that the prosecutor, ASA Senterfitt, promised him he was not "going to get that much time," but he never asked her what sentence he would receive. *Id*. He clarified that "not much that time" did not mean he was given a specific number of months. He was not sure how much time he would receive. *Id*. Griffin discussed the affidavit he executed earlier in the year on Mosley's behalf. He testified about the contents of the affidavit and vouched for its veracity, despite it contradicting the testimony he gave earlier during the evidentiary hearing. (PCR/10 1770-1775, 1779-1804) He stated that he wrote a draft, which was taken by Investigator Wildes, hired by Mosley's appellate counsel, and said Investigator Wildes later returned with a typed version, which he signed. (PCR/10 232-4) On cross-examination, Griffin admitted to testifying to "[t]he truth" at Mosley's trial; that he did not have a plea deal, as reiterated in the following statement, "I ain't have no plea deal like on

exact what time I was going to get" (PCR/10 1795-96); and that he "didn't lie at all, sir." (PCR/10 1796)

On September 5, 2014, Circuit Judge Elizabeth Senterfitt, formerly ASA Senterfitt, was called by the State Attorney's Office. (PCR 10/1844-1892) She testified that Griffin was a "testifying co-defendant" by the time of Mosley's trial, who had maintained his previously-entered pleas of not guilty. (PCR 10/1849) She denied telling, or witnessing anyone in her presence telling, Griffin what sentence he would receive if he testified against Mosley (PCR 10/1851), as this was not her practice. (PCR 10/1852) She also stated that she would not have put Griffin on the stand if she did not believe he was being truthful. (PCR 10/1852) Judge Senterfitt also testified that the plea recommendation reached in Griffin's case was a result of his cooperation from the inception of the case, Griffin's young age of fifteen years, his involvement in the case, and his prior record. (PCR 10/1854-56, 1891) Judge Senterfitt categorically denied threatening Griffin and testified that it was not necessary as he had been cooperative from the first day he came forward. (PCR/10 1865, 1871-72) Judge Senterfitt unequivocally denied telling Griffin that he would get little jail time or probation in exchange for his testimony and further commented, that she could not tell him what he was going to get if she did

not know. (PCR/10 1882) She also denied knowledge of anyone else at the State Attorney's Office making similar promises. (PCR/10 1882)

The State also called its investigator, Ernest Edwards on September 5, 2013. (PCR/10 1807-1821) He testified that he spoke with Griffin on August 5, 2013 at the Appalachee State Prison, to discuss the affidavit he had signed. (PCR/10 1809-10) Griffin divulged that an attorney came to see him and took notes as they spoke. He did not see what the attorney was writing and Griffin denied writing anything himself. (PCR/10 1812) Investigator Edwards specifically asked Griffin whether he had read the affidavit before signing it and Griffin responded "I remember signing the paper but I didn't read it. I don't want anything to do with this." (PCR/10 1812-13)

Mosley's guilt phase trial counsel, Richard Kuritz, also testified. He and Griffin's defense attorney, John Whited, were "personal friends," so he called him to inquire "whether the state has passed on any information to him and he said no promises were made to his client." (PCR/9 1599-1600, 1670-71)

Trial court's ruling

Because the trial court found Judge Senterfitt's testimony more credible and persuasive than Mosley's claims and Griffin's testimony, it denied this claim.

Analysis

As was the case at the state evidentiary hearing, Mosley remains unable to meet his burden in proving the existence of newly discovered evidence sufficient to warrant a new trial. First, no evidence exists that Griffin was given a plea deal or other inducement to testify against Mosley, aside from an affidavit filed over eight years after he testified at trial, and which he told Investigator Edwards he had not read before signing. Second, it follows that if the evidence does not exist, it cannot be said that it would probably produce an acquittal at retrial. Even if Griffin had been made a plea deal, which had been suppressed by the State, it cannot be argued that that information alone would have produced an acquittal on retrial. Mosley was faced with overwhelming evidence of guilt at trial, in addition to Griffin's testimony, which corroborated the evidence. If the jury heard that he received a benefit in exchange for his testimony, it is unlikely they would have acquitted Mosley.

While post-trial recantations can serve as the basis for a newly discovered evidence claim, the trial judge is obliged to "examine all the circumstances of the case, including the testimony of the witnesses...." *Bell v. State*, 90 So.2d 704, 704 (Flaq. 1956) (citing *Henderson v. State*, 185 So.2d 625, 630

(Fla. 1939). Here the trial court did just that. After conducting an evidentiary hearing, it chose to find the testimony of the state witnesses more credible than that of Mosley's witnesses. Based on the trial court's experience, common sense and personal observations (including observing demeanor and analyzing testimony) of Griffin, Senterfitt and other postconviction witnesses, the court made a determination that Griffin's new testimony was false. This finding was clearly grounded in the record.

Because Mosley has not shown an abuse of discretion by the trial court in making this finding, its decision in denying his motion based on newly discovered evidence should not be overturned on appeal.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WITHOUT AN EVIDENTIARY HEARING (Restated)

Mosley contends that trial counsel was ineffective for failing to strike Juror "R" because she was actually biased against Mosley, relying on statements she made in response to a question concerning gruesome photographs of one of the victim's bodies. As the trial court found, her answers showed that she may have experienced difficulty in looking at the photographs, but in no way established that she had an actual bias against

Mosley or that she could not render a verdict solely upon the evidence presented at trial and the instructions given by the Court. The trial court properly denied this claim.

Evidentiary hearing not granted

The trial court summarily denied this claim without an evidentiary hearing. (PCR/7 1242-45)

Applicable Law

The Florida Supreme Court explained the legal test for ineffective assistance of counsel claims in *Bradley v. State*, 33 So.3d 664, 671-72 (Fla. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria.

First, counsel's performance must be shown to be deficient. *Id.* at 671. Deficient performance means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. *Id.* The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). This Court has made clear that

"[s]trategic decisions do not constitute ineffective assistance of counsel." *Id.* (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000) There is a strong presumption that trial counsel's performance was not ineffective. *Id.*

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. *Id.* at 672. A defendant must do more than speculate that en error affected the outcome. The prejudice prong is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)

Both deficient performance and prejudice must be shown. *Id.*

The Florida Supreme Court has previously addressed the issue of juror bias. "[W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased." *Peterson v. State*, - So.3d -, 39 Fla. L. Weekly S451, 4 (Fla. 2014) (citing *Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007). The actual bias standard requires a showing that the questionable juror was not

impartial, that is, "was biased against the defendant, and the evidence of bias must be plain on the face of the record." *Id.* (citing *Patton v. Yount*, 467 U.S. 1025, 1038-40, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). In other words, the test for juror competency is whether a juror can "lay aside any bias or prejudice and render [his or her] verdict solely upon the evidence presented and the instructions on the law given to [him or her] by the court." *Kearse v. State*, 770 So.2d 1119, 1128-29 (Fla. 2000) (quoting *Lusk v. State,* 446 So.2d 1038, 1041 (Fla.1984)).

In the instant case, during *voir dire,* the State informed prospective jurors that they would see photographs of the victim's badly burned body. The State asked if there was "anybody who feels as though they would be so bothered or so disturbed by having to look at those photographs that you could not be fair and impartial in this case?" (R/X 152)

...

JUROR "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.

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

> STATE: Okay. Well, I can tell you that type of evidence comes through 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?
>
> JUROR "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.

(R/X 154-54)

Later, the State asked the jurors as a whole, "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 agree to do that? To which the prospective jury replied, "[y]es." (R/XI 243)

Juror "R" remarked on a concern she had about how she would feel after viewing photographs of a burned body. She did not indicate, in any way, that she had a bias against either side. The record is completely devoid of any evidence reflecting that Juror "R" had any bias or prejudice and furthermore, that, if she had either prejudice or bias, she was unable or unwilling to to lay them aside and render a verdict based solely on the evidence presented and the instructions on law given by the court. Additionally, when asked whether she was for or against the death penalty, she replied, "[n]ot automatically and only

with a lot of weighing of the evidence." (R/XI 223) When asked if she would be comfortable recommending it, she answered, "[y]eah, when the time came I'm not sure how I would feel personally inside of my head, but I would follow instructions to certainly weigh everything." (R/XI 223-24)

The Eleventh Circuit addressed the issue of juror bias in *Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181, 1198 (11th Cir. 2012) when it considered the deficiency prong of a biased-juror argument. There, Owen argued that no reasonable attorney would have permitted juror Knowles to remain on the jury because her daughter's rape in a home invasion was strikingly similar to the facts of Owen's case. In making that argument, Owens overlooked the fact that juror Knowles gave several favorable responses during jury selection, including that she could put aside her daughter's experience in deciding Owens' case and that she could judge the evidence fairly. Knowles answered all of counsel's questions in a manner indicative of an unbiased juror. Thus, the Eleventh Circuit reasoned, trial counsel was not deficient for allowing Knowles to remain on the jury that ultimately convicted Owens.

Also, noteworthy is the fact that the record is devoid of any indications that Juror "R" had difficulty viewing the photographs or any of the evidence presented during the trial.

Furthermore, Mosley has failed to prove *Strickland* prejudice. Mosley has failed to prove that any juror, including Juror "R," sitting on his case was actually biased. Actual bias means "bias-in-fact that would prevent service as an impartial juror" because that juror was biased against the defendant. *Caratelli v. State*, 961 So.2d 312, 324 (Fla. 2007).

Although Mosley complained of Juror "R" in his state postconviction motion and now on appeal from the trial court's ruling on that motion, it should be noted that he affirmatively accepted Juror "R" as a juror on his jury. (R/XII 508). Mosley was an active participant in the jury selection process and was specifically asked by the trial judge whether he approved of the jury, to which he responded, "[y]es, Your Honor." (R/XII 508) He did not express any concern about Juror "R's" impartiality. Mosley's trial counsel, Richard Kuritz, later testified at the postconviction hearing that he and Mosley worked side-by-side in preparation for and at trial. He described Mosley as involved as co-counsel. If the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel. *Gamble v. State*, 877 So.2d 706,714 (Fla. 2004). Mosley's claim should be denied simply for this reason.

Neither the trial judge, Mosley's attorney, nor the State, each of whom was in the best position to evaluate Juror "R's" responses and observe her demeanor, appear to have understood them to mean that she could not be fair and impartial.

Lastly, Juror "R" took an oath to be fair and impartial. (R/XI 243) Jurors are presumed to follow the law as instructed by the trial court and obey their oaths. *Hallford v. Culliver,* 459 F.3d 1193, 1204 (11th Cir. 2006). Without any actual evidence proving that Juror "R" was actually biased, the trial court correctly presumed that she followed the instructions, set aside any feelings of bias, and was fair and impartial during deliberations.

As the Florida Supreme Court held in *Caratelli*, the standard to obtain relief on a postconviction claim is more stringent that the standard that applies when that claim is raised on direct appeal. Thus, it follows, that when a defendant, such as Mosley, personally affirms his acceptance of the jury panel, he should not then be permitted to complain in a postconviction motion that his counsel was ineffective for allowing a biased juror to remain on his jury. Otherwise, the defendant would have a "trump card" to use in postconviction proceedings which is not available on direct appeal. *See generally Joiner v. State*, 618 So.2d 174, 176 n.2 (Fla. 1993)

(observing that, absent a requirement that alleged errors during jury selection must be renewed prior to the jury being sworn, the defendant "could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial.") "A rule 3.850 motion cannot be used to go behind representations that defendant made to the trial court, and the court may summarily deny post-conviction claims that are refuted by such representations." *Kelley v. Crews,* 2015 WL 163057, 7 (N.D. Fla. 2015) (quoting *Stano v. State*, 520 So.2d 278, 279 (Fla. 1988). Although this rule has usually applied in the case of sworn representations made by a defendant during a plea colloquy, it has also been applied to unsworn representations made by a defendant during the course of a trial. *See e.g., McIndoo v. State*, 98 So.3d 640, 641 (4th DCA 2012) (holding that defendant's statement at trial that he was satisfied with his counsel and that he freely and independently decided not to call any witnesses refuted his claim that his attorney was ineffective for failing to call a known witness).

In his brief, Mosley addresses other potential jurors who, after expressing reluctance regarding the photographs, were struck from the jury. Mosley relies on this in making his argument that Juror "R" was actually biased. However, the record

reveals that the parties only referred to one other juror who may have taken issue with the photographs, Juror "C." (R/XII 478-497) In fact, the court's statement regarding Juror "C" was, "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." (R/XII 482) (emphasis added) Juror "C" was not struck solely for her reluctance about the photographs, as demonstrated by the trial judge's use of "and or." Juror "C" was struck for numerous reasons. Specifically, in response to her position on the death penalty, she stated, "I'm not for sure. I don't want to say because of my religion belief. I don't believe in it. I'm not here to judge nobody. I leave that up to God." (R/XI 224) The following day, she reiterated her position by stating, ""What I said yesterday I was against it, like everybody else said, you know religion belief. I don't believe in death penalty." "I'm not God." "I have to leave it up to him." (R/XII 430) "I don't like the death penalty." Finally, when asked whether she could set aside her thoughts on whether she likes the death penalty or not and obey the law, Juror "C" replied, "I don't think I can." (R/XII 431) When questioned about her ability to view the photographs and remain fair to both sides, Juror "C" replied, "No, I don't think – I don't think so, huh-uh." (R/X 155) It is for all of these

reasons that Juror "C" was struck for cause, not simply because of her feelings about the photographs.

Even if Juror "C" had been struck solely for her statements concerning the photographs, the fact that the trial court struck her for cause does not equate to a finding that she was actually biased. In keeping with *Bryant v. State*, 656 So.2d 426, 428 (Fla. 1995), "a juror must be excused for cause if any 'reasonable doubt' exists as to whether the juror possesses an impartial state of mind." Consequently, the trial court's striking for cause of Juror "C" who answered the question about photographs similarly to Juror "R" does not show that Juror "R" was actually biased.

Mosley relies on *Thompson v. State*, 796 So.2d 511 (Fla. 2001). However, *Thompson* is clearly distinguishable from the instant matter. In *Thompson,* the juror at issue had "extreme difficulty accepting the notion that a defendant has a right not to testify." *Id.* at 517. Thompson did not testify in his own defense. Although the trial court, in summarily denying Thompson's motion for postconviction relief, concluded that no prejudice resulted because the evidence was sufficient to support the conviction, this Court determined that the real issue was "whether, as a result of counsel's performance, the panel which made that ultimate determination was composed of

jurors who held the fact that Thompson exercised a fundamental constitutional right against him." *Id.*

In Mosley's case, we are not dealing with a juror who expressed difficulty with Mosley not testifying or a juror who required the State to prove its case beyond its required burden. Rather, she simply expressed a concern over her feelings after viewing photographs of a badly burned body.

Likewise, Mosley's reliance on *Titel v. State*, 981 So.2d 656 (4th DCA 2008) is misplaced. Titel was charged with sexual battery. His trial counsel inadvertently contributed one juror's statements about being dead set against sexually-related crimes and his belief that such offenders should be executed, to another, whom he struck. As a result, the juror at issue was not questioned further about his feelings and remained on the jury which ultimately convicted Titel. *Id.* at 657. Titel subsequently filed a motion for postconviction relief and was granted a hearing on this issue. The trial court denied the claim, finding that trial counsel was deficient for failing to strike the juror, but also finding that Titel failed to demonstrate prejudice. *Id.* The 4th District Court of Appeal addressed the issue of whether Titel demonstrated that a juror was actually biased. The record revealed that there were five other prospective jurors who responded that there had been rapes in

their families. Those jurors were questioned further individually as to whether they could be fair. Four of the five were eliminated and the fifth satisfied the court that she was not biased and could be fair. The juror at issue was the only one not asked if he could be fair and remained on the jury. Thus, the Fourth District Court of Appeal determined that Titel satisfied his burden in showing prejudice. *Id.* at 658.

Again, Mosley did not face a juror who expressed strong feelings about the charge itself or that the death penalty should be the only sentence upon conviction. Juror "R" was simply concerned with her reaction to gory photographs.

As the trial court noted, Mosley's reliance on *Mantarranz v. State*, 133 So.3d 473 (Fla. 2013) is misplaced. Mantarranz was charged with first-degree murder and burglary. *Id.* The juror in *Mantarranz* unequivocally stated that she could not be fair to Mantarranz because she had been the victim of burglaries, her family members had been victims of theft-related offenses, and she had a bias towards the State. *Id.* at 477. She repeated this sentiment until, it appears, she was embarrassed into rejecting her own opinions. *Id.* at 489. Trial counsel had to strike the juror, using a preemptory strike. This Court later held that the juror should have been stricken for cause and the fact that Mantarranz had to use a preemptory resulted in prejudice,

because that left him with one less preemptory to use on another prospective juror. *Id*. at 490.

Juror "R's" statement about having difficulty in viewing the photographs does not rise to the level of bias. She certainly did not say that she had a bias towards the State or against Mosley, as the juror in *Mantarranz* did.

Mosley also cites *Leon v. State*, 396 So.2d 203 (3d DCA 1981) The facts in *Leon* mirror the facts in *Mantarranz* and the Third District Court of Appeal, ruled similarly, holding that the juror, who had expressed an inability to be fair and impartial, because he had also been the victim of a burglary, should have been stricken for cause. *Id.* at 204-05.

In sum, Mosley has failed to show that trial counsel's decision keep Juror "R" on the jury was contrary to or an unreasonable application of *Strickland*, or that the decision was based on an unreasonable determination of the facts. Thus, the trial court's decision should be affirmed.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Mosley submits that trial counsel was ineffective for failing to request an alibi jury instruction. The trial court found that trial counsel's strategic decision not to request an

alibi jury instruction, when trial counsel testified that he could not show that Mosley was in a particular place for the entire time frame during which the murders were committed and the victims' bodies disposed of and feared that such a defense would have lost credibility with the jury, was within the broad range of reasonably competent performance. The trial court properly denied this claim.

Applicable Law

The Florida Supreme Court explained the legal test for ineffective assistance of counsel claims in *Bradley v. State*, 33 So.3d 664, 671-72 (Fla. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria.

First, counsel's performance must be shown to be deficient. *Id.* at 671. Deficient performance means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. *Id.* The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct.

158, 100 L.Ed. 83 (1955). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." *Id.* (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000) There is a strong presumption that trial counsel's performance was not ineffective. *Id.*

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. *Id.* at 672. A defendant must do more than speculate that an error affected the outcome. The prejudice prong is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)

Both deficient performance and prejudice must be shown. *Id.*

Trial testimony

At trial, the State presented cell phone records reflecting that the murders occurred on April 22, 2004 between 12:33 p.m. and 1:21 p.m. (R/XV 1149-54)

Detective Dennis Fuentes, employed with the Jacksonville Sheriff's Office, testified that Mosley revealed to him that he

had been with both victims on April 22, 2004 between noon, or shortly thereafter, and 1:30 p.m. (R/XIV 914-15)

Sergeant Hugh Eason, also employed with the Jacksonville Sheriff's Office, testified that Mosley told him that he arrived at the JCPenney shopping center to meet the victim around 12:45-1:00 p.m. (R/XIV 983) He further told Sergeant Eason that he spent five minutes speaking with victim Wilkes, before they left, in his vehicle, to go see some houses she was interested in. (R/XIV 983-84) They returned to the shopping center parking lot, where victim Wilkes performed oral sex on Mosley before they parted ways. (R/XIV 986)

The defense presented a handful of witnesses whose testimony attempted to show that Mosley was elsewhere at the time of the murders and subsequent disposal of the bodies, however, that testimony was not concrete and easily attacked on cross-examination by the State.

In his brief, Mosley addresses the testimony of Dr. Christie Aston, the Mosley family practitioner. (R/XVIII 1621) She testified that she treated Mosley's daughter, Amber, on April 22, 2004. (R/XVIII 1622) Amber had an appointment scheduled for 11:15 a.m., but she could **not** testify as to the exact time she arrived at the office, how long she was there (R/XVIII 1623), or what time she left the office (R/XVIII 1627).

Mosley also relies on the testimony of Jimmy Horton, who ran Quality Tire. (R/XVIII 1629) Horton testified that Mosley came in for a flat repair on April 22, 2004. (R/XVIII 1631) He described that day as "real busy." (R/XVIII 1633) He testified that Mosley came in the morning and could have arrived as early as 8 or 9am. (R/XVIII 1631, 1633) On re-direct, he admitted to having guessed at the 1pm timeframe he provided, during his deposition, as the time Mosley returned to the shop (R/XVIII 1635). When asked by defense counsel, "[b]ut you're not sure about the time?" Horton replied, "No, not exactly." (R/XVIII 1633) He concluded by stating, "As time, to tell you exactly that time I can't tell you that." (R/XVIII 1635)

Jim Jeanette testified on behalf of Mosley. (R/XVIII 1744-62) Jeanette, a plumber, arrived at the Mosley residence in response to a call for service on a broken toilet. (R/XVIII 1751) Mosley had called for service on April 21st (R/XVIII 1751) and Jeanette came out the following day. (R/XVIII 1746) When Jeanette arrived, he met with Mosley's wife. Mosley was not at the residence the entire time Jeanette was there. (R/XVIII 1752, 1746, 1747) Jeannette provided a receipt for his services, which Mosley's wife signed, in his absence (R/XVIII 1752). The original receipt was moved into evidence by the State. (R/XVIII 1754)

The remaining three witnesses called on Mosley's behalf consisted of his family: his two daughters and wife.

Amber testified as to his whereabouts on April 22nd. (R/XIX 1810-1821) She readily admitted that she did not keep a diary in April, 2004. (R/XIX 1811) She told the jury that she had left school early that day and that her mother had taken her to the doctor and Food Lion before returning home. (R/XIX 1812) She recalled seeing her father at home, at approximately 1pm. (R/XIX 1813) When asked if she saw him later that evening, she responded, "I don't remember." (R/XIX 1813) She stated that present at her home that night were her sister, her mother and herself and specifically denied that her grandmother, Mosley's mother, Barbara McKinney, spent the night. (R/XIX 1816)

Her sister, Alexis, also testified on Mosley's behalf. (R/XIX 1822-1834) She testified that she is close to her father, loves him, and has visited him at jail. (R/XIX 1822) Although she didn't keep a diary, and more than eighteen months had elapsed by the time of trial, she could recall the events of April 22 and 23, 2004. (R/XIX 1823) Her unfaltering recollection revealed that Mosley arrived home on April 22nd at 11:30 p.m. (R/XIX 1823); that she and her mother were still awake (despite this being a school night and the following morning, she would be getting up at 5:15 a.m.) (R/XIX 1823, 1825); and that he was

wearing a black collarless shirt and gray pants with big side pockets. (R/XIX 1833) She further corroborated her sister's recollection that their grandmother, Barbara McKinney, did not spend the night at their residence. (R/XIX 1827) She also stated that at 5:15 a.m. the following morning, she passed her parents' bedroom and their door was open. Coincidentally, she "just happened to look over there and he was in the bed asleep." (R/XIX 1825) Although she was able to provide the afore-mentioned details, she could not recall what time she went to bed; what time Mosley went to bed; what time her sister went to bed; what time Mosley awoke. (R/XIX 1827) Notably, she testified that her father did not bring anything home with him the night of April 22nd and did not ask anyone to go out to his vehicle to get anything. (R/XIX 1831)

Lastly, Mosley's wife, Carolyn, was called. Carolyn testified that she and Mosley had been married nineteen years and had two daughters together. (R/XIX 1882) Despite the allegations of infidelity with numerous women, and worse, murder, she still loved him. (R/XIX 1882) Carolyn was unable to testify to Mosley's whereabouts before 1pm on the day of the murders. In fact, she testified that she was not trying to suggest an alibi for that period of time. (R/XIX 1898-99) She was able to recall that Mosley went to sleep around 1am the

night of April 22nd. (R/XIX 1891) Contrary to Alexis' testimony, Carolyn stated that Mosley arrived home on April 22nd with either milk or bread, which he had left in the vehicle, and she retrieved. (R/XIX 1900-01) She further confirmed that she did not know whether Mosley left the house while she was asleep that night. (R/XIX 1901) On cross-examination, the following exchange occurred:

STATE: Do you remember this question and answer:

"Q Is it possible he had left the house?"

"A I don't know. I don't know. As I said, I went to bed. I don't know."

"Q Are you saying you're not sure where he was when you went to bed?"

"A I'm saying I don't remember. I'm not sure. He may have been there." (R/XIX 1909)

Do you remember those questions and answers?

CAROLYN: I do remember that.

Of special interest is the fact that Carolyn admitted forging her husband's signature on her copy of the plumber's receipt, after the plumber had left the Mosley residence, although she had previously stated, in a sworn statement, that he had signed it. (R/XIX 1896, 1912)

In rebuttal, the State played a portion of a recorded jail call placed by Mosley to Carolyn.

UNIDENTIFIED VOICE: Hello.

UNIDENTIFIED VOICE: Hello. This is a collect call from –

UNIDENTIFIED VOICE: John.

...

UNIDENTIFIED VOICE: Hello.

UNIDENTIFIED VOICE: Carol.

UNIDENTIFIED VOICE: Hey.

UNIDENTIFIED VOICE: Where y'all been?

UNIDENTIFIED VOICE: Oh –

UNIDENTIFIED VOICE: **Before they cut me off let me say this right quick. Okay. Remember the 22nd when I came in about 11:30 after I had left work. Remember that was the night my mama stayed over there with you. My mama, Alexis and Amber need to write a statement and get it notarized that I was home all night Thursday, the 22nd, last week.**

UNIDENTIFIED VOICE: Thursday.

UNIDENTIFIED VOICE: **Okay. Yeah. Because my mom had to work late that day and she wanted to get to work early the next say. She stayed over there that day, last Thursday. I know I got off about 11:00 and then I know I went by the A.T.M. and I came home, so Alexis need to write a statement. Amber, you and my mom.**

UNIDENTIFIED VOICE: Saying that you were –

UNIDENTIFIED VOICE: **Last Thursday, yeah, saying that I was home all night. I don't know when I got –I think I got home what, about 11:30. You can say approximately 11:30. They are going to try to hold you to a time of 11:25, 11:30, 11:35. I don't remember exactly and my mom need to tell them that she stayed over there that night. She had worked. She's tired. She wanted to get in early the next day. Her job right around the corner.**

UNIDENTIFIED VOICE: (Inaudible.)

(End of audiotape.)

(R/XIX 1929-30)

During his opening statement at trial, Mosley's guilt phase attorney, Richard Kuritz, made a few passing references to the term "alibi" in how he did not anticipate defense witnesses would be testifying in the capacity of an alibi. He did not present evidence to establish an alibi and did not ask the jury to find Mosley not guilty because of a presented alibi defense. Specifically, Kuritz made the following comments:

> KURITZ: What you'll hear from the plumber, Mr. Jannette.... **He's not going to say Mr. Mosley was trying to set up an alibi.**

(R/XII 583)(emphasis added)

> KURITZ: And you'll hear from their tower expert to say that just because I'm standing in one spot right now and I hit tower 26 doesn't mean that if I hang up and call back I'm not going to hit tower 27. It looks for the best available tower, hits several towers 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.**

(R/XII 585)(emphasis added)

> KURITZ: [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....[S]he said, yeah, I talked to John and we're going to meet at the J.C. Penney parking lot. See, her call goes about another 11 minutes which will take us to about 11:49, 11:50. That's her phone. Her phone records are going to show that supporting the time frame, **not us making up an alibi**.

(R/XII 586)(emphasis added)

> KURITZ: So around 8:00, 9:00 or 10:00 o'clock while Mr. Mosley is still at work the bodies are right here.

> Police and family are already right here.... Mr. Mosley knows he's going to work. **That's his alibi?**

(R/XII 599)(emphasis added)

Evidentiary hearing testimony

At the evidentiary hearing, Kuritz testified. (PCR/9 1573-1694) He stated that his theory of defense was that Mosley did not commit the murders, someone else did, such as Bernard Griffin. (PCR/9 1583) In response to a question about whether the defense was arguing alibi at trial, Kuritz responded, "I wouldn't use the word alibi. I was always arguing that John didn't do it and so a lot of my defense and what I put forward was trying to show that he couldn't have done it." (PCR/9 1586) He later elaborated, by stating, "I was calling as many witnesses as I could to kind of close the window of time that he would have had the option of availability to do this." (PCR/9 1586) Further, the following exchange occurred, clearly reflecting that Kuritz did not view this defense as one involving an alibi:

> STATE: Is that essentially when the whole alibi starts from that 11:38 a.m. time?
>
> KURITZ: **Again, you're using the word alibi.**
>
> STATE: I'm sorry.
>
> KURITZ: That's okay. I respect that. **I never thought of this as an alibi case because I never had something where I say here's where he was when you say it happened.** What I was always attempting to do and that was the beginning of what I was attempting to do is I

> was trying to narrow the timeframes by showing a phone call or something that I could affirmatively say he was here, he was there, and try to narrow the options of availability of when he could have been done so, yes, that's when I began my time clock.

(PCR/9 1588) (emphasis added)

Further in his testimony, and in response to a question about whether he considered the defense theory of Mosley not being present when the murders occurred and when the bodies were disposed of an alibi defense, he stated that he did not think that met the definition of alibi. Specifically, he stated,

> I wouldn't. . . . I'm just saying he wasn't there and that's not necessarily an alibi because I don't have necessarily an alibi.
>
> I was arguing that the client wasn't there and state can't prove that he was there and here's the reason why they can't prove he was there, but it doesn't rise to the level in my mind to what the traditional juror would say is an alibi.
>
> And in John's case I didn't feel we had what I would call an alibi. What I felt was I could show the state couldn't prove that he was involved with it by these various timeframes but I couldn't say at 1:00 o'clock, you know, this was exactly what was going to be and this is exactly when the time – the crime occurred. I didn't think I had enough to say alibi with credibility. What I thought I could do is kind of chip away at the state's case and show that their story wasn't credible.

(PCR/9 1594-95)

Later, he again addressed the issue of an alibi defense in stating,

> I did not [file a notice of intent to rely on alibi defense]. I didn't think I had enough credible evidence to call it an actual alibi. I just was trying to limit the time period to show that he couldn't have done it and discredit the state's theory. I don't think it rose to what I believe an alibi would be and the alibi instruction only says if you have a reasonable doubt as to whether he was there or not then find him not guilty which is what I was arguing the whole time, so I didn't think – I didn't think the weight of the alibi instruction was going to add anything to it.
>
> I felt using the word alibi in a traditional sense I think I would lose credibility with the jury so I didn't use that.

(PCR/9 1604-05)

Kuritz confirmed that he did not seek an alibi jury instruction and explained why:

> Like I said the alibi instruction only says if you have a reasonable doubt as to whether he was there or not or somewhere else then you just find him not guilty. My whole argument was there's plenty of reasonable doubt as to all of this, so I felt that I tied it in as effectively as I could to show you have to have reasonable doubt as to whether he could have done this because these are my very spots, but I didn't feel like I had enough to call it an alibi.

(PCR/9 1606)

In response to a question about whether Mosley's wife, two daughters, Jim Horton and Dr. Aston's testimony placed Mosley somewhere other than the murder scene, he replied, "I did my best to make it seem that way. The testimony of the family, of course, because of John's attempts to manipulate their testimony

or get them to remember things was somewhat questionable with it, but I did my best to make it seem that way." (PCR/9 1638-39)

Although Kuritz and Mosley communicated very well together and Mosley's involvement with pre-trial preparation and trial was as involved as co-counsel's (PCR/9 1649; 1677), they never used the term "alibi" or discussed it as a trial strategy. Mosley never requested an alibi instruction. (PCR/9 1639-40; 1676) Post-trial, and after he had an opportunity to review the trial transcripts, Mosley gave Kuritz a "huge compliment;" thanked him for doing everything he had requested; told Kuritz that he had proved that he couldn't have done it; and thanked him for all the time and effort he put into his defense. (PCR/9 1651)

Mosley's defense consisted of evidence of his whereabouts at varying times and locations. The defense did not possess witness(es) and/or location(s) for the entire time frame during which the State alleged the murders were committed and the bodies disposed of. It is for this reason that Kuritz chose not to seek the alibi jury instruction. (PCR/9 1673-74, 1691-93) Kuritz also submitted that his decision not to seek the alibi instruction was a strategic one. Once the word "alibi" was uttered, he did not want the jury expecting "rock solid" evidence that Mosley was elsewhere at the time of the murders

and disposal, which he was unable to present. (PCR/9 1674-75) He reiterated that he did not want to lose credibility with the jury and did not want the State to argue that, using it against Mosley. (PCR/9 1675-76) He also found that the idea of presenting an alibi was complicated by the fact that the State could not even allege a specific time the murders and body disposal occurred; the State merely provided a time frame. (PCR/9 1676) Lastly, Kuritz testified that Mosley himself did not ask him to seek an alibi instruction. (PCR/9 1676)

Trial court's ruling

Based on the afore-mentioned testimony and evidence, the trial court denied this claim, finding that Kuritz's strategic decision not to request an alibi instruction was "clearly within 'the broad range of reasonably competent performance contemplated by *Strickland*.'" As the trial court found, trial counsel may have used the term "alibi" during argument, but never directly referred to an alibi. Trial counsel contemplated whether to pursue an alibi defense and opted against it after reviewing the undisputed evidence and determining that Mosley did not have a valid alibi.

Analysis

It is clear from the record that the evidence Mosley presented at trial was insufficient to qualify as an alibi

defense and thus did not warrant a jury instruction on same. The trial court's reliance on *Greenhow v. United States*, 490 A.2d 1130, 1134 was proper (holding that alibi must cover "the entire time" crime was alleged to be committed). His evidence was lacking because it did not prove that he was at a particular place(s) which spanned the entire time frame during which the murders were committed and the bodies disposed of.

This Court has previously rejected claims of ineffective assistance when trial counsel has investigated and made a strategic decision, supported by the record, not to present an alibi defense. *See Mungin v. State*, 932 So.2d 986 (Fla. 2006); *Reed v. State*, 875 So.2d 415, 429-30 (Fla. 2004) (affirming the trial court's finding that counsel was not ineffective for failing to present an alibi defense when, after an investigation, trial counsel concluded that the available testimony provided, at best, an incomplete alibi); *Evans v. State, 995 So.2d 933, 944 (Fla. 2008)* (rejecting ineffective assistance claim where alibi defense was not complete)*; Reed v. State,* 875 So.2d 415, 429–30 (Fla.2004) (rejecting ineffective assistance claim where alibi defense was not complete); *Haliburton v. Singletary,* 691 So.2d 466, 470-71 (Fla. 1997) (finding no error in trial counsel's decision not to present alibi defense when counsel's strategy was to convince the jury

that the State's main witness was not believable and that it was possible that the victim's ex-girlfriend committed the murder). The logic of these cases can be extended to the strategic decision not to seek an alibi jury instruction. Because the testimony of Mosley's witnesses offered an incomplete alibi, Kuritz made a strategic decision not to seek the alibi instruction and instead, attack the sufficiency of the State's case. Consequently, Kuritz's performance was not deficient.

Trial counsel's strategy in not asking for an alibi instruction was reasonable in light of both the state's evidence and Mosley's. As Kuritz testified to at the evidentiary hearing, he was concerned that asking for such a jury instruction would have caused him to lose credibility with the jury. He still presented his evidence to indicate that Mosley was at other places with other people during the time frame in question, but chose to argue that the State failed to meet its burden in proving its case beyond a reasonable doubt instead of arguing alibi. This was reasonable trial strategy.

Additionally, Mosley, agreed with Kuritz's decision not to seek the alibi instruction. Kuritz testified at the postconviction hearing that he and Mosley worked side-by-side in preparation for and at trial. They never discussed

presenting an alibi; rather, their agreed-upon strategy was to attack the State's case. If the defendant consents to counsel's strategy, there is no merit to a claim of ineffective assistance of counsel. *Gamble v. State*, 877 So.2d 706,714 (Fla. 2004).

Furthermore, the fact that the jury instruction was not given is harmless. If the jury chose to believe Mosley and his varying evidence of his whereabouts, they could have simply reached a verdict of not guilty. By finding him guilty of two counts of murder, they discounted his evidence and a jury instruction would not have changed that result.

Mosley has failed to show that trial counsel's decision not to seek the alibi instruction was deficient and he has failed to demonstrate prejudice. Thus, the trial court's decision should be affirmed.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Mosley contends that trial counsel was deficient in failing to object to numerous instances of prosecutorial misconduct during the trial. The trial court found that trial counsel's strategic use of objections was reasonable because the objections would have lacked merit and/or the errors complained

of were insubstantial and/or Mosley was unable to prove prejudice as a result of the comments. The trial court properly denied this claim.

Applicable Law

The Florida Supreme Court explained the legal test for ineffective assistance of counsel claims in *Bradley v. State*, 33 So.3d 664, 671-72 (Fla. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria.

First, counsel's performance must be shown to be deficient. *Id.* at 671. Deficient performance means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. *Id.* The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955). This Court has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel." *Id.* (quoting *Occhicone v. State*, 768 So.2d 1037,

1048 (Fla. 2000) There is a strong presumption that trial counsel's performance was not ineffective. *Id.*

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. *Id.* at 672. A defendant must do more than speculate that an error affected the outcome. The prejudice prong is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052)

Both deficient performance and prejudice must be shown. *Id.*

Furthermore, this issue was raised on direct appeal to this Court. In denying relief, this Court found no fundamental error as to the State's comments. A claim for ineffective assistance of counsel alleging a failure to challenge a claim that was not preserved for appeal and which this Court found was not fundamental error cannot establish prejudice. *See Gonzalez v. State*, 990 So.2d 1017, 1028 (Fla. 2008) (finding that Gonzalez failed to demonstrate that counsel's failure to object to the comments resulted in prejudice after he was unable to show that the comments constituted fundamental error on direct appeal);

Chandler v. State, 848 So.2d 1031, 1046 (Fla. 2003) ("Because Chandler could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test."). *Cf Lowe v. State*, 2 So.3d 21, 38 (Fla. 2008).

Trial testimony

During the State's case-in-chief, Jacksonville Sheriff's Office Detective Craig Waldrup testified that he accompanied Griffin during the search for both the murder scene and location of the bodies. (R/XIV 805-07) He testified that Griffin's demeanor and reaction to certain areas led him to believe Griffin was being truthful about the murders and where Mosley left the bodies. (R/XIV 826) Detective Waldrup also testified that he followed Griffin's directions, observed Griffin become visibly upset as the approached the scene where Ms. Wilkes' body had been left and found victim Wilkes' body "right where he said it would be." (R/XIV 813-15)

Detective Mark Romano testified that Griffin's final version of the murders and body disposals was the truth. (R/XV 1127) He followed that up, however, with a statement that Griffin had been minimizing his involvement and that there was

no doubt in his mind that the first version Griffin provided was not the whole truth. (R/XV 1127)

He also testified that he did not have any reason to believe Griffin was lying about whether a woman employed at Subway was working the night the victim's bodies were disposed of. (R/XV 1145)

In closing at the guilt phase, the State made the following remarks:

> In the days following the disappearance of Lynda Wilkes and ten-month-old Jay-Quan a small army of good people climbed that retched mountain of trash in Valdosta piece by piece looking for the body of a child they had never met, but 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, of the blood in her car, of the cell phone records, of his letters, of his statements to the police, to the media, to his wife.
>
> Together they never did find the body of that baby but they find what is for the purposes of these proceedings something even more important. They found the truth, and that's why we're here.

(R/XIX 1955)

> Let's put Bernard Griffin's testimony aside. What evidence do you have in this case that has nothing to do with Bernard Griffin? Lynda Wilkes' blood. If ever there was testimony that was a microcosm of a trial it was the testimony of Gabe Caceres and Dr. Martin Tracey.
>
> Gabe Caceres did not quit. Remember his testimony? Remember how tedious the extraction was? He tried the first method. It didn't work. He tried again and again then he tried the second extraction method and it didn't work but he kept trying and he got a profile.

Not a partial profile. There's 13 markers. He got a 13-marker profile from the carpet in the back of the defendant's car and a 13-marker profile from the bone of Lynda Wilkes. It was a match.

(R/XIX 1955-56)

I submit to you that the defense in this case is asking you or is going to ask you to make quatum leaps of logic because the defendant knows Bernard Griffin – Bernard Griffin must have had his cell phone. Because Bernard Griffin sells drugs, Lynda Wilkes apparently come into some money and Bernard Griffin may know the children of her friend he must be responsible. That's it. He must be responsible.

The blood in the back must have come from sex. His times are off so it couldn't have happened that way. He must be a wonderful timekeeper. There were no injuries on the defendant. Bernard Griffin described Lynda Wilkes kicking the defendant during the murder, scratching him but then they asked Bernard Griffin did you see any scratches on John Mosley. No. That's not reasonable doubt.

Jay-Quan Mosley wasn't found at the landfill. Bernard Griffin must be untruthful about the body being dumped in the dumpster. Well, that's why we called Danny Muck from Valdosta to talk about the 100,000 pound compactors within the spiked wheels. They were not going to find Jay-Quan Mosley in that landfill unless it was a miracle. They tried and you saw how they tried. They didn't do it. They didn't find him. That's not reasonable doubt. That's good work.

(R/XIX 1983-84)

The only – the evidence that you heard was that this defendant had a motive to kill Lynda Wilkes. Okay. So let's talk about the incompetent, sinister police. Talk about metamorphosis.

You know, last Wednesday it sounded to me like from the defense attorney the police were – well, maybe they were just incompetent and they were young. Well, you heard Gary Stucki has about 18 years on. That's no rookie.

(R/XX 2070-71)

> You heard from Detective Romano and Detective Stucki. These are not rookie officers. They did check for surveillance tapes. The defense attorney can tell you they didn't but you heard that they did. They did try to get surveillance tapes and they got some. Unfortunately they didn't show anything.

(R/XX 2073)

> 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. They told you that they had an hour-and-a-half interview and then tried to summarize it and put it together, and if they were trying to feed Bernard they really didn't do a good job.
>
> This October meeting and the $200 and the phone calls. Detective Romano had these phone records way back and the A.T.M. information at the beginning of the investigation. If he's feeding Bernard stuff he could have asked him on May 5th about phone records and the A.T.M.. They already had all of that. Why wait until October for that? They weren't feeding him anything.

(R/XX 2074)

> And, ladies and gentlemen, this defendant never told anybody that he went back to Quality Tire. He didn't tell the police that. He didn't tell the media that when he told his story and told about his path that day. He never, ever said he went back to Quality Tire. He always said he – once he met up – he had gone to Quality Tire, that he goes over, he meets with Lynda and he gives this story, his fantasy story, about getting oral sex from her and getting money from her and then according to him he goes right back home to rush back to his toilet.

(R/XX 2083)

> The last person seen [with the victim]. Is he just the unluckiest person in the world? Is that what we have here? He's got a paternity suit against her. He's the last person seen with her that day at the location that he met with her and suddenly she and the baby are

> gone forever and Jay-Quan was never found. He's not a victim of circumstance. He's a victim of his own greed and his own desire.
>
> He 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.

(R/XIX 1968)

> He gave false statements to David Jordan. He told David Jordan – now this is on April 22nd. He may helped his grandmother move at some other time, but on April 22nd we know he wasn't helping his grandmother move by his own story but he told David Jordan that's what he was doing. It was a lie and he told Terrence Forbes that he had been up all night.

(R/XIX 2085-96)

> Remember his time line that he created? I was going out to Home Depot, flat tire, Quality Tire, Lynda Wilkes, home. Nothing about going back to Quality Tire. Nothing about grandmother, nothing. He lied to them.

(R/XIX 1969)

At the penalty phase, in closing, the State made the following comments:

> There are things in life that can be forgiven. I submit to you these murders are not among them. These were not accidents. These were not sudden thoughts. These were not mistakes. These were well-planned, premeditated for a long time. This is what John Mosley wanted to do and nothing was going to stop him, not a work schedule, not a flat tire, not a lunch date. Nothing you heard today changes what happened at Armsdale, nothing.
>
> As His Honor told you and we 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, and His Honor again will go over with you aggravating circumstances and mitigation and he will tell you it's not a counting process.

(R/XXII 2411-12)

> At the end of the guilt phase you were asked to deliver the truth and today is different. Today it's justice we're asking you to deliver, and I submit to you that justice not only means accountability, it means full accountability. I asked every one of you on that long day, that long day-and-a-half we spent almost three weeks ago could you recommend the death penalty. The most common answer I submit to you was the right one, under the right circumstances. That's the way it should be. We should have a guilt phase and penalty phase, and I submit to you 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.
>
> It is our law and it's not something that is pleasing to talk about but it is the law that binds all of us and binds each of us, and I submit to you the easy thing to do is to say yourself what difference does it make. John Mosley is going to die in prison no matter what we do.
>
> Under our law, the law we all swore to uphold, under these facts, the facts that you had presented two weeks ago and the facts today and the law that I've just reviewed and Judge Weatherby will read to you 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.

(R/XXII 2422-23)

Evidentiary hearing testimony

Kuritz testified at the evidentiary hearing that he tends "to object from a strategic point less than other lawyers perhaps might." His strategy in approaching objectionable or close to objectionable comments "would be more along the line that if it's just a little close to the line or something there

I don't want to draw more attention to it because they've heard it and I believe you can't unring the bell, so I will tend to let things go as I perhaps did in this case." (PCR/9 1623) He provided another client's criminal trial as an example: he defended a woman charged with first degree murder and over the course of the week of trial, made one objection. (PCR/9 1653) While he conceded that one or more answers given in the State's case may have been objectionable, he clarified that:

> I think from a strategic standpoint on a lot of those that I glanced at I don't think – maybe one or so might have rose to the whole level of [objection], but in the context of the way the testimony was going and the way the trial was going I would have – oftentimes I'll make a strategic decision just not to object.

(PCR/9 1623-24)

He stated it was his strategy not to object to statements allegedly bolstering Griffin's credibility so as to allow the jury to see the inconsistencies in Griffin's statements and the desperation on law enforcement's part to believe all Griffin had to say – in essence, to show how it was not believable. (PCR/9 1625) It was during his cross-examination of Detective Romano that Romano made a statement about believing Bernard was not lying, so he could not object to the answer given to his own question. (PCR/XX 1625)

Concerning the State's closing argument, Kuritz did not find the statement about the small army of good people who found

the truth (R/ R/XIX 1955) objectionable, in light of its context. (PCR/9 1626-27)

Kuritz explained that his practice is "not to object unless it becomes overwhelming, because if he objects and that objection is overruled, he risks looking foolish before the jury and losing credibility with them. (PCR/9 1627)

When questioned about the argument made concerning Detective Stucki's experience (R/XX 2070-71), Kuritz replied that he did not feel it was improper bolstering, nor objectionable, as it was a comment that he was a trained professional. (PCR/9 1628)

Regarding the statements about law enforcement not feeding Bernard information and arguing that if they had, Bernard would have done better (R/XX 2074), Kuritz did not find this argument objectionable and even stated it's made regularly. (PCR/9 1629)

When questioned about his opinion of the propriety of the State's characterization of Mosley's story as a "fantasy story," Kuritz stated that he might consider the statement objectionable as he sat on the witness stand at the moment in the evidentiary hearing, but welcomed the comment at trial, as he viewed it as an opportunity to turn it around on the State. (PCR/9 1630)

Concerning the statement that Mosley lived his life with impunity, Kuritz testified that it was a fair comment in light of the evidence presented. (PCR 9/1631)

When asked about the statements characterizing Mosley's version of the events as lies, Kuritz responded that "you've got to call a spade a spade," and "it's kind of a fair comment on the evidence." (PCR/9 1634) When asked, "[Y]ou were read or reminded of a number of times where the prosecutors in this case said that a witness had lied. Would you agree with me that the case law supports the proposition that it is not improper for a prosecutor to say that a witness lied if that's consistent with the evidence but it is improper for a prosecutor to call the witness a liar," Kuritz replied, "Exactly." (PCR/9 1657)

Kuritz was asked for his opinion on the State's remarks that the death penalty was appropriate in this case (R/XXII 2411-12) and he replied that while a prosecutor typically is not allowed to go into that, he recognized that the State was tying that into a discussion about the aggravating and mitigating factors. (PCR/9 1636-37)

Kuritz stated he would not have objected to the State's comment that justice required full accountability. (R/XXII 2422) (PCR/9 1637)

Kuritz was also asked about the State's comment about recommending a life sentence being the easy to thing to do (R/R/XXII 2422-23); he testified that he did not think he would have objected to it, in retrospect. (PCR/9 1637-38)

Kuritz engaged in a two-part analysis concerning raising objections at trial. First, he would ask himself whether could he object, and second, whether he should object. (PCR/9 1652) He also shouldered a concern that objecting and, for example, then having the court strike that comment, would simply bring attention to it from the jury. (PCR/9 1654) Although he did not object much during trial, he felt strongly about two comments made by ASA Senterfitt during her closing, to which he objected. Both objections were overruled. (PCR/9 1654)

Trial court's ruling

The trial court denied this claim, finding that trial counsel's strategic decision not to object was not deficient. The prosecutor's comments were based on the facts in evidence; the comments were so inconsequential that they did not poison the minds of the jurors; the State's witnesses did not improperly vouch for Griffin; and the prosecutor's comments during the penalty phase closing did not constitute vouching and did not mischaracterize the law. Noting counsel's hearing testimony in which he stated that being judicious with his

objections is a part of his style, in order to avoid antagonizing the jury and losing credibility, the court found no demonstration of ineffectiveness or prejudice.

Analysis

In order to prevail on an ineffective assistance claim for failing to object to comments made during closing argument, a defendant "must first show that the comments were improper or objectionable and that there was no tactical reason for failing to object." *Hildwin v. State,* 84 So.3d 180, 191 (Fla. 2011) (quoting *Stephens v. State,* 975 So.2d 405, 420 (Fla. 2007)). The State submits that the comments complained of were not improper, nor did they affect Mosley's right to a fair trial.

It should be noted, at the outset, that only portions of most of the comments at issue in Mosley's initial brief were cited, leading the reader to reach the immediate conclusion that they are improper. However, when read in context, the prejudicial nature quickly fades and the prosecutor's true intent is apparent.

First, Mosley claims the prosecutor engaged in improper bolstering as it relates to testimony provided by law enforcement concerning Griffin. Detective Waldrup's testimony about believing Griffin had been truthful was not improper. It was a comment on the evidence that, indeed, Griffin's statement

to police led them to the body of victim Wilkes. This does not constitute bolstering. *See Spann v. State*, 985 So.2d 1059, 1067 (Fla. 2008) (determining that no bolstering occurred where testimony was directly related to the evidence). Since this testimony was not improper, trial counsel's failure to object was not unreasonable or deficient.

Likewise Kuritz's failure to object to Detective Romano's statements about Griffin was not deficient. This strategy was appropriate given the relationship Detective Romano had developed with Griffin; trial counsel was simply trying to chip away at Detective Romano's credibility and the relationship he developed with a state witness.

In closing argument, counsel is permitted to review the evidence and fairly discuss and comment upon property admitted testimony and logical inferences from that evidence. *Conahan v. State*, 844 So.2d 629, 640 (Fla. 2003), *citing Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992). *See Merck v. State*, 975 So.2d 1054, 1064 (Fla. 2007) (finding that prosecutor's comments were not improper when based on the facts in evidence and common-sense inferences from those facts). Mosley's own case law is instructive on this matter; Mosley relies on *Parker v. Allen*, 565 F.3d 1258, 1274 (11th Cir. 2009), however that case stands for the proposition that the State cannot, during argument,

allude to evidence not before the jury. That is not the case here. The comments made by the State were comments on facts in evidence for the jury to consider.

Second, Mosley contends that a number of comments addressing Mosley's version of events as "lies" constitute denigration of Mosley and his defense. He cites several cases holding that it is improper for the State to participate in name-calling of the defendant or denigrate the defense presented for the jury's consideration. However, Florida courts have held that where commentary by the State is supported by the evidence, there will be no reversal. *See, e.g., Lugo v. State,* 845 So.2d 74, 107–08 (Fla. 2003) (holding that where the evidence substantially proved the defendant's deceitful actions, the prosecutor's remarks calling into question the defendant's veracity were nothing more than appropriate comments on the evidence).

Third, Mosley argues prosecutorial expertise for the State's argument during closing that the death penalty is not appropriate and not sought in every case but was being sought in Mosley's. Mosley conceded that this very Court previously addressed these comments on direct appeal; this Court noted that the comments were relatively brief and were primarily made to inform the jury of the process for weighing the aggravating

and mitigating factors in the penalty phase. This Court further found that the trial court properly instructed the jury on its weighing functions. *Mosley v. State*, 46 So.3d at 522.

There is a glaring difference between the language used by the prosecutor in *Davis*, the case on which Mosley relies, and the instant case. In *Davis*, the prosecutor stated, "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 v. State*, 136 So.3d 1169, 1206 (Fla. 2014). In Mosley's case, the prosecutor stated, "As His Honor told you and we 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, and His Honor again will go over with you the aggravating circumstances and mitigation and he will tell you it's not a counting process. . . . " (R/XXII 2412) Clearly, the State, in Mosley's trial, was discussing the death penalty and the weighing process the jury had to perform in determining whether death was appropriate.

Fourth, Mosley contends that the prosecutor presented "easy way out" arguments in closing, prohibited by cases such as *Urbin v. State*, 714 So.2d 411, 421 (Fla. 1998), *Henyard v. State*, 689 So.2d 239, 249-50 (Fla. 1996), and *Garron v. State*,

528 So.2d 353, 359 n.7(Fla. 1988). However, Mosley's reliance on this line of cases is misplaced. In these cases, the prosecutor implied that the jury was required by law to return a verdict of death. In Mosley's case, the prosecutor simply advised the jury to consider both the mitigating and aggravating circumstances before making a recommendation.

Counsel is not ineffective for making a tactical decision not to object to statements introduced during the State's closing arguments when those statements were not improper. *Stephens v. State*, 975 So.2d 405, 416-17 (Fla. 2007); *see Mungin v. State,* 932 So.2d 986 (Fla.2006).

Kuritz's use of objections was nothing short of strategic, as he testified at the evidentiary hearing. He did not find every comment that has been addressed in Mosley's brief objectionable, thus he did not object. Other times, he simply chose not to object because the comment was close, or more importantly, he did not want to risk being overruled and losing credibility with the jury or risk highlighting the comment with an objection. He also added that he welcomed some of the comments so he could twist them and use them against the State in rebuttal.

If the prosecutor's comments were deemed improper, because the statements of counsel are not evidence, the trial court

"may rectify improper prosecutorial statements by instructing the jury that only the evidence in the case is to be considered." *United States v. Jacoby*, 955 F.2d 1527, 1541 (11th Cir. 1992) Here, after closing arguments, the trial court instructed the jury that "[i]t is to the evidence introduced in this trial and to it alone that you are to look for the proof in this case" (R/XX 2115), and "the case must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of the tangible exhibits including the sound exhibits from the videos, those things and, of course, the instructions as I'm giving to you." (R/XX 2120)

In short, Mosley has failed to show that trial counsel's tactical decision not to object to numerous alleged improper statements was deficient. Additionally, Mosley is unable to prove prejudice as this Court, on direct appeal, previously determined that there was no fundamental error. Thus, the trial court's decision should be affirmed.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Mosley alleges the cumulative effect of the errors in his trial deprived him of a fair trial. As the trial court found, Mosley failed to prove deficiency on any of his claims of

ineffective assistance of counsel or any error as to his substantive claims, thus his cumulative claim failed. The trial court properly denied this claim.

Applicable Law

Although this issue is presented as an independent basis for relief, Mosley does not identify any purported errors beyond the ones already addressed in his brief. He simply asserts that the effect of the errors must be considered cumulatively. Furthermore, because Mosley's individual claims are without merit, his cumulative error claim must fail. *See Griffin v. State,* 866 So.2d 1, 22 (Fla. 2003) ("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail."); *Vining v. State,* 827 So.2d 201, 219 (Fla. 2002) (holding that where alleged individual errors are without merit, the contention of cumulative error is similarly without merit); *Downs v. State,* 740 So.2d 506, 509 (Fla. 1999) (concluding that where allegations of individual error do not warrant relief, a cumulative error argument based thereon is without merit); *Patrick v. State*, 104 So.3d 1046, 1063-64 (Fla. 2012) (recognizing that a cumulative error claim must necessarily be rejected when the underlying errors are either procedurally

barred or without merit). Accordingly Mosley is not entitled to relief on this claim.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the 3.851 motion following an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief has been furnished via the eportal to Rick Sichta, rick@sichtakaw.com, this 2nd of March, 2015.

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Counsel certifies that this brief was typed using Courier New 12.