IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN.,

Appellant,

vs. **Case Number SC03-780**

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY
STATE OF FLORIDA

AMENDED INITIAL OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Mungin appeals the circuit court's denial of relief on his Rule 3.850 motion following a limited evidentiary hearing.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R.___." -Record on direct appeal to this Court;

"PCR__." -Record in instant appeal;

"Supp. PCR.___" -Supplemental Record in instant appeal;

REQUEST FOR ORAL ARGUMENT

Mr. Mungin, through counsel, respectfully requests that the Court permit oral argument.

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PROCEDURAL HISTORY

On January 28, 1993, Mr. Mungin was convicted by a Duval County jury for the September 16, 1990, murder of a 51-year old Betty Jean Woods during a robbery of a convenience store. Following a penalty phase, the jury recommended the death penalty by a vote of seven to five. The trial court followed the jury recommendation, finding the existence of two aggravating circumstances, no statutory mitigation and minimal weight to the nonstatutory mitigation that Mr. Mungin could be rehabilitated and did not have an antisocial personality. This Court affirmed on direct appeal over the dissent of Justice Anstead. *Mungin v. State*, 689 So. 2d 1026 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997).

On September 16, 1998, the CCRC-North filed a Rule 3.850 motion on behalf of Mr. Mungin (Supp. PCR3-44).[1] On January 12, 1999, the Chief Judge of the Fourth Judicial Circuit appointed Senior Judge John D. Southwood to preside

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[1]On September 1, 1998, the Chief Judge in the Fourth Judicial Circuit entered an order appointing attorney Mark E. Olive to represent Mr. Mungin pursuant to the capital attorney registry (Supp. PCR1-2). However, CCRC-North filed the Rule 3.850 on behalf of Mr. Mungin in order to protect his rights under the chaotic situation regarding the funding of the CCRC offices at the time and the recent enactment of the attorney registry. In March, 1999, the Chief Judge issued an order revoking Mr. Olive's appointment due to Mr. Olive's position regarding the registry contract, *see Olive v. Maas*, 811 So. 2d 644 (Fla. 2002), and appointed Wayne F. Henderson, Esq., to represent Mr. Mungin (Supp. PCR54-55).

over Mr. Mungin's postconviction proceedings since he had presided over the case at trial (Supp. PCR45).

A status conference was held on May 26, 1999 (Supp. PCR58; 345-79), and an order setting an *in camera* inspection for July 14, 1999, was subsequently entered (Supp. PCR60).[2] At the status conference, the fact that the *in camera* inspection was to include records from the Department of Corrections, State Attorney's Office for the Fourth Judicial Circuit, and the Jacksonville Sheriffs Office was extensively discussed (Supp. PCR350-75). According to the order setting the *in camera* inspection, the records which were subject of the *in camera* inspection were records claimed to be exempt from the State Attorney's Office for the Fourth Judicial Circuit, the Department of Corrections, and the Jacksonville/Duval County Sheriff's Office (Supp. PCR60). The record is unclear, however, on what exactly occurred at the *in camera* hearing. The record reflects that an order to deliver to the lower court the records exempted from the Department of Corrections was entered on July 9 (Supp. PCR62), but no order

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[2]A transcript of the *in camera* inspection exists but, per prior order of this Court, it remains sealed and thus Mr. Mungin's counsel does not have access to this transcript. Mr. Mungin again renews his request for access to this transcript in order to ascertain with certainty which records were subject to the *in camera* review by the lower court.

appears with respect to the delivery of exempt records from the other agencies identified in the court's order. The record does reflect with certainly that the State Attorney's Office exempted records (Supp. PCR47),[3] but it is not known whether those exemptions were the subject of the July 14 *in camera* inspection as indicated in the court's order. The order issued by the lower court following the *in camera* inspection only addresses the Department of Corrections (Supp. PCR85-86).

A status hearing was subsequently scheduled for December 14, 1999 (Supp. PCR88. At that hearing, one of the issues discussed was whether Mr. Henderson could continue to represent Mr. Mungin due to personal and other work-related commitments (Supp. PCR384). Additionally, the status of the public records issues was addressed. While the court recalled having performed an *in camera* inspection, there was significant confusion as to which records had been reviewed (Supp. PCR385 *et. seq*.). It was ultimately determined that the *in camera* inspection may not have included review of the records exempted from the State

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[3]At the May 26, 1999, status hearing, the Assistant State Attorney confirmed that his office had exempted materials from disclosure (Supp. PCR360; 375). The record does not contain a written notification by the Sheriff's Office that it exempted records from disclosure, but at the May 26, 1999, hearing, it was confirmed that the Sheriff's Office had also submitted exempted material to the records repository which was to subject to *in camera* review (Supp. PCR350; 362; 368).

Attorney's Office despite Mr. Mungin's previous request for those documents to be reviewed (Supp. PCR385-86). The Assistant State Attorney did recall coming down to the judge's chambers for the *in camera* inspection but he left after the court determined that counsel should not be present due to concerns that the proceedings would be *ex parte* (Supp. PCR387). After reviewing his file, the court determined that his clerk had not requested that the repository forward the Sheriff's Office and State Attorney records for the *in camera* review (Supp. PCR388-90). The issue of the records thus ended without being resolved and the parties addressed the issue of appointing new counsel for Mr. Mungin (Supp. PCR391).

On December 21, 1999, Mr. Mungin, *pro se*, filed a motion requesting the court remove Mr. Henderson from representing him given Mr. Henderson's own request at the December 14 that another attorney be appointed (Supp. PCR90-96). On February 3, 2000, Mr. Henderson formally moved to withdraw (Supp. PCR114), and on February 10, 2000, the motion was granted and attorney Dale Westling was next appointed as registry counsel (Supp. PCR114; 117).

On July 12, 2000, another status conference was conducted (Supp. PCR119), following which time the court granted Mr. Mungin and new counsel until August 31, 2000, in which to file an amended 3.850 motion (Supp. PCR121).

On August 16, 2000, Mr. Mungin's counsel sought a further extension to September 30, 2000, in which to file the amended motion as new information had recently surfaced with warranted investigation (Supp. PCR123); the State did not object to the request (Supp. PCR124). An order granting the extension was subsequently entered (Supp. PCR125), and on September 14, 2000,[4] a twenty-four page amended motion was filed (Supp. PCR163-185).[5] The State's response was filed on October 27, 2000, in which the State did not oppose an evidentiary hearing (Supp. PCR188-196).

The court then set a hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993), to take place on January 18, 2001 (Supp. PCR197). A pre-hearing conference was also set for March 7, 2001 (Supp. PCR199).[6] During this time

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[4]On September 1, 2000, Mr. Westling, on behalf of Mr. Mungin, filed an amended motion to require production of certain records from the repository (Supp. PCR157-58). On September 11, 2000, the court entered an order for the repository to deliver to the court the remaining exempted records (specifically including the State Attorney's Office for the Fourth Judicial Circuit) so that the court could conduct the *in camera* review it had not previously conducted (Supp. PCR161).

[5]In a *pro se* motion dated August 24, 2000, Mr. Mungin sought the removal of Mr. Westling based on Mr. Westling's failure to adequately communicate and investigate the case (Supp. PCR129-156). The court ultimately denied this request (Supp. PCR159-60).

[6]It does not appear that the *Huff* hearing or the scheduling conference were actually conducted at this time.

period, additional problems surrounding the attorney-client relationship arose between Mr. Mungin and Mr. Westling, culminating in a renewed motion by Mr. Mungin to remove Mr. Westling (Supp. PCR203-212). On March 1, 2001, Mr. Westling ultimately moved to withdraw due to irreconcilable differences (Supp. PCR268), and Mr. Mungin moved for the appointment of new counsel (Supp. PCR269-70). Following a hearing, the court entered an order granting Mr. Westling's motion to withdraw and accepting the appearance of attorney Kenneth Malnik, who had been privately retained by Mr. Mungin (Supp. PCR277-78; 280). Mr. Mungin thereafter filed a consolidated amended Rule 3.850 motion, containing seventeen (17) numbered claims for relief (PCR1-76). The State filed a response to this motion (PCR79-105).

A *Huff* hearing was held on March 8, 2002 (Supp. PCR400-449), after which the court granted an evidentiary hearing on two claims (Claims I and IV),[7] and summarily denied the remaining claims (PCR108-09).[8] On June 24, 2003, Mr.

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[7]Claim I addressed allegations of trial counsel's ineffectiveness at the guilt phase , conflict of interest, and newly discovered evidence (PCR3; 108); Claim IV alleged ineffective assistance of counsel during the penalty phase due to counsel's failure to present certain mitigating evidence (PCR33;108).

[8]Claim XIV, alleging judicial bias, was withdrawn at the *Huff* hearing (Supp. PCR438-39). Rulings on Claims VII and XVI, which alleged cumulative error, were, at the State's request, deferred until after the conclusion of the evidentiary

Mungin filed two supplemental claims to his consolidated Rule 3.850 motion, one alleging a *Brady* violation,[9] and the other raising a Sixth Amendment violation in light of *Ring v. Arizona* (PCR110-11). The trial court refused to entertain the *Brady* claim (PCR227-29); as to the *Ring* claim, the lower court indicated that it would not address it until the parties had "benefit of more information" from the United States Supreme Court and this Court (PCR229-30). The evidentiary hearing was conducted by the lower court on June 25 and 26, 2002. Following the evidentiary hearing, post-hearing memoranda were submitted by the parties (PCR116-151; 152-73; 175-79). Relief was denied by order entered signed on March 18, 2003, and filed with the clerk on March 21, 2003 (PCR203-09). Timely notice of appeal was entered (PCR210-11). This Amended Initial Brief is being filed in accordance with the substitution of counsel and relevant Orders entered by this Court.

STATEMENT OF THE FACTS FROM EVIDENTIARY HEARING

THE DEFENSE CASE

Charles F. Cofer. Now a sitting circuit court judge in Duval County, Judge

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hearing (Supp. PCR405).

[9]*Brady v. Maryland*, 373 U.S. 83 (1963).

Cofer was one of two attorney assigned by the Jacksonville Public Defender's Office to represent Mr. Mungin in the early 1990s (PCR234-35). Judge Cofer began working at the Public Defender's Office in January, 1980, and stayed there until his appointment to the county court bench in July, 1998 (PCR235). The first homicide case he handled as an assistant public defender was in 1983 or 1984 (*Id*.). Upon prompting by Judge Southwood as to Judge Cofer's educational background, Judge Cofer testified that he received his undergraduate degree from Duke University in 1974 and graduated from the University of Virginia School of Law in 1977 (PCR236). Following law school he worked in a law firm with a civil practice until joining the Public Defender's Office in 1980 (PCR236).

His first involvement with Mr. Mungin's case was before Mr. Mungin's actual arrest; Judge Cofer had received word from the Tallahassee Public Defender's Office that Mr. Mungin was being prosecuted for shootings in Tallahassee and Monticello and would likely be brought to Jacksonville for homicide charges (PCR236-37). Shortly after Mr. Mungin was arrested in Georgia and brought to Jacksonville, Judge Cofer would have been officially assigned to represent Mr. Mungin (PCR237).[10]

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[10]Much later into the case, attorney Lewis Buzzell was brought into the case to assist Judge Cofer (PCR305). Judge Cofer, however, remained, and considered

Mr. Mungin was indicted in approximately April, 1992, and immediately thereafter Judge Cofer filed a standard motion for discovery from the State in Mr. Mungin's case (PCR237-38; Def. Exhibit 1). The State filed a response to the discovery demand (PCR239-40; Def. Exhibit 2). Part of the defense discovery request was for the disclosure of criminal histories of all prosecution witnesses (PCR240). The prosecuting attorney was Assistant State Attorney De la Rionda (*Id*.). The State's response to the defense discovery demand did not indicate that any of the witnesses had a criminal history (PCR241). Judge Cofer's standard practice in death penalty cases would be to follow up the more general discovery demand with a more specific demand encompassing, *inter alia,* a request for disclosure of witness criminal histories (PCR241). Such a demand was filed by Judge Cofer on June 12, 1992, and included language specifically requesting witness criminal histories (PCR243; Def. Exhibit 3). The motion was granted by Judge Southwood on December 21, 1992. Judge Cofer, however, had no recollection of ever being provided any criminal history information by the State Attorney's Office as to prosecution witness Ronald Kirkland despite the specific

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himself to be lead counsel in the case (*Id*.). Judge Cofer conducted the cross-examination of the primary witnesses, including witness Kirkland, but Mr. Buzzell did the closing argument (PCR306).

request for such information (PCR245). The reason for filing such discovery demands is to determine if there is any information which can be used to impeach a prosecution witness (PCR245-46).

During the time of his representation of Mr. Mungin, Judge Cofer did not have a recollection of having been aware that the Public Defender's Office had represented Ronald Kirkland during the pendency of Mr. Mungin's case (PCR246). While he "may have been aware" from his "own record check" of the "possibility" that the Public Defender's Office had represented Kirkland in cases before the pendency of Mr. Mungin's case, Judge Cofer could not state with certainty whether he knew that the Public Defender's Office had previously represented Kirkland (PCR247). He did not recall ever disclosing to Mr. Mungin the possibility that Kirkland may have been represented by the Public Defender's Office (PCR248). Customarily, as an Assistant Public Defender, "there would be conflicts and potential conflicts" and one would have to check the date or time period in which the office had represented the individual, the type of offense, and the remoteness of the representation; there was no "uniform policy" with respect to when the office would withdraw due to prior representation of a victim or prosecution witness (PCR248-49). When a victim or witness has more recent or more serious charges

involving potentially impeachable offenses, “that is a major situation that you have to address with the client” (PCR249).

Judge Cofer took Kirkland’s deposition in June, 1992, prior to which he had not been provided with any criminal history of the witness by the State (PCR249-50). His “practice and habit” in criminal cases, however, is to make his own request through the public defender investigator section to obtain a copy of a witness’s criminal history record, which is “pretty easily done” (PCR250). His practice would be to do this before a witness’s deposition so that he could inquire of the witness during the deposition about their criminal history (PCR251). With respect to Mr. Mungin’s case, Judge Cofer had no independent recollection of obtaining the criminal history of Kirkland and that based on some of what he has reviewed “it’s possible that I did not” (PCR251). After being shown a documentary exhibit. Judge Cofer testified that he did in fact request Kirkland’s criminal history from the Sheriff’s Office (PCR252). The form reflecting the request was not dated, but the packet contains a docket from September 26, 1992, so the request would have to have been made after that time (PCR253). According to the information he had received, Kirkland was arrested on September 26, 1992, for matters relating to three (3) separate misdemeanor worthless check

cases; it appeared actually that the cases were from 1991 but there were warrants outstanding on which Kirkland was arrested in September of 1992 when the Public Defender's Office was appointed (PCR254). The cases were disposed of on October 13, 1992, with a plea of guilty and a withhold of adjudication (PCR254). These events were occurring simultaneously with Judge Cofer's representation of Mr. Mungin (PCR254-55). He had no recollection of having reviewed this criminal history when he was representing Mr. Mungin (PCR255). It was "puzzling" to Judge Cofer why he would not have done this before Kirkland's deposition, which would have been his normal practice (PCR255). Had he known that the Public Defender's Office was representing Kirkland at the same time it was representing Mr. Mungin, Judge Cofer would have disclosed that information to Mr. Mungin so that he could make the decision on how he wished Cofer to proceed (PCR255-56). There were ethical concerns to keep in mind with respect to Kirkland, who that office was also representing and who would be an adversary witness against Mr. Mungin (PCR257). Based on the documents and Judge Cofer's having run a computer check the day before the evidentiary hearing, it was "confirmed" that the Public Defender's Office had represented Kirkland (PCR259).[11] In reviewing the

[11]The accuracy of the documentation indicating that the Public Defender's Office represented Kirkland was raised by Judge Southwood, who interrupted

docket, Judge Cofer also testified that when Kirkland was sentenced on October 13, 1992, he received ninety (90) days probation, which would have come up approximately in the second week of January, 1993 (PCR259). However, the docket reflected next that on all three cases, a violation of probation warrant was issued on January 11, 1993 (PCR260; Defense Exhibit 4). About two (2) weeks later, Mr. Mungin's case went to trial before Judge Southwood (PCR260). On questioning by Judge Southwood, Judge Cofer testified that during Kirkland's deposition, taken before his arrest on September 26, 1992, Kirkland admitted to a disorderly intoxication and DUI case, but refused to answer a question about a matter that had been sealed; in fact, prosecutor De la Rionda had objected to Judge Cofer's questioning on this during Kirkland's deposition (PCR261). Judge Cofer did not believe he asked Kirkland who had represented him in the cases he disclosed (PCR262). Judge Cofer also identified certified documents reflecting Kirkland regarding case No. 91-89230-MMA (worthless check), No. 91-89229-MMA (worthless check), and No. 91-10326-MMA (worthless check) (PCR263-64;

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collateral counsel's questioning of Judge Cofer and noted that the document being reviewed in court was not an "official record" and was subject to "mistakes made in these proceedings" (PCR258-59).

Def. Exhibits 5, 6, 7).[12]

In addition to running a criminal history check prior to the evidentiary hearing, Judge Cofer explained that he ran another check on a different computer system which is a database interconnected between the Public Defender's Office, the State Attorney's Office, and the Clerk's Office (PCR267). Based on the information contained in Defense Exhibits 5, 6, and 7, Judge Cofer testified that there was information he was unaware of during his representation of Mr. Mungin (PCR268-70). Documents also established that Kirkland had a 1988 grand theft case in which he was sentenced to probation and in which he was represented by the Public Defender's Office for the Fourth Judicial Circuit (PCR279; 281) (Defense Exhibit 8).[13]

Judge Cofer's trial strategy was that Mr. Mungin was not guilty of the charges and that the State did not prove its case beyond a reasonable doubt (PCR270). It was not a case where the defense was suggesting guilt of lesser

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[12]The actual court files and State Attorney files on these cases had been purged, but the State stipulated to the introduction of the certified printouts of the docket from the Clerk's Office (PCR265).

[13]In admitting this document into evidence, Judge Southwood commented that "it's pretty well established that Mr. Kirkland has been represented by the Office of the Public Defender on more than one case. And I would also suggest nobody apparently argues with this fact" (PCR282).

charges (PCR271). Judge Cofer's objective was to attack Kirkland's identification as to the robber he saw allegedly exiting the convenience store (PCR272). Kirkland initially was unable to pick out a photograph of Mr. Mungin from a photospread offered to him by the police, and had only seen the alleged robber for a very brief moment (PCR273). Had he known that Kirkland was on probation during the pendency of this case in addition to having had a capias recalled just prior to Mr. Mungin's trial, he would have wanted to elicit this information from Kirkland (PCR274).[14]

Below, Mr. Mungin, through Judge Cofer, introduced additional criminal cases involving Kirkland, including a 1991 DUI case for which Kirkland was adjudicated guilty and given six months of probation followed by 50 hours of community service (PCR283; Defense Exhibit 9). The probation in that case was terminated on October 8, 1991, but the file also reflected a violation of probation

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[14]Judge Cofer explained that a strategic decision had been made not to call Detective Conn to rebut Kirkland's trial testimony so that the defense could preserve its last closing argument (PCR275; 347). While he could not definitively testify that this decision would or would not have been the same had he known of the full extent of impeaching evidence that existed regarding Kirkland, knowledge of this additional information "certainly changes how I would have cross-examined Mr. Kirkland" (PCR275-76). Judge Cofer also admitted that what Kirkland told Detective Conn could have been brought out before the jury had the detective been called in the defense case (PCR349).

on September 10, 1991 (PCR283-84). Kirkland was represented by the Public Defender's Office for the Fourth Judicial Circuit on that case (PCR283-84). In another 1991 case for disorderly intoxication involving Kirkland, he was also represented by the Public Defender for the Fourth Judicial Circuit (PCR286; Defense Exhibit 10). In that case, Kirkland was given 38 days credit time served on September 19, 1991 (PCR286). At the time of Mr. Mungin's trial, the Public Defender's Office had a computer system to check whether witnesses in a case had been previously represented by that office; indeed, Judge Cofer, in the mid-1980s, had been involved in the development of the case-tracking system at the office (PCR287). Judge Cofer, however, had no recollection of employing this system to run a check on any of the witnesses who were going to be testifying against Mr. Mungin, including Kirkland (PCR288).

In preparing for trial, Judge Cofer met with Mr. Mungin on a number of occasions at the jail (PCR288). Mr. Mungin consistently took the position that he was not guilty and that there was an alibi that could be a potential defense (PCR289). However, Mr. Mungin later began complaining that investigation into the guilt-innocence defense was taking a back seat to the penalty phase (PCR289; Defense Exhibit 11). Although there was a defense investigator involved in the

case, Lynn Mullaney, her "primary purpose" was to deal with penalty phase investigation (PCR290). Judge Cofer had no recollection whether any other investigators had been involved in pursuing guilt-innocence investigation on behalf of Mr. Mungin (PCR291-93).

During his conversations with Judge Cofer, Mr. Mungin mentioned an individual who went by the name of "Ice" (PCR293). In Mr. Mungin's statements to law enforcement, he mentioned suspects by the name of "Snow" or "Ice" (PCR293-94). Mr. Mungin related to Judge Cofer that at the relevant time period, he had lived in southern Georgia and would travel to Pensacola to visit a female friend, and during one of these trips, the shootings in Monticello and Tallahassee occurred (PCR294).[15] As best Judge Cofer could recall, Mr. Mungin told him that after the shootings in Tallahassee and Monticello, he back-tracked to Jacksonville and the gun that was used in the Tallahassee and Monticello cases, as well as a car, were traded to someone named "Ice" who resided in an area on Monfrief Road (PCR295). Thus, Mr. Mungin told him that the gun was in the possession of "Ice" during the time of the Jacksonville homicide (PCR296).

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[15]As noted earlier, Mr. Mungin had been arrested for the Monticello and Tallahassee shootings when he was arrested for the instant offense. It was when he was in prison for the other shootings that Mr. Mungin gave statements to law enforcement about "Snow" and "Ice" (PCR294).

Judge Cofer testified that he did some investigation "on his own" with respect to "Ice" but he did not go to the location around 22nd and Myrtle in Jacksonville to see if he could find "Ice" or determine if "Ice" even existed (PCR296). He ran a computer check with the nickname "Ice" but nothing came up (PCR296). Judge Cofer had a recollection of contacting Robert Blue, an investigator, and asking him if he had heard of someone named "Ice" but Blue did not know anything (PCR297). He had no recollection, however, of sending out anyone to the neighborhood to inquire as to the existence and/or whereabouts of "Ice" (PCR297-98).[16]

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[16]Later, Judge Southwood interjected some of his own leading and generalized questions to Judge Cofer on the question of the alibi defense:

> Q [by Judge Southwood] Again, I hate to interject myself anymore than I have to, but I'm not bashful either. I'm kind of jumping the gun, but as long as you're here, let me ask you this: If a defendant or any defendant in any case, particularly Mr. Mungin, in your conversations with him, tells you he has witnesses who can alibi his–provide an alibi for him for the time of the alleged offense, would it not be your normal practice to pursue those people and interview them or attempt to locate them or something? I mean you wouldn't just ignore that, would you?
>
> A [by Judge Cofer] No, and I did not.
>
> Q And did you pursue interviewing any and all witnesses that he said he said that he had to provide him with an alibi?

With regard to the penalty phase, Judge Cofer had no recollection of directing the investigator, Ms. Mullaney, to find any reports involving a suicide attempt made by Mr. Mungin when he was approximately 12 or 13 years old (PCR298). Upon being shown a document, however, Judge Cofer testified that he did specifically make a request to Ms. Mullaney to obtain hospital records from Georgia Medical Center concerning a hospitalization and suicide attempt involving Mr. Mungin (PCR299; Defense Exhibit 12). The actual records were introduced into evidence below (PCR300; Defense Exhibit 13).

Judge Cofer explained that his "typical method" of introducing such evidence at a penalty phase would be to provide the information to a mental health expert who could incorporate the information into his or her testimony (PCR301-02). In this case, Dr. Harry Krop was utilized as a defense penalty phase mental health expert on the issues of Mr. Mungin's potential for rehabilitation, to establish that Mr. Mungin did not suffer from an antisocial personality disorder, and to his

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> A Your Honor, I conducted – there were various aspects of this alibi. I conducted an investigation of the alibi, a portion of which made the alibi untenable, and after consultation with Mr. Mungin, it was not pursued.

(PCR309-10). Judge Southwood later acknowledged that his questioning was in fact an effort to "presumptively rebut" Mr. Mungin's claims (PCR318).

substance abuse problems (PCR302). It would have been consistent with the penalty phase strategy to show the jury that Mr. Mungin's background was problematic and that he suffered from some significant mental health issues (PCR303).

On cross-examination, Judge Cofer explained that the Jacksonville murder had occurred on Sunday, September 16, and the Tallahassee/Monticello shootings on September 14 (PCR313). He recalled that there was evidence that Mr. Mungin had stolen a Ford Escort in Georgia on September 13, and that an Escort, later discovered in Jacksonville, was identified as having been used in the Tallahassee/Monticello cases (PCR313). Between September 15 and September 16, a Dodge was then reported stolen in Jacksonville (PCR314). A Dodge vehicle was recovered in Georgia (PCR315). He also recalled that the ballistics from all three shootings matched each other, and the gun was recovered from Mr. Mungin's bedroom (PCR315).

In terms of investigating the alibi, Judge Cofer explained that he and Mr. Buzzell went to Pensacola to interview witnesses (PCR319). He explained his understanding of Mr. Mungin's alibi:

> This I pretty much remember. Mr. Mungin, as I had indicated earlier, had been interviewed in prison two times by Jacksonville

> homicide detectives and general outlines of the alibi defense were presented in both of those interviews. And when I – during my interviews with Mr. Mungin, there was relative, not exact, consistency with the general chronologies that were set down in those interviews. In other words, Mungin had left Georgia, had the gun, went to Monticello, the shooting occurred there, he was on his way to visit the girlfriend in Pensacola. The shooting occurred in Tallahassee, be back-tracked to Jacksonville, delivered the gun out to "Ice," I think you referred to him as "Ice" in the detective's report one time, and "Snow" in another one. Exchanged vehicles out. My recollection is then went back up to Georgia with a different vehicle, left Georgia, then again for Pensacola, went to Pensacola, saw his girlfriend, spent a day or so there. On the way back, stopped in at Jacksonville and retrieved the gun from "Ice," went back to Georgia where he was arrested at a relative's home and the gun was in his room.

(PCR320).

In Judge Cofer's view, "most attorneys" would view it as a "daunting task" to attempt to locate "Ice" despite the fact that he knew his nickname and had a "general locale in a high crime area of Jacksonville" (PCR321). Thus, he focused on doing "some leg work" in Georgia and Pensacola, as well as Monticello and Tallahassee (PCR321). He also had a lead in Pensacola for Charlette, the woman that Mr. Mungin had been with in this period of time (PCR322). After locating her, Charlette told them she recalled that Mr. Mungin was in Pensacola at the time he said he was (PCR323-24). She told them that she and Mr. Mungin had gone target practicing and she described a gun which "would have matched the type of weapon

that Anthony used" (PCR324). At that point, he and Mr. Buzzell determined that "this was not going to work" (PCR324). Judge Cofer also said he discussed this with Mr. Mungin, but that despite his explanation, "my general feeling is it kind of went over his head" (PCR325).[17] That Charlette claimed to have seen Mr. Mungin with a gun contradicted his claim that he had given the gun to "Ice" (PCR325). Judge Cofer acknowledged, however, that in her interview with law enforcement, Charlette had never admitted having been involved with target practicing with Mr. Mungin and having seen a weapon (PCR326).[18]

With regard to the penalty phase issue as to the records reflecting Mr. Mungin's hospitalization and suicide attempt, Judge Cofer believed that the issue was adequately covered by Dr. Krop's testimony, as Judge Cofer's habit would

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[17]Later, Judge Cofer testified that "I think at some point Anthony finally understood that the lynch-pin of that alibi defense had been lost. At that point we really didn't go into a whole lot more" (PCR328-29).

[18]Moreover, Judge Cofer acknowledged on re-direct that Charlette was not specific in her recollection of when Mr. Mungin arrived in Pensacola (PCR365). In other words, if her recollection was that Mr. Mungin arrived in Pensacola in the evening after the mid-afternoon shooting in Jacksonville, this would not necessarily be indicative of his guilt (PCR365). If she believed he arrived in Pensacola in the morning of the shooting, however, this could be more indicative of guilt (PCR365). Charlette was never able to provide any of this specific information when she was interviewed by Judge Cofer and Mr. Bezzell (PCR366). Judge Cofer had no notes of his interview with Charlette ((PCR366).

have been to send the records to Dr. Krop and he would incorporate them into the mental health mitigators (PCR334).

Regarding the issue of prosecution witness Kirkland, Judge Cofer explained that there was no "automatic" conflict when a former Public Defender client is a witness in another current client of the office (PCR335). He explained that any conflict depended on a number of factors such as the remoteness of the representation, how extended or involved the Public Defender's office had been in the former client's cases, and whether the former client's priors constituted offenses with which the former client could be impeached (PCR335). Prior to any deposition, including that of Kirkland, it would have been his practice to order a criminal history rap sheet (PCR338). He did not apparently do so prior to Kirkland's deposition, however (PCR340). Based on documents in his own file, Judge Cofer acknowledged that he knew or should have known that Kirkland was on probation at the time he testified against Mr. Mungin but that he did not elicit that information on Kirkland's cross-examination (PCR346). This information would be a "permissible area to inquire about of a witness" (PCR349-50). Whether or not there was any evidence of a "deal" with the State is not the point, "[i]t's a question of whether I can suggest that there is" (PCR350). Had Judge Cofer

known that Kirkland was on probation, "I would have asked him about that status" (PCR350).[19]

Edward James Kimbrough. Kimbrough, a 33 year old life long resident of Jacksonville, is a businessman and pastor at the Overcomer's Association, which ministers to the homeless of Jacksonville (PCR376-77). He had several felony convictions as a younger man, but turned his life around after entering a rescue mission (PCR378). He is now a business owner and married with children (PCR 378).

In the mid-to-late 1980's, Kimbrough lived in Jacksonville and became friendly with Mr. Mungin along with a group of other individuals named Greg Bell ("Poncho"), Alric Goins, Philip Levy, someone named "Tank" who was also known as Paulins or Pullins, and Donette Dues (PCR379). Mr. Mungin's nickname was "Chico" (PCR379-80). Kimbrough was also familiar with a man nicknamed "Ice," who was in his 30s and lived in the Moncrief area of Jacksonville; "Ice" had a jeri-curl, was tall and heavy-set (PCR381-82) "Ice" would "provide a service for

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[19]The argument would have been particularly relevant in Mr. Mungin's case, for the defense could have argued that Kirkland's "certainty" about his identification of Mr. Mungin had changed over time, becoming more "certain" at the time of trial, and that this change could be attributable to his being on probation (PCR361-62).

those who wanted to do drugs, alcohol or whatever" and was "quite frequently" hanging out on Moncrief Street (PCR381). "Ice" also dealt in stolen vehicles and was always armed (PCR382). Kimbrough and Mr. Mungin both knew "Ice" and would hang around with him because "we pretty much were doing drugs back then" (PCR381). The last time he saw "Ice" was in the mid-1990s (PCR384). At no time did any investigator or attorney on behalf of Mr. Mungin ask him any questions about "Ice" (PCR384). At the time of Mr. Mungin's trial, Kimbrough was living on Lee Street in Jacksonville and would gladly have provided a description of "Ice" and attested to the fact that "Ice" in fact existed (PCR384).

On cross-examination, Kimbrough testified that "Ice" was a different person from "Snow"; "Snow"'s real name was Jesse (PCR385). He never ever saw Mr. Mungin with a gun (PCR386). Even though he had been on crack cocaine during this period, Kimbrough's memory of knowing "Ice" and where he was located was not affected (PCR389). He did not recall ever seeing "Ice" and Mr. Mungin together (PCR389).

Jesse Sanders. Currently serving a 15-year prison sentence, Sanders testified that in the mid-1980s he knew Mr. Mungin and would hang out with him in an area close to the Monfrief Street area of Jacksonville (PCR392). He and Mr.

Mungin met each other due to their shared enjoyment of rapping on street corners (PCR393).

In the mid-1980s, Sanders knew a man named "Ice" who would hang around the Moncrief Street area of Jacksonville (PCR393). "Ice" was a hustler who knew how to make money illegally by stealing cars (PCR395). Sanders, "Ice," and Mr. Mungin would be involved in some criminal activities together (PCR395). Sanders recalled one time when he was about 14 or 15 years old when he, "Ice," Edward Kimbrough and others were involved in a crime, but "Ice" never got arrested (PCR397). "Ice" also dealt drugs and exchanged stolen cars for drugs (PCR397). "Ice" would also trade guns for cars (PCR398).

In 1992 and 1993, Sanders was serving a prison sentence (PCR399). No one from Mr. Mungin's legal team ever contacted him about whether "Ice" existed; had he been contacted he would have told them that "Ice" was a real person (PCR399).

On cross-examination, Sanders testified that he did not know "Ice" by his real name but knew were he hung out on the street (PCR401). Sanders did not know a man named Robert Blue who worked at the Public Defender's Office (PCR402). While he was in prison, Sanders did not know anything about Mr.

Mungin having been arrested (PCR402). Nor has Sanders talked with Mr. Mungin since he was incarcerated (PCR402). Sanders has no idea if Mr. Mungin committed the crime in Jacksonville or the crimes in Tallahassee or Monticello (PCR403). Sanders never saw Mr. Mungin with a gun in the time they spent together (PCR403-04).

Brian Washington. Washington, 38 years old, resides in Kingsland, Georgia, about 40 miles away from Jacksonville (PCR405-06). He knew Mr. Mungin, who used to come to his house in Kingsland all the time in the late 1980s and early 1990s (PCR406-07). The last time he saw Mr. Mungin was at around 10:30 AM on September 16, 1990, at a convenience store in Kingsland (PCR407-08).[20] He recounted the brief conversation they had during which Mr. Mungin said he needed a ride to Jacksonville, and Washington told him he could give him a ride but had to first take his wife to church (PCR408). After he took his wife to church, Washington picked up Mr. Mungin from his cousin, Angie Jacobs', house (PCR409). They then drove to Jacksonville and Washington dropped Mr. Mungin off somewhere near Golfair Boulevard (PCR410).

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[20]Washington knew it was September 16 because of several birthdays in the family in September and September 16 was a Sunday, which is the day he took his wife to church (PCR412).

About a week or so later, Washington learned that Mr. Mungin had been arrested for a homicide (PCR410). After he learned this, Washington told his mother that it could not have been true because of the time frame (PCR411). No one from Mr. Mungin's legal team ever contacted him about the case, and had he been asked he would have told them what he knew (PCR411).

On cross-examination, Washington testified that he considered himself a friend of Mr. Mungin's but had not kept in touch with him since Mr. Mungin's arrest (PCR412-13). Washington did not know about any shootings in Tallahassee or Monticello, he had only heard about the Jacksonville crime when his mother told him about it (PCR414). After his mother told him about it, Washington knew it "couldn't be" because he "vividly" remembered giving Mr. Mungin a ride from Kingsland to Jacksonville (PCR415-17).

Victoria Angela Jacobs Glover. Known as Angie, she is Mr. Mungin's first cousin and resides in Kingsland, Georgia (PCR420). In September, 1990, Mr. Mungin was living with her family in Georgia (PCR421). She was aware that Mr. Mungin had a girlfriend, Charlette Dawson, in Pensacola (PCR421). The last time she saw her cousin was when he was arrested in her house (PCR422). Prior to his arrest, Mr. Mungin had been gone for several days, and she recalled him telling her

that he had gone to Pensacola (PCR423-24).

On cross-examination, Angie testified that all she knew about her cousin's whereabouts was what he told her (PCR425). She recalled giving a statement to a public defender investigator in 1992 in which she said she really did not know anything other than Mr. Mungin used to go out with a girl in Pensacola and he used to go there to visit her (PCR426-27).

Philip Levy. Levy is presently in the Duval County Jail serving a six-month sentence for burglary (PCR429). In the mid-to-late 1980s, he and Mr. Mungin became friends and would hang out, drink, and listen to music (PCR430). The last time he saw Mr. Mungin was in 1990 on a Sunday between 11:30 AM and 1:00 PM (PCR431-32). They spent time reminiscing about told times since it had been a while since they had last seen each other (PCR432). They met at Levy's aunt's house and then went to the area of 28th Street and Stuart to see if Donetta Dues, a former girlfriend of Mr. Mungin, was home (PCR433). After that, Levy and Mr. Mungin went to Levy's uncle's house, and then Mr. Mungin left to his aunt's house (PCR433-34). The last time Levy saw him was around 4:30 or 5:00 PM (PCR434). He was pretty sure this occurred on a Sunday in mid-September of 1990 (PCR435).

On cross-examination, Levy explained that he was sure it was a Sunday because when they went to see Ms. Dues, she was at church (PCR436). He did not know about Mr. Mungin's arrest for about a year after it happened because he had moved to another area of Jacksonville (PCR437-38). He did not know he had any information that would be helpful so he did not think to contact someone (PCR438). He did not see Mr. Mungin in the possession of a gun on that day (PCR441).

Ronald Kirkland, Jr.. Kirkland confirmed that, prior to testifying at the evidentiary hearing, he spoke with Assistant State Attorney De la Rionda (PCR455-56). In 1990, he gave a statement to police which included a description of the suspect as having jeri-curls, in his late 20s to maybe even early 30s, and about 5'5" to 5'7" (PCR456-57). The detective showed him some pictures and Kirkland was certain that the person he saw in the picture he identified was the person he saw leaving the store (PCR457). Because of the passage of time, Kirkland could not recall whether he had previously stated that he would be unable to swear in court that that was the person (PCR458). In the time since Mr. Mungin's trial, Kirkland acknowledged problems with substance abuse and abuse of prescription drugs (PCR458).

Kirkland acknowledged a 1988 arrest for grand theft for which he received a withhold of adjudication and was sentenced to probation and restitution; he was represented by the Public Defender's office (PCR461).[21] He also recalled having a worthless check case in 1991 and while he did not remember whether a public defender had been appointed, he did not hire his own lawyer for that case (PCR462). He also acknowledged a 1991 DUI case in which the Public Defender's Office represented him (PCR462). After reviewing some documents, he also recalled three worthless check charges in 1992 for which he received 90 days probation which he successfully completed (PCR464-65). He does not know if there was ever a warrant issued for violation of that probation (PCR465). At the time of Mr. Mungin's trial, Kirkland never discussed with anyone from the State Attorney's Office his status as a probationer (PCR465). In 1999, he was convicted of making a false statement (PCR466).

On cross-examination, Kirkland testified that prior to Mr. Mungin's trial he

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[21]Kirkland was permitted to testify after the State withdrew a relevancy objection to his testimony about his criminal history. As Mr. Mungin's counsel pointed out, the State had disputed the accuracy of the printouts which listed Kirkland's criminal history and thus Kirkland's testimony was necessary in light of the State's position (PCR459-61). The trial court then permitted Kirkland's testimony "to clarify any inference that the records were incorrect" but for no other purpose (PCR461).

did not tell anyone from the State Attorney's Office about his arrest for worthless check charges because it was "kind of embarrassing" (PCR473-74). There were no deals made to him in exchange for his testimony against Mr. Mungin (PCR474).

Vernon Longworth. Longworth knew Mr. Mungin from the Jacksonville area and became friendly with him (PCR477). Longworth's nephew is Philip Long, who was a good friend of Mr. Mungin's as well (PCR478). In 1990, Longworth was residing at 28th and Stuart in Jacksonville (PCR478). The last time he saw Mr. Mungin was on a Sunday afternoon when he came to his house for a few hours to visit (PCR479). He knew it was a Sunday because it was football season and the TV was on (PCR479). Mr. Mungin asked if he could shower because it was a hot day (PCR480). Longworth also testified that Mr. Mungin had gone to Donetta Dues's house across the street to visit the child he had with Ms. Dues (PCR480). After Mr. Mungin took a shower, he and Philip and a few other guys left to go to a juke joint (PCR480). In 1992 and 1993, Longworth resided in Jacksonville and would have been available to talk with anyone from Mr. Mungin's legal team had he been contacted (PCR481).

On cross-examination, Longworth emphasized that he was positive Mr. Mungin came to his house on a Sunday in September, although he did not recall the

exact date (PCR482). He did not recall the exact time that Mr. Mungin came over (PCR483-84). At some point, Longworth heard that Mr. Mungin had been arrested but did not know for what (PCR486). He did not go to the public defender to offer any information (PCR487).

THE STATE'S CASE

Charles F. Cofer. Judge Cofer testified that a continuation homicide report from Detective Gilbreath covered statements given by Mr. Mungin, a well as witness statements by Ms. Dawson in Pensacola (PCR489-90; State's Exhibit 2). He would have taken into consideration the statements reflected in the report in deciding whether to present an alibi defense at trial (PCR490).

Judge Cofer also testified that when a person is put on probation, if the probationer fails to satisfy the conditions of probation, the probation officer prepares an affidavit which gets filed in court, which would then issue a rule to show cause (PCR495). Neither the State Attorney's Office nor the Public Defender's Office is involved in this process (PCR495).

On cross-examination, Judge Cofer explained that Mr. Mungin's statements to law enforcement reflected in State's Exhibit 2 were "generally consistent" with some "minor diversions which, in my view, could be attributed to interviewing a

person at two different times" (PCR496-97). Nothing in State's Exhibit 2 indicates that law enforcement undertook any investigation into looking for "Ice" at the location that Mr. Mungin had given them (PCR502-03). In Judge Cofer's view, the prospect of finding "Ice" was "minimal" and became "relatively unimportant after my discussions with the witness in Pensacola" (PCR504). He acknowledged that if "Ice" had been located and said that he or someone else had committed the murder, "that would have been beautiful" (PCR504). However, when the Pensacola witness placed a gun matching the description of the murder weapon in Mr. Mungin's hand during the time Mr. Mungin said he was in Pensacola, "that kind of brings the whole process to a screeching halt" (PCR504).

Judge Cofer could not state with certainty that investigator Blue went out looking for "Ice" or that Mr. Ewing went out to investigate the alibi; he could state with certainty that he himself did not go into the Moncrief neighborhood to attempt to verify the existence of "Ice" (PCR505).[22]

Detective Dale Gilbreath. Gilbreath was the lead detective assigned to the

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[22]Following the conclusion of Judge Cofer's testimony, Judge Southwood stated on the record that while the parties were deciding if there was to be any further evidence, he would be "get[ting] with" Judge Cofer about some new procedures that Judge Southwood was not familiar with (PCR510). Judges Southwood and Cofer then proceeded to talk privately in the jury room (PCR510).

case involving Mr. Mungin (PCR512). He explained that he had prepared a rough draft of his police report before preparing the final report; the rough draft was introduced as State's Exhibit 3 (PCR515).[23] At the time of the deposition he gave to Mr. Mungin's trial counsel, he only had the rough draft version, which he had provided to counsel and had informed him that it was a rough draft (PCR515). Subsequent to the deposition, he prepared the final version of the report which he then provided to Judge Cofer (PCR516).

On cross-examination, Gilbreath testified that he had in his possession his notes of his interviews with Mr. Mungin; these notes had never been previously turned over to the State (PCR518-19). However, upon objection from the State, the court refused to permit Mr. Mungin's collateral counsel to review the notes as well as the request that the court review the notes *in camera* (PCR519-24).

Gilbreath testified that he contacted Mr. Mungin on two occasions to take a statement from him. Initially, on November 21, 1992, Mr. Mungin indicated he did not want to talk (PCR525). On March 31, 1992, Gilbreath had the second interaction with Mr. Mungin with no one else present (PCR526). Neither of these interviews were tape recorded, and were not memorialized in writing until

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[23]The final version of the report had previously been introduced as State's Exhibit 2.

September 28, 1992 (PCR527). Nor was Mr. Mungin asked to put any statement in writing (PCR527). In the second statement, Mr. Mungin discussed "Ice" (PCR528). Neither Gilbreath nor any other detective attempt to investigate the physical location where "Ice" was known to hang out (PCR528; 529).

SUMMARY OF THE ARGUMENTS

1. The lower court erred in failing to *sua sponte* recuse itself and the judicial circuit from the postconviction proceedings because trial counsel and the lower court judge were both sitting circuit court judges in the same circuit. One judge should not be in a position of having to assess the credibility of a fellow judge, and, for this reason, the circuit should have recused itself. Because of the court's failure to recuse itself and the circuit, Mr. Mungin was denied his right to a full and fair postconviction hearing before an impartial tribunal.

2. The lower court erred in failing to conduct the requisite *in camera* inspection of exempted records submitted to the records repository from the Jacksonville/Duval County Sheriff's Office and the Duval County State Attorney's Office. Although the exempted materials were forwarded to the court for review, the review never occurred, in violation of Fla. R. Crim. P. 3.852.

3. The lower court erred in refusing to permit Mr. Mungin's counsel from

obtaining or even reviewing Detective Gilbreath's rough notes of his interviews with Mr. Mungin, notes which were the only contemporaneous memorialization of the interviews. The court also erred in restricting counsel's cross-examination of Gilbreath as the door had been opened to this topic by the State's direct examination.

4. The lower court erred in summarily denying several claims. These claims were facially sufficient, stated cognizable claims for relief, were not procedurally barred, and required factual resolution. The lower court failed to attach portions of the record and failed to adequately explain his reasons for denying these claims. Reversal for an evidentiary hearing is required.

5. Mr. Mungin received ineffective assistance of counsel at the guilt phase due to the singular and combined effects of counsel's failure to adequately impeach key witness Ronald Kirkland, the State's failure to disclose impeachment evidence relating to Kirkland, counsel's failure to elicit favorable testimony from Detective Conn, and counsel's failure to adequately investigate and present favorable evidence in the form of an alibi.

6. Trial counsel had an actual conflict of interest due the simultaneous and prior representation of key witness Kirlkland by the Public Defender's Office. In

the alternative, Mr. Mungin received ineffective assistance of counsel due to the failure to investigate and disclose the evidence of the conflict.

7. Trial counsel rendered ineffective assistance at the penalty phase by failing to elicit powerful evidence in mitigation, which evidence undermines confidence in the jury's 7-5 recommendation of death.

I

FUNDAMENTAL ERROR OCCURRED BY THE FAILURE OF JUDGE SOUTHWOOD AND THE FOURTH JUDICIAL CIRCUIT TO RECUSE THEMSELVES FROM MR. MUNGIN'S POSTCONVICTION PROCEEDINGS.

Mr. Mungin's postconviction proceedings, including his evidentiary hearing, were presided over by Judge John D. Southwood of the Fourth Judicial Circuit. Mr. Mungin was afforded an evidentiary hearing on some, but not all, allegations of ineffective assistance of counsel of his trial attorney, Charles F. Cofer. At the time of the postconviction proceedings, however, Cofer was a sitting judge also in the Fourth Judicial Circuit (PCR235). Due to the conflict inherent in one sitting judge having to assess the effectiveness, or lack thereof, of a colleague also sitting as a judge in the very same judicial circuit, the Fourth Judicial Circuit and Judge Southwood should have *sua sponte* recused themselves from hearing Mr. Mungin's postconviction proceedings.

It is axiomatic that Rule 3.850 proceedings are governed by basic principles of due process. Moreover, "no other principle is more essential to the fair administration of justice than the impartiality of the presiding judge." *In re McMillan*, 797 So. 2d 560 (Fla. 2001). *Accord Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) ("Due Process Clause entitles a person to an impartial and disinterested tribunal in . . . criminal cases"); *Porter v. Singletary*, 49 F. 3d 1483, 1487 (11th Cir. 1995) ("If the judge was not impartial, there would be a violation of due process"). Indeed, the due process right to a fair tribunal is so fundamental that the deprivation of such is structural error not subject to harmless-error review. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Mr. Mungin submits that the fundamental right to a fair and impartial tribunal warranted the lower court's *sua sponte* recusal from this case due to the unseemly and unfair circumstance of one sitting judge having to pass on the effectiveness, or lack thereof (including credibility determinations) of a fellow judge sitting in that same judicial circuit.

While collateral counsel did not move for the disqualification of the Fourth Judicial Circuit, Mr. Mungin nonetheless submits that fundamental error occurred when the judge below did not *sua sponte* recuse himself, particularly after granting an evidentiary hearing when the testimony of fellow Judge Cofer would have to be

heard and assessed for credibility and reasonableness. *See Kalapp v. State*, 729 So. 2d 987 (Fla. 5th DCA 1999) (addressing merits of argument raised for first time on appeal that judge should have *sua sponte* recused himself). Judge Southwood had an obligation to *sua sponte* recuse himself in order to avoid appearances of impropriety. *See* Fla. R. Jud. Admin. 2.160 (I) ("Nothing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative"); Florida Code of Judicial Conduct, Canon 3 (E) (1) (1998) ("[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned").

The unfairness and unseemliness of the proceedings below were evident due to the fact that one judge was required to assess the credibility of another.[24] For example, prominently featured in Judge Southwood's order was the following passage:

> This Court will note, initially, that many of the allegations raised by

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[24]This situation has occurred in other capital cases. For example, in *Hodges v. State*, 885 So. 2d 338, 344-45 (Fla. 2003), the Court noted that the judge (from Hillsborough County, where the original trial occurred) recused himself from Hodges' case after granting an evidentiary hearing "due to the election of Hodges' penalty phase counsel, Daniel Perry, to the position of circuit court judge in Judge Padgett's judicial circuit. Judge Dennis Maloney of the Tenth Judicial Circuit was assigned to the case." The undersigned counsel is aware of several other cases in a similar posture (George Brown, Juan Melendez, James Dailey, and Dean Kilgore).

> Defendant are directed at trial counsel's tactic [sic] decisions. *One of the outstanding factors to be considered is experience and expertise of trial counsel from the office of the public defender.* ***There may not be many lawyers with the experience of dealing with homicide cases as exhibited by current county court judge and former assistant public defender Charles G. Cofer, Defendant's trial attorney whose testimony presented at the evidentiary hearing was both more credible and more persuasive than Defendant's allegations.***

(PCR204) (emphasis added). The order went on to discuss the "credibility" of Judge Cofer several more times (PCR206; 207). Given that Judge Cofer was a sitting circuit court judge in the same judicial circuit as Judge Southwood, it is hardly surprising that Judge Southwood would go to the lengths he did to praise Judge Cofer.[25] Moreover, following the conclusion of Judge Cofer's testimony during the State's case below, Judge Southwood stated on the record that while the parties were deciding if there was to be any further evidence, he would be "get[ting]

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[25]Indeed, Mr. Mungin's collateral counsel did not even seek to elicit from Judge Cofer his educational experience; it was only upon prompting by Judge Southwood did Judge Cofer testified that he received his undergraduate degree from Duke University in 1974 and graduated from the University of Virginia School of Law in 1977 (PCR236). Moreover, the record does not reflect that "there may not be many lawyers" with the experience that Judge Cofer had in trying homicide cases, as Judge Southwood's order reflects. Judge Cofer testified that as an assistant public defender he tried 27 or 27 actual jury trials; however, he was an assistant public defender for over eighteen (18) years (PCR236; 334). Mr. Mungin submits that Judge Southwood's hyperbole about Judge Cofer's experience is fairly and reasonably attributable to their status as colleagues.

with" Judge Cofer about some new judicial procedures that Judge Southwood was not familiar with (PCR510). Judges Southwood and Cofer then proceeded to talk privately in the jury room (PCR510). These are examples of the problem associated with the unique facts of this case and why the Fourth Judicial Circuit, including Judge Southwood, should have been disqualified.[26] Because there was more than a reasonable question about whether Judge Southwood could provide a fair and impartial tribunal and fact-finder with respect to Judge Cofer's representation of Mr. Mungin, he, along with the entire Fourth Judicial Circuit, should have been disqualified from presiding over this case. Reversal for a new evidentiary hearing with directions that Mr. Mungin's case be assigned to another judicial circuit is warranted under the facts of this case.

[26]Another example of Judge Southwood's effort to dispute Mr. Mungin's allegations that Judge Cofer was ineffective occurred when collateral counsel was questioning Cofer. In the middle of counsel's examination of Cofer, Judge Southwood interjected some of his own leading and generalized questions on the question of the alibi defense (PCR309-10). Judge Southwood later acknowledged that his questioning was in fact an effort to "presumptively rebut" Mr. Mungin's claims (PCR318). Judge Southwood's role was to preside over the case, not act as an advocate to "presumptively rebut" Mr. Mungin's claims.

II

THE LOWER COURT ERRED IN FAILING TO CONDUCT AN *IN CAMERA* INSPECTION OF EXEMPTED RECORDS FROM THE DUVAL COUNTY STATE ATTORNEY'S OFFICE AND THE DUVAL COUNTY SHERIFF'S OFFICE.

Pursuant to the discovery procedures announced by this Court relative to capital cases, various state agencies involved in Mr. Mungin's case submitted records to the records repository; several of those agencies, including the Department of Corrections, the Duval County State Attorney's Office, and the Duval County Sheriff's Office, not only submitted records but also claimed exemptions from disclosure. A status conference was held on May 26, 1999 (Supp. PCR58; 345-79), and an order setting an *in camera* inspection for July 14, 1999, was subsequently entered (Supp. PCR60).[27] At the status conference, the fact that the *in camera* inspection was to include records from the Department of Corrections, State Attorney's Office for the Fourth Judicial Circuit, and the Sheriffs Office was extensively discussed (Supp. PCR350-75). According to the

[27]A transcript of the *in camera* inspection exists but, per the Order of this Court it remains sealed and thus Mr. Mungin's counsel does not have access to this transcript. Mr. Mungin again renews his request for access to this transcript in order to ascertain with certainty which records were subject to the *in camera* review by the lower court.

order setting the *in camera* inspection, the records which were subject of the *in camera* inspection were records claimed to be exempt from the State Attorney's Office for the Fourth Judicial Circuit, the Department of Corrections, and the Jacksonville/Duval County Sheriff's Office (Supp. PCR60). The record is unclear, however, on what exactly occurred at the *in camera* hearing. The record reflects that an order to deliver to the lower court the records exempted from the Department of Corrections was entered on July 9 (Supp. PCR62), but no order appears with respect to the delivery of exempt records from the other agencies identified in the court's order. The record does reflect with certainly that the State Attorney's Office exempted records (Supp. PCR47),[28] but it is not known whether those exemptions were the subject of the July 14 *in camera* inspection as indicated in the court's order. The order issued by the lower court following the *in camera* inspection only addresses the Department of Corrections (Supp. PCR85-86).

A status hearing was subsequently scheduled for December 14, 1999 (Supp.

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[28]At the May 26, 1999, status hearing, the Assistant State Attorney confirmed that his office had exempted materials from disclosure (Supp. PCR360; 375). The record does not contain a written notification by the Sheriff's Office that it exempted records from disclosure, but at the May 26, 1999, hearing, it was confirmed that the Sheriff's Office had also submitted exempted material to the records repository which was to subject to *in camera* review (Supp. PCR350; 362; 368).

PCR88). At that hearing, the status of the public records issues was addressed. While the court recalled having performed an *in camera* inspection, there was significant confusion as to which records had been reviewed (Supp. PCR385 *et. seq*.). It was ultimately determined that the July *in camera* inspection may not have included review of the records exempted from the State Attorney's Office despite Mr. Mungin's previous request for those documents to be reviewed (Supp. PCR385-86). The Assistant State Attorney did recall coming down to the judge's chambers for the *in camera* inspection but he left after the court determined that counsel should not be present due to concerns that the proceedings would be *ex parte* (Supp. PCR387). After reviewing his file, the court determined that his clerk had not requested that the repository forward the Sheriff's Office and State Attorney records for the *in camera* review (Supp. PCR388-90). The issue of the records thus ended without being resolved and the parties addressed the issue of appointing new counsel for Mr. Mungin (Supp. PCR391).

The record next reflects that just prior to the filing of the amended Rule 3.850 motion by new registry counsel in September, 2000, counsel filed an amended motion to require production of records from the records repository (Supp. PCR157-58). On September 11, 2000, the lower court entered an order

directing the repository to deliver to the Clerk's office the records that had been exempted, including exemptions taken by the State Attorney's Office (Supp. PCR161).

After this, however, the record is silent as to what occurred as a result of the additional *in camera* inspection or even if the requisite *in camera* hearing occurred. In preparation for this Amended Brief, the undersigned, after observing that there did not appear to be any order from the lower court with respect to the results of this second *in camera* inspection, contacted opposing counsel, Assistant Attorney General Curtis French, to see if Mr. French's file contained any such order. After Mr. French responded that his file did not contain such an order, the undersigned contacted the Clerk of Court in Duval County in order to see if there was any such order in the clerk's file that did not make it into the record on appeal. After consulting with a printout, the representative from the Clerk's Office told the undersigned that there was no such order in the file. Thus, there is nothing refuting the fact that the lower court ultimately failed to perform the required *in camera* inspection of the records exempted from the Duval County State Attorney's Office and the Duval County Sheriff's Office.

The failure of the lower court to conduct the *in camera* inspection is error

that warrants reversal at this time. *See Lopez v. Singletary*, 634 So. 2d 1054 (Fla. 1993); *Walton v. Dugger*, 634 So. 2d 1059 (Fla. 1993); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990). Here, the lower court had no discretion not to perform the requisite *in camera* inspection. *See* Fla. R. Crim. P. 3.852 (f)(2) ("The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents"). This is not a situation where the issue of these records was never addressed below. Indeed, the lower court acknowledged that its own error contributed to the fact that the exempted records from the State Attorney's Office and Sheriff's Office were not sent as part of the records to be reviewed in the first *in camera* inspection (Supp. PCR388-90), and ordered these exempted materials to be forwarded to him for review (Supp. PCR161).

Under these circumstances, the lower court erred in not conducting the requisite *in camera* inspection. As this Court is well-aware, constitutional claims often arise when defendants in the postconviction setting discover that the State has failed to disclose exculpatory evidence at the time of trial that was material as to guilt and/or punishment. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999); *Banks v. Dretke*, 124 S. Ct. 1256 (2004); *Mordenti*

v. State, 2004 Fla. LEXIS 2253 (Fla. Dec. 16, 2004); *Cardona v. State*, 826 So. 2d 968 (Fla. 2002); *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Young v. State*, 739 So. 2d 553 (Fla. 1999). It is thus critical that judges perform the requisite *in camera* inspections in order to evaluate whether exculpatory information should be disclosed to collateral defendants and, if disclosed after *in camera* review, the defendant should be permitted to amend his Rule 3.850 motion. *Provenzano, supra*. Here, the lower court's failure to do so requires reversal.[29]

III

MR. MUNGIN WAS DEPRIVED OF A FULL AND FAIR EVIDENTIARY HEARING BY THE LOWER COURT'S FAILURE TO ORDER THE DISCLOSURE OF DETECTIVE GILBREATH'S NOTES OF HIS INTERVIEWS WITH MR. MUNGIN AND TO PERMIT CROSS-EXAMINATION OF SAME.

During the evidentiary hearing below, the State called Detective Dale Gilbreath as a witness. Gilbreath was the lead detective assigned to the case involving Mr. Mungin (PCR512). One of his tasks as lead detective was to

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[29]Based on Argument I, Mr. Mungin submits that any such *in camera* review be conducted by a qualified judge in another judicial circuit, not by Judge Southwood or any other judge in the Fourth Judicial Circuit.

conduct interviews of Mr. Mungin, who, at the time, was incarcerated as a result of the Tallahassee and Monticello shootings. He explained that he had prepared a rough draft of his police report before preparing the final report; the rough draft was introduced as State's Exhibit 3 (PCR515).[30] At the time of the deposition he gave to Mr. Mungin's trial counsel, he only had the rough draft version, which he had provided to counsel and had informed him that it was a rough draft (PCR515). Subsequent to the deposition, he prepared the final version of the report which he then provided to trial counsel Cofer (PCR516).

On cross-examination, Gilbreath testified that he had in his possession his notes of his interviews with Mr. Mungin; these notes had never been previously turned over to the State (PCR518-19). However, upon objection from the State, the court refused to permit Mr. Mungin's collateral counsel to review the notes as well as the request that the court review the notes *in camera* (PCR519-24). Subsequently, Gilbreath testified that he contacted Mr. Mungin on two occasions to take a statement from him. Initially, on November 21, 1992, Mr. Mungin indicated he did not want to talk (PCR525). On March 31, 1992, Gilbreath had the second interaction with Mr. Mungin with no one else present (PCR526). Neither of

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[30]The final version of the report had previously been introduced as State's Exhibit 2.

these interviews were tape recorded, and were not memorialized in writing until September 28, 1992 (PCR527). Nor was Mr. Mungin asked to put any statement in writing (PCR527).

The lower court erred in refusing to provide Mr. Mungin access to Gilbreath's notes of his interviews with Mr. Mungin, thus depriving him of due process and a full and fair evidentiary hearing. When it was revealed during cross-examination that Gilbreath not only had kept his notes of his interviews with Mr. Mungin but had brought them to the hearing, counsel immediately requested to see them (PCR519). The State objected because the notes were not part of the public records request made by Mr. Mungin (PCR520). The court and the State agreed that trial counsel Cofer had testified that he did not recall ever receiving these notes (PCR521). Mr. Mungin's counsel then argued that "if there's a discovery violation, then that may be a defense for Mr. Cofer's investigation in this case" (PCR521),[31] noting that Gilbreath apparently had the notes during his deposition

[31]Had the notes been produced in the discovery phase of the case permitted by Rule 3.852, a claim could have been included in the final Rule 3.850 motion filed by Mr. Mungin. However, the notes were not disclosed, the court never conducted the requisite *in camera* inspection of the Sheriff's Office records, the court refused to order their production once their existence was confirmed at the evidentiary hearing, and then the court refused to even review them *in camera* at the evidentiary hearing.

taken by trial counsel (PCR523). Mr. Mungin's counsel again requested production of the notes in order to adequately cross-examine Gilbreath and also to assess whether trial counsel could have attempted to obtain the notes prior to trial (PCR523). The court noted that if Mr. Cofer had attempted to get the notes "[t]hat doesn't necessarily mean if he attempted, he would have got[ten] them" (PCR523). The State then argued that this issue was beyond its reason for calling Gilbreath, but that it would not have an objection if the court were to review the notes *in camera* (PCR524). Mr. Mungin's counsel reiterated he simply wanted to "examine the notes in camera to see if there's differences between the notes and the typed statement" (PCR523). The State then objected that this subject area was beyond the scope of direct, and the court denied the request to produce the notes and refused to review them *in camera* (PCR524).

The lower court erred in denying the request for the production of these notes. As for the State's representation that Gilbreath's notes were not part of the public records request, that representation was false. The Jacksonville Sheriff's Office did produce records pursuant to Fla. R. Crim. P. 3.852; however, the agency also claimed exemptions from production (Supp. PCR350; 362; 368). Those exemptions were not, however, reviewed by the lower court *in camera*. *See*

Argument II, *supra*. Mr. Mungin's collateral counsel informed the court that he had never been provided with the notes (PCR519). Thus, the error in not conducting the *in camera* inspection is made apparent by this situation but could have been easily resolved in part by the court simply permitting collateral counsel to review the notes. The State, however, chose to object rather than simply agree that Mr. Mungin should be permitted to review notes that the detective generated during his interviews with Mr. Mungin himself.[32] The lower court also erred in refusing to even review the notes *in camera*, something which he would have been required to do in any event under Rule 3.852. *See* Argument II, *supra.*

The State's suggestion that the notes would somehow exceed the scope of the reason why the State called Gibreath to testify and thus beyond the scope of direct examination is also not borne out by the record. The State's direct examination focused on the two reports authored by Gilbreath as a result of his interviews with Mr. Mungin, and posed the specific question: "And in your

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[32]This is not a situation where Mr. Mungin's interviews were recorded by audio or video and thus the detective's notes would be essentially meaningless as there would be a definitive memorialization of exactly what Mr. Mungin said. Gilbreath testified that he alone interviewed Mr. Mungin, that he never recorded the interviews nor did he ask Mr. Mungin to provide a written statement, and the report memorializing these interviews was not generated until nearly a year after the first interview and six months after the second (PCR525-27).

interview, did you document it in those reports" (PCR515). The State then asked Gilbreath what the difference was between the draft report and the final version (PCR515). The door had clearly been opened by the State for Mr. Mungin to question Gilbreath about his interviews with Mr. Mungin and how those interviews had been memorialized. Indeed, the State did not object when Mr. Mungin's counsel began questioning Gilbreath on this issue; it only objected when the request was made to produce the raw notes and *then* belatedly argued that the questioning was beyond the scope of the direct examination (PCR523-24). Thus, not only was the State's argument that the questioning was beyond the scope not made in a timely fashion, *see Jones v. Butterworth*, 701 So. 2d 76, 78 (Fla. 1997) (objection "waived unless it is made at the time the testimony is offered"), it was also contrary to law as the door had been opened by the State during its direct exam. "It is too well settled to need citation of authority that a full and fair cross-examination of a witness upon the subjects opened by the direct examination is an absolute right, as distinguished from a privilege, which must always be accorded to the person against whom the witness is called and this is particularly true in a criminal case such as this wherein the defendant is charged with the crime of murder in the first degree." *Coco v. State*, 62 So. 2d 892, 894-95 (Fla. 1953). Here, the subject of

Gilbreath's interviews of Mr. Mungin was brought out on direct exam, and thus cross-examination should have been allowed "relative to the details of an event or transaction a portion only of which has been testified to on direct examination. . . . [Cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief." *Zerquera v. State*, 549 So. 2d 189, 192 (Fla. 1989) (quotations omitted).

Because the lower court erred in failing to permit Mr. Mungin to review Gilbreath's notes of his interviews with Mr. Mungin and subsequently question him about those notes, Mr. Mungin was denied a full and fair evidentiary hearing and thus due process. Reversal is warranted.

IV

THE LOWER COURT ERRED IN SUMMARILY DENYING VARIOUS CLAIMS AND IN FAILING TO ATTACH ANY PORTIONS OF THE RECORD AND/OR OTHERWISE EXPLAIN THE REASONS FOR THE SUMMARY DENIAL.

In considering whether a Rule 3.850 movant is entitled to present evidence in support of his constitutional claims, his factual allegations "must" be accepted as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989). "Under rule

3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000). Here, the lower court improperly denied, without an evidentiary hearing, numerous claims raised by Mr. Mungin in his Rule 3.850 motion.[33] Reversal for an evidentiary hearing is warranted.

A. Trial counsel's ineffectiveness during voir dire.

In Claim II of his final Rule 3.850 motion, Mr. Mungin alleged that defense counsel was ineffective when he accepted the jury without objection even though the State had clearly struck jurors on the basis of race:

> During Voir Dire, the prosecutor eliminated seven prospective black jurors from the jury, three by seeking and obtaining cause, and four by peremptory strikes (R531-38; 539-40; 544-46; 551-53; 554-55). Four blacks served on the jury (R559-60). As to three of the four black jurors eliminated by peremptory strike, the prosecutor articulated reasons for his strikes [that] were not demonstrably pretextual. However, the State's use of the peremptory strike to remove Helen Galloway was demonstrably pretextual. The defense did object to the removal of Helen Galloway but the objection was overruled.

[33]The lower court never entered a written order regarding his ruling on these claims.

(PCR26). The motion went on to detail how the defense properly argued that the State's purported reason for striking Galloway was a ruse,[34] and that other white jurors who had expressed the same answers to questions about the death penalty were not struck by the State (PCR28-29).[35] Finally, the motion alleged that trial counsel, although making the proper and well-founded objections under prevailing law to the State's challenge to Galloway, ultimately waived the issue for Mr. Mungin by failing to object to the final composition of the jury as is required under the law. *See Ault v. State*, 866 So. 2d 674, 683 (Fla. 2004) (in order to prevent waiver or juror challenge issue, opponent must call court's attention to its earlier objection before jury is sworn); *Arnold v. State*, 775 So. 2d 696, 698 (Fla. 4th DCA 1999) (same). Thus, the prejudice in failing to object caused the issue not to be preserved for appeal (PCR30). *See Mungin v. State*, 689 So. 2d 1026, 1030 n.7

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[34]The prosecutor had argued that Galloway was struck because she said she had mixed emotions about the death penalty, and asserted that each juror, white or black, who reported mixed emotions about the death penalty had been struck (R534).

[35]For example, trial counsel had pointed out that Galloway's responses were no different from those of prospective jurors Venettozzi and Goodman (PCR27-28). The State pointed to its strike of juror Podejko as having been for the same reason as Galloway in order to establish that the strike against Galloway was race-neutral; Podejko, however, in addition to stating she had mixed feelings about the death penalty, also said she was not sure if she could convict if a conviction might subject the defendant to a death sentence (R374; 403-04).

(Fla. 1995) ("Mungin raised two other guilt phase issues. Issue 1 (whether trial court erred in overruling a defense objection to the State's peremptory challenge of a black prospective juror) has not been preserved for our review").

Despite acknowledging that the factual allegations made by Mr. Mungin in this claim were set forth in "great specificity" (Supp. PCR407), the trial court summarily denied this claim at the *Huff* hearing, concluding that the record refuted the allegations (PCR411). This conclusion was based on the State's argument at the *Huff* hearing that while there was no dispute that this issue "was raised, or at least the underlying issue was raised on direct appeal" (Supp. PCR409), it "really doesn't matter" if counsel had a "strategic decision or not" because "the underlying claim was meritless" (Supp. PCR410). Latching on this reasoning, the lower court found that the record conclusively refuted the allegation and thus summarily denied the claim (Supp. PCR411).

The lower court's ruling suffers from numerous flaws. By failing to attach any portion of the record, it is entirely unclear what part of the "record" conclusively refuted Mr. Mungin's allegation that trial counsel failed to object to the composition of the jury despite having made lengthy objections to the State's challenge to juror Galloway. The State had noted that the underlying juror issue

had been raised on direct appeal, noting that the State's direct appeal initial brief had addressed the issue (Supp. PCR410).[36] Is the basis of the court's summary denial the fact that the juror issue had been raised on appeal? The record is silent on this, and the lower court failed to attach any portion of the record in support of its summary denial or otherwise explain its reasoning, in violation of well-settled procedures in Rule 3.850 proceedings. *See McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002) ("This Court has explained that to support summary denial without a hearing, a trial court must either state its rationale in its decision or attache those specific parts of the record that refute each claim presented in the motion") (quoting *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993)).

To the extent that the lower court's summary denial is premised on the State's bare allegation that the juror issue, even if preserved, would have been meritless, this too is an improper basis for denial. The lower court engaged in no analysis whatsoever of the underlying facts surrounding defense counsel's

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[36]In its written response to Mr. Mungin's claim, the State had argued that the juror claim was procedurally barred (PCR90). The State did not argue procedural bar at the *Huff* hearing, however, and wisely so. An ineffective assistance of counsel claim is cognizable when there is a failure to preserve an issue for appellate review. *See Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001). *Accord Pietri v. State*, 885 So. 2d 245, 255-56 (Fla. 2004) (rejecting procedural bar and finding cognizable an ineffectiveness claim for failing to preserve juror issue which had been held on direct appeal to not have been preserved).

objections to juror Galloway; indeed, the lower court, prior to the *Huff* hearing, had not even reviewed the State's direct appeal brief which included its argument that the issue was meritless (Supp. PCR409-10).[37] Moreover, the lower court openly acknowledged at the conclusion of the case that it had not even had a copy of the trial record when presiding over the postconviction proceedings (PCR536-37).[38] Thus, the court could hardly have meaningfully reviewed the underlying merit of the juror issue in order to determine whether counsel had a strategic decision to not preserve the issue in the few minutes the claim was discussed at the *Huff* hearing.[39]

This claim unquestionably should be heard at an evidentiary hearing. The State conceded that the record is silent as to whether or not trial counsel had a strategic decision for not objecting to the final composition of the jury (Supp.

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[37]On direct appeal, this Court did not engage in an alternative analysis of the underlying issue; it merely concluded that the issue had not been preserved for appeal without determining that even had it been preserved it would have been meritless. *Mungin*, 689 So. 2d at 1030 n.7.

[38]In the court's words: "I don't know if I'm going to need it or not, that's what I'm telling you at this point in time. Let's see if I need it, I'll let somebody know. If you all have it, so be it. I don't know if you have one available to you or not. . . If you want to reference it, you can. If I fell like I need to see it, so be it" (PCR536-37).

[39]The issue of whether the underlying merit of trial counsel's objection to the State's challenge of Galloway is not one that can be assessed during a few moments at a *Huff* hearing. Courts struggle long and hard over such issues, which require extensive review of the pleadings, the record, and the law. *See Ault, supra*.

PCR410) ("I mean I think it clearly was [a strategic decision], but it really doesn't matter if it wasn't because . . . the underlying claim was meritless"). Mr. Mungin's counsel argued as well that "the question here is we just want a hearing as to whether this was a strategic decision not to preserve this" (Supp. PCR408). Whether or not counsel made a strategic decision cannot be presumed because it is a factual issue. *See Patton v. State*, 784 So. 2d 380, 387 (Fla. 2000). It may well be that trial counsel, despite lodging extensive objections to the juror strike, later became satisfied with the ultimate jury. *See Joiner v. State*, 618 So. 2d 174, 176 (Fla. 1993) ("[i]t is reasonable to conclude that events occurring to his objection caused him to be satisfied with the jury about to be sworn").[40] It may well be, however, that trial counsel was simply unaware of the law requiring him to object to

[40]This rationale, however, is not likely in this case. It is significant to note that in his motion for a new trial, defense counsel included as one of the grounds the trial court's error in allowing the State to exercise a peremptory challenge of Helen Galloway for racially-discriminatory purposes (R387). Defense counsel also ardently argued this point at a hearing on the motion for new trial, expressing repeated disagreement with the court's ruling (R1270-73). Certainly, had trial counsel become "satisfied" with the jury after the objections were lodged regarding Galloway, defense counsel would not have included this issue in one of the grounds enumerated in the motion for new trial and argued this point extensively at a subsequent hearing.

the jury prior to the jurors being sworn in.[41] Given that trial counsel did lodge proper inquiries and objections, no conclusion can be gleaned from this record, absent a hearing, that counsel tactically abandoned those objections. *See Thomas v. State*, 700 So. 2d 407, 408 (Fla. 4th DCA 1997) ("Appellant's second claim for relief was that his trial counsel was ineffective in failing to renew his objection to the state's use of a peremptory challenge to excuse a juror where the record indicates that the juror was Hispanic, precluding the point from being raised on direct appeal. . . . The allegation of failing to preserve an issue which, if well founded, could result in reversal, constitutes a preliminary basis for relief pursuant to rule 3.850"); *Crumbley v. State*, 661 So. 2d 383, 384-85 (Fla. 1st DCA 1995) (reversing summary denial of ineffectiveness allegation based on trial counsel's failure to preserve *Neil* error for appellate review); *Tidwell v. State*, 844 So. 2d 701, 702 (Fla. 1st DCA 2003) ("The second ground raised by appellant alleged that his attorney failed to preserve an objection to the state's improper use of peremptory

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[41]Counsel had the obligation to know the law attendant to preserving such issues, and any tactical or strategic decision that he might have had based on any misunderstanding or ignorance of the law would be entitled to no deference. *See Hardwick v. Crosby*, 320 F. 3d 1127, 1163 (11th Cir. 2003) ("a tactical or strategic decision is unreasonable if it is based on a failure to understand the law"). Again, Mr. Mungin notes that counsel *did* raise the error regarding the strike of Galloway in his motion for new trial, which is significant evidence that he simply did not know he was required to object before the jury was sworn.

challenges to remove male jurors because the attorney did not renew his objection by moving to strike the jury panel before it was sworn. . . Appellant's allegations are facially sufficient" and summary denial reversed); *Chattin v. State*, 800 So. 2d 665, 666 (Fla. 2d DCA 2001) ("Chattin alleged [in his rule 3.850 motion] that trial counsel was ineffective for failing to properly preserve the challenges for cause. . . [W]e reverse that portion of the trial court's order denying this claim and we remand for an evidentiary hearing"). Reversal is warranted.

B. Failure to Object to Improper Argument by the State.

In Claim III of his final amended Rule 3.850 motion, Mr. Mungin alleged that trial counsel was ineffective for failing to object to three arguments advanced by the State which, singularly and cumulatively, denied him of a fair trial. The first arguments related to the prosecutor telling the jurors that "[e]verybody is entitled to a new trial no matter how overwhelming the evidence may be" (PCR32). The second argument related to the prosecutor telling the jurors that the law did not allow that the jurors recommend a life sentence because of sympathy for Mr. Mungin's grandmother, who testified at the penalty phase (PCR32). The final argument related to the prosecutor analogizing Mr. Mungin to a dog (PCR32). The trial court concluded that these arguments were not but could have been raised on

direct appeal and thus the claim was procedurally barred (Supp. PCR416).

The lower court erred in concluding that these claims were barred. The claims were not nor could have been raised on direct appeal because they were not preserved by objection. The allegation raised in the rule 3.850 motion was that counsel failed to object to the arguments, an argument that cannot be raised on appeal but rather in a 3.850 proceeding. Contrary to the lower court's ruling, an allegation of failure to object is a cognizable claim in a rule 3.850 motion. *See Bruno v. State, supra.*

The prosecutor's analogy of Mr. Mungin to a dog is a particularly egregious argument that could not but have resulted in prejudice in the jury's deliberation of the penalty. The prosecutor argued:

> Just as a father or mother may bring a dog home to their child – that dog may be a pit bull. As a puppy that dog is a wonderful dog. He plays with all the kids. He's great. Everybody loves him. Later on when that puppy dog gets big he becomes vicious and he starts biting people and he starts biting other dogs and kills other dogs, – he starts biting other kids and he starts biting dogs, other dogs. He even kills dogs. That dog is the puppy who was a beautiful dog and nobody dreamed it would turn out the way it did.

(R1222-23). This argument is clearly objectionable.[42] As this Court has observed,

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[42]At the *Huff* hearing, the trial court noted his view that the prosecutor "doesn't call Mungin a dog. He just kind of implied that he might be" (Supp. PCR413). Neither scenario is acceptable, and the trial court's belief that a

arguments which denigrate the neutrality and fairness of the proceedings and which improperly inflame the jurors are not permitted and deprive the defendant of a fair trial. *See Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999); *Gore v. State*, 719 So. 2d 1197 (Fla. 1998). Here, counsel did not object, to Mr. Mungin's substantial prejudice. Given the slim 7-5 vote at the penalty phase, coupled with the lack of the more serious aggravating circumstances[43] and the presentation of mitigation, the above argument cannot but be harmful and thus Mr. Mungin was prejudiced due to counsel's failure to object. An evidentiary hearing is warranted.

C. Failure to properly prepare defense witness.

In Claim V of his final 3.850 motion, Mr. Mungin alleged that trial counsel failed to properly prepare defense witness Glenn Young for his testimony at the penalty phase and that, as a result, Mr. Mungin was prejudiced by Young's very

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prosecutor "implying" to a penalty phase jury that the defendant "might be" properly analogized to a pit bull is more than disturbing and calls into question the judge's ability to fairly review this case. *See* Argument I.

[43]As this Court noted on direct appeal, Mr. Mungin's jury was instructed on two aggravating factors: prior violent felony and during the course a robbery/pecuniary gain, the latter which were merged into one. *Mungin*, 689 So. 2d at 1028 n.3. None of the more serious aggravators, such as CCP or HAC, were involved in the case. Moreover, the Court had also concluded that the court erred in denying a motion for acquittal on the charge of premeditated murder. *Id*. At 1029-30.

damaging testimony about how much time Mr. Mungin would serve in prison if the jury were to recommend a life sentence (PCR36-45). The lower court ruled that "[b]ecause the issue has been dealt with and the Supreme Court addressed the issue, I'm going to deny any relief as far as the 3.850 is concerned" (Supp. PCR422). The lower court erred in its procedural ruling and in denying an evidentiary hearing.

As to the procedural ruling,[44] while the issue of Young's testimony was raised, it was raised as fundamental error because trial counsel failed to make a contemporaneous objection and in fact had affirmatively introduced it. *Mungin*, 689 So. 2d at 1030-31 ("We also note that Mungin invited this testimony because Young was his witness"). The Court concluded that "[a]ny error occurred was not fundamental." *Id*. at 1030. That the Court addressed, and did not find, that Young's testimony did not constitute fundamental error is a distinct claim from Mr. Mungin's allegation that trial counsel's failure to prepare resulted in a witness who provided highly damaging testimony to the penalty phase jury. Indeed, this Court noted that Young's testimony was "apparently unexpected." *Id*. at 1031. As

[44]The lower court did not use the term "procedural bar" although it appears that the denial is premised on the conclusion that the claim was *res judicata* in that it had already been addressed on direct appeal.

counsel argued below at the *Huff* hearing:

> Judge, I think the question really is this, and this is why we need an evidentiary hearing: It may be that Judge Cofer prepped this witness and this witness came up with a totally different answer so we're making the assumption, maybe, that Cofer got surprised. He may well have been prepared. We all know sometimes witnesses can surprise us. The question was were there questions discussed beforehand because it's a dangerous line of inquiry if you're just fishing. You know the old trial maxim: Don't ask a question if you don't know the answer.

(Supp. PCR419).

A claim that trial counsel performed deficiently in opening the door to damaging testimony is a cognizable claim in rule 3.850 proceedings. For example, in *Johnson v. State*, 769 So. 2d 990, 1000-01 (Fla. 2000), this Court addressed the merits of a similar claim which had been heard at an evidentiary hearing. Under the facts of this case, the lower court unquestionably erred in its procedural ruling and thus reversal is warranted. Because the allegations in the motion are not conclusively refuted by the record, an evidentiary hearing is warranted on this issue.

D. Failure to object to other errors.

Mr. Mungin's final 3.850 also raised numerous other allegations which he acknowledges that the Court has rejected in death penalty cases. He raised them below and raises them herein in order to preserve them. *See Sireci v. State*, 773

So. 2d 34, 41 n.14 (Fla. 2000) ("we take this opportunity to suggest that issues which are being raised solely for the purposes of preserving an error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately entitled heading and providing a description of the substance").

Mr. Mungin submits the following claims for preservation under the procedure set forth in *Sireci*: Claim VI (failure to object to various comments and arguments by the State which diminished the jurors' sense of responsibility, in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)) (PCR46-52);[45] Claim VIII (Mr. Mungin is innocent of first-degree murder and was denied an adversarial testing) (PCR54);[46] Claim IX (Mr. Mungin is innocent of the death penalty) (PCR55-57);[47] Claim X (penalty phase instructions improperly shifted the burden to the defense to prove that death was the inappropriate sentence and trial counsel

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[45]The lower court denied this claim as legally insufficient and on the basis that it gave the jury the standard instructions (Supp. PCR423-24).

[46]The lower court denied this claim as facially insufficent, noting however that were Mr. Mungin to prevail on his ineffective assistance of counsel claim he would be entitled to a new trial (Supp. PCR427-29).

[47]The lower court denied this claim "because it was dealt with on the direct appeal" (Supp. PCR429).

failed to object) (PCR57-60);[48] Claim XI (jurors received inadequate guidance as to aggravating factors and Florida's statute is unconstitutionally vague) (PCR60-63);[49] Claim XII (denial of constitutional rights and right to collateral counsel due to rules prohibiting juror interviews) (PCR63-64);[50] Claim XIII (death sentence predicated on an automatic aggravating circumstance of during the course of a felony) (PCR65-69);[51] Claim XV (Mr. Mungin is insane to be executed) (PCR70);[52] and Claim XVII (electrocution and lethal injection are unconstitutional and violative of principles of international law) (PCR73-75).[53]

V

MR. MUNGIN RECEIVED INEFFECTIVE ASSISTANCE OF

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[48]The lower court denied this claim because it gave the standard instructions at trial and the claim could have been raised or was raised on direct appeal (Supp. PCR430-31).

[49]The lower court denied this claim because it was or could have been raised on direct appeal (Supp. PCR431-32).

[50]The lower court denied this claim, although the basis of the denial is not entirely clear in the lower court's statements (Supp. PCR432-37).

[51]The lower court denied this claim as having been previously rejected by this Court (Supp. PCR437-38).

[52]The lower court denied this claim as not being ripe (Supp. PCR439).

[53]The lower court denied this claim as having been rejected previously in other cases (Supp. PCR440).

COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT.

Mr. Mungin was entitled to the effective assistance of counsel at his capital trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). The State also had a concomitant obligation to disclose any exculpatory and impeaching evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963). Both singularly and cumulatively, the deficiencies in trial counsel's performance and/or the failure by the State to disclose impeachment evidence undermined confidence in the outcome of the proceedings, thus depriving Mr. Mungin of a reliable adversarial testing. This Court reviews this issue *de novo*, *see Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), and should reverse the lower court and order a new trial based on the foregoing reasons.

A. Deficient Impeachment of Ronald Kirkland.

Without question, state witness Ronald Kirkland was the linchpin of the State's case against Mr. Mungin. Without a confession or physical evidence linking Mr. Mungin to the crime scene, Kirkland's identification of Mr. Mungin at the scene was unquestionably a critical piece of evidence for the prosecution. Moreover, Kirkland's testimony provided evidence supporting the State's theory of robbery; he was the only witness to testify that he saw Mr. Mungin leave the scene

of the crime with a paper bag (R671).[54] *Mungin v. State*, 689 So. 2d 1026, 1028 (Fla. 1995) ("There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, identified the man as Mungin"). Thus, any evidence tending to impeach Kirkland's credibility was critical to the jury's assessment of the State's case.

In his 3.850 motion, Mr. Mungin alleged that trial counsel, Judge Charles Cofer, failed to utilize critical impeachment evidence in his own file, evidence which would have given the jury a true picture of Kirkland's motivations and thus his credibility. This evidence, in the form of a pending violation of probation warrant and an outstanding capias, was neither elicited on Kirkland's cross-examination nor argued in closing arguments. In denying this claim, the lower court merely concluded that Mr. Mungin had failed to establish either prong of the *Strickland* test and thus the claim was meritless (PCR206).

At the outset, Mr. Mungin submits that the lower court's order is facially

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[54]Mr. Munin was not, of course, even charged with robbery or attempted robbery. On direct appeal, the Court held that the trial judge had erroneously failed to grant a judgment of aquittal on the charge of premeditated murder and also found error in instructing the jury on both premeditated and felony murder. *Mungin*, 689 So. 2d at 1029.

deficient for the same reasons the Court discussed recently:

> We recognize that when reviewing ineffective assistance of counsel claims we give deference to the circuit court's superior vantage point and uphold factual findings that are supported by competent, substantial evidence. . . However, in this instance, while the circuit court ruled against Ragsdale on the deficiency and prejudice prongs of the ineffectiveness claim, the circuit court's summary order contains virtually no factual findings. We have repeatedly stressed the need for trial judges to enter detailed orders in postconviction capital cases. The present order is completely inadequate and does not assist us in your review. Accordingly, we reverse the circuit court's order, vacate Ragsdale's death sentence, and remand for a new penalty phase before a jury.

Ragsdale v. State, 798 So. 2d 713, 720 (Fla. 2001). Just as in *Ragsdale*, there is nothing for this Court to review but the summary conclusion of the lower court and thus reversal is warranted on this basis alone.

In addition, prior to the evidentiary, Mr. Mungin filed a supplemental argument raising a *Brady* violation insofar as the criminal history of Kirkland (PCR110-11). The argument was raised following collateral counsel's meeting with trial counsel Cofer in which Cofer indicated his belief that he had not received all of Kirkland's criminal history from the State (*Id*.). At the beginning of the evidentiary hearing, Mr. Mungin's collateral counsel informed the court of the *Brady* aspect of the claim but the court, without even requesting a position from the State, refused to permit the *Brady* aspect of the claim to be heard (PCR227). Mr. Mungin

submits that in this regard, the lower court erred. In the first place, the State posed no objection to the supplementation of the *Brady* aspect of the claim. *See Jones v. State*, 709 So. 2d 512, 518 (Fla. 1998) (addressing merits of a *Brady* claim that had been orally amended at evidentiary hearing). Secondly, and most importantly, the State was not prejudiced by the raising of the *Brady* aspect of the claim; in fact, the State devoted a substantial portion of its examination of trial counsel to establishing that it had not withheld the information in question because trial counsel possessed the information in his file (PCR354). Because the State devoted its questioning to defeating any notion that it had failed to disclose the impeachment at issue, it unquestionably suffered no prejudice from the belated *Brady* claim and thus the lower court erred in refusing to consider it.

As demonstrated by the testimony and exhibits adduced below, Mr. Mungin satisfied both *Strickland* and/or *Brady* as to this claim. Trial counsel Cofer explained that his strategy at trial was to argue that Mr. Mungin was not guilty based on reasonable doubt and would not concede guilt to any lesser offenses (PCR270). Because there were no fingerprints linking Mr. Mungin to the convenience store where the homicide occurred nor were there any inculpatory statements made by Mr. Mungin, his strategy centered on attacking Kirkland's perception as to the

individual he purportedly saw exiting the store (PCR272-73). While Cofer did recall impeaching Kirkland's ability to identify Mr. Mungin (PCR273), he made no attempt to impeach Kirkland on the issue of bias because, without a reasonable tactical or strategic reason, he did not know that such evidence existed. This failure is noteworthy given Cofer's practice to request criminal histories of all prosecution witnesses; in fact he received such a printout for Kirkland (PCR250-52). This criminal history was run after Kirkland's arrest for worthless check charges in September, 1992, and he would have reviewed any criminal histories prior to deposing Kirkland (PCR253; 255). Kirkland's deposition was conducted, however, in June, 1992, prior to his arrest and subsequent probation sentence (State Exhibit 1).

While there was some confusion about whether the State had provided the defense with an accurate account of Kirkland's criminal history, as it is obliged to do under *Brady*, the State's cross-examination of Cofer established that Cofer in fact had received from the State the information that Kirkland had a criminal history and was on probation at the time he testified for the State (PCR345) ("I will concede that in my file there was a docket that should have made me aware of that factor"). Cofer did not, however, recall ever having any documentation indicating

that arrest warrants had been issued against Kirkland weeks after he was placed on probation (PCR354). These records, introduced at the hearing, established that Kirkland was never taken into custody but the capiases were inexplicably recalled around February, 1993 (PCR270; Defense Exhibits 5, 6, 7). Because the lower court never made any factfinding with regard to this claim, the Court has nothing to review in terms of where the breakdown occurred here with respect to the available impeachment evidence. While the record does support the fact that Cofer was aware that Kirkland had been on probation at the time he testified against Mr. Mungin, it also supports the fact that he was not aware that Kirkland had been subsequently arrested and had capiases issued against him which were subsequently and inexplicably recalled. Under either a *Brady* or *Strickland* analysis, however, the bottom line is that the jury did not hear of the impeachment evidence regardless of which entity was ultimately responsible.[55]

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[55]Trial counsel has the obligation to investigate and prepare which encompasses obtaining information helpful to the defense such as criminal histories of prosecution witnesses. In its posthearing memorandum, the State suggested that it would not have been reasonable for Cofer to go to the probation office to pull Kirkland's file (PCR162-63). However, Cofer himself testified that had he known that Kirkland had been placed on probation, he "almost certainly" would have gone to the probation department and pulled the capias files and see what was in them. Had he done so, he "would have seen that there was a warrant and seen the nature of the allegations" (PCR360). On the other hand, the State also had the obligation to disclose this information to the defense. *Brady* is violated when the State fails to

Cofer testified that had he known that Kirkland was on probation during the pendency of this case in addition to having had a capias recalled just prior to Mr. Mugin's trial, he would have wanted to elicit this information from Kirkland, as he explained:

> Well, prior to trial you have the detective, who shows a photospread, who indicates that the witness at the time of seeing the photospread said that he couldn't swear that the man he picked out was the person, that he was fairly certain and looked like him. At trial Mr. Kirkland showed very little hesitancy, identified Mr. Mungin as being the person, and also denied making the statement to – or indicating he could not recall telling Detective Conn that he wouldn't be able to swear. Having the fact that, one, he was on probation, and, two, that there was some outstanding warrant for him, would have been an area that you would typically inquire of a witness about to cast doubt upon the certainty of his identification at trial. In other words, if you show that there's a shift, in other words, at the time of the identification on a photospread, he indicated that he couldn't swear to it, and then much later at trial he does, showing the status of him being on probation and a warrant outstanding would tend to suggest that Mr. Kirkland had strengthened his identification because of concerns for himself.

(PCR274). He agreed that it would have been an effective argument to make under the circumstances in this case because he would have been able to argue that

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disclose the criminal record of its witnesses. *State v. Gunsby*, 670 So. 2d 920, 923 (Fla. 1996). *See also United States v. Scheer*, 168 F. 3d 445, 452 (11th Cir. 1999) ("[i]n the case of impeachment evidence, a constitutional error may derive from the government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination")

Kirkland was more certain at trial than he was earlier about his identification of Mr. Mungin because he had pending legal difficulties and was attempting to curry favor with the State (PCR361-62). Despite knowing that Kirkland had been on probation, he did not use this evidence to impeach him at trial. This is deficient performance. *See Robinson v. State*, 707 So. 2d 688, 694 (Fla. 1998).

Whether due to ineffective assistance of counsel and/or the State's failure to disclose the true nature of Kirkland's criminal history, Mr. Mungin was prejudiced.[56] A witness' bias and incentive for testifying is information that a jury is entitled to know when assessing that witness' credibility. *Giglio v. United States*, 405 U.S. 763 (1972); *Moore v. State*, 623 So. 2d 608, 609 (Fla. 4th DCA 1993); *Brown v. Wainwright*, 785 F. 2d 1457, 1464 (11th Cir. 1986). This is particularly true where the witness in question is a critical one for the prosecution and the State's theory rests in large part, if not exclusively, on that witness's testimony and credibility. *See, e.g. Cardona v. State*, 826 So. 2d 968 (Fla. 2002); *Mordenti v. State*, 2004 Fla. LEXIS 2253 (Fla. Dec. 16, 2004). This area of cross-examination on bias would have been admissible and relevant. *See Auchmuty v. State*, 594 So.

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[56]The prejudice prong of *Strickland* and the materiality prong of *Brady* involve the same legal analysis. *See Mordenti v. State*, 2004 Fla. LEXIS 2253 at *18 (Fla. Dec. 16, 2004).

2d 859, 860 (Fla. 4th DCA 1992) (reversible error to bar cross-examination of key prosecution witness about being on probation at time of offense and having charges brought against him for violation of probation); *Douglas v. State*, 627 So. 2d 1190, 1191-92 (Fla. 1st DCA 1993) (error in refusing to permit cross-examination of confidential informant as to whether charges were pending at the time of offense, whether he was in trouble at the time, and whether he was facing charges for violating probation); *Phillips v. State*, 572 So. 2d 16, 17 (Fla. 4th DCA 1990) (error in refusing to permit cross-examination of key witness about witness's probationary status); *Watts v. State*, 450 SO. 2d 265, 267 (Fla. 2d DCA 1984) (error in refusing to permit cross-examination of key witness "about his probationary status as well as the pendency of both a new felony charge and the revocation hearing in an attempt to demonstrate that Beasley's testimony in appellant's case was calculated to affect those proceedings"). It matters not whether there was an actual *quid pro quo* between the witness and the State. *See Jean-Mary v. State*, 678 So. 2d 928, 929 (Fla. 3d DCA 1996) (rule permitting impeachment on criminal cases having been dropped "applies even to the instant situation where the charges against the state's witness have been recently nolle prossed and there is no specific evidence of any agreement between the witness

and the state").

In conclusion, Mr. Mungin has established that counsel was deficient and that he was prejudiced by the jurors' failure to be informed about Kirkland's potential for bias and motive for testifying and in becoming more "certain" about his identification of Mr. Mungin. Given the paucity of evidence, the errors that this Court has already found with respect to the guilt phase, and the additional errors cited below (particularly with regard to Kirkland's lack of certainty about his identification of Mr. Mungin), there is more than a reasonable probability of a different outcome. Relief is warranted.

B. Failure to elicit testimony from Detective Conn.

Mr. Mungin's 3.850 motion also alleged that trial counsel, without a reasonable tactic, failed to provide the jury with information arising from the deposition of Detective Conn that Kirkland had not been able to swear in court that the person he identified as Mr. Mungin in a photo spread was the actual person he saw on the day in question. The lower court denied this claim, concluding that trial counsel made a tactical decision not to call Conn as a defense witness "based upon what he felt the facts of the case supported" (PCR206-07). The lower court erred.

At the evidentiary hearing, Cofer testified that Kirkland, on cross-

examination, had admitted to much of what he could have elicited from Detective Conn with the "exception about the certainty of his identification" (PCR275). He made a decision, however, not to call Conn because "we just felt at the time that it was just not worth losing open and close to recall Detective Conn, who was an adverse witness, to establish that one fact" (*Id*.). However, the trial record actually contradicts counsel's proffered tactical decision: counsel waived his opening closing argument (PCR362).[57] Thus, trial counsel's proffered reason at the evidentiary hearing is not supported by what occurred at trial. Moreover, "a criminal defense attorney may not fail to introduce evidence which directly exculpates his client of the crime charged for the sake of preserving the right to address the jury last in the closing argument." *Diaz v. State*, 747 So. 2d 1021, 1026 (Fla. 3d DCA 1999). *Accord Williams v. State*, 507 So. 2d 1122 (Fla. 5th DCA 1987). Trial counsel's putative strategic decision was neither consistent with the record nor was it reasonable under the circumstances of Mr. Mungin's case.

Mr. Mungin was unquestionably prejudiced. The seemingly rock-solid

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[57]Cofer also acknowledged at the hearing that his decision to call Conn may have changed had he known about or presented Kirkland's criminal history (PCR275-76). He also admitted that he could have used Conn to impeach Kirkland on the issue of his changed testimony regarding the certainty of his identification of Mr. Mungin (PCR350-51).

identification given by Kirkland at trial became a feature of the State's closing argument:

> Mr. Kirkland then told you that a few days later on September 20th, four days later, he was shown some photographs. Six or seven he described it as. And the defense tried to bring out a big thing about well, was it six, was it seven. He said either six or seven. The key thing is he signed his name on the back. This Anthony Mungin, the defendant in this case. And he picked him out of a group of six black males or seven black males. He picked out the defendant's photograph as being the person who he observed coming out of that Lil' Champ store. Identity I will submit to you is not an issue in this case as the Defense, I believe, will attempt to argue. He just didn't pick him out in this courtroom when he saw him again. He picked him out of that photograph spread four days after it happened, or three and a half days after it happened.

(R975-76). The prosecutor repeatedly referred to Kirkland's testimony, extolling his credible identification because Kirkland was "alert" and "focused" on Mr. Mungin and had "heightened perception of what was going on" much like people who remember where they were when President Kennedy was assassinated (R975). Given the importance of Kirkland's testimony, and the reliance on such by the State during closing argument, Mr. Mungin has more than established a reasonable probability of a different outcome had the jury known that when he first picked out Mr. Mungin in a photograph, Kirkland in fact was unable to swear in court to his identification. In conjunction with the other errors permeating this case, Mr.

Mungin is entitled to relief.

C. Failure to adequately investigate and present favorable evidence.

One of trial counsel's most important responsibilities is to conduct adequate pretrial investigation. *See House v. Balkcom*, 725 F. 2d 608, 618 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984) ("pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation"). In Mr. Mungin's case, he alleged that trial counsel failed to adequately investigate and present favorable evidence, namely, that Mr. Mungin had an alibi for the day in question and that someone named "Ice" had committed the crime. The lower court denied this claim, relying on counsel's testimony that he did investigate and made a decision not to present the evidence in question because it was "inconsistent" with the facts of the case (PCR207). Mr. Mungin submits that the lower court erred.

Trial counsel utterly failed to meaningfully investigate. Cofer testified that Mr. Mungin told him he was not guilty and had an alibi, an alibi which Cofer acknowledged was consistent with two statements he have to law enforcement (PCR289; 496). He explained his understanding of Mr. Mungin's alibi:

> This I pretty much remember. Mr. Mungin, as I had indicated earlier, had been interviewed in prison two times by Jacksonville homicide

> detectives and general outlines of the alibi defense were presented in both of those interviews. And when I – during my interviews with Mr. Mungin, there was relative, not exact, consistency with the general chronologies that were set down in those interviews. In other words, Mungin had left Georgia, had the gun, went to Monticello, the shooting occurred there, he was on his way to visit the girlfriend in Pensacola. The shooting occurred in Tallahassee, be back-tracked to Jacksonville, delivered the gun out to "Ice," I think you referred to him as "Ice" in the detective's report one time, and "Snow" in another one. Exchanged vehicles out. My recollection is then went back up to Georgia with a different vehicle, left Georgia, then again for Pensacola, went to Pensacola, saw his girlfriend, spent a day or so there. On the way back, stopped in at Jacksonville and retrieved the gun from "Ice," went back to Georgia where he was arrested at a relative's home and the gun was in his room.

(PCR320).

Cofer testified that the Public Defender's Office had resources to assign an investigator to perform guilt phase investigation, but his recollection was unclear as to whether any investigator actually conducted work on the guilt phase (PCR292-97; 505). While he did believe he ran a database with the name "Ice," he never went, nor did he have anyone on his behalf go, to the specific street in Jacksonville where "Ice" was known to hang out (PCR296).[58] He did go to Pensacola to speak with Charlette Dawson (PCR319), who recalled that Mr. Mungin was in Pensacola

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[58]If one compares the efforts undertaken by Cofer to investigate Mr. Mungin's account with the efforts undertaken by collateral counsel and found to be unreasonable in *Swafford v. State*, 828 So. 2d 966 (Fla. 2002), it could not be clearer that Cofer's "investigation" was at best cursory and superficial.

at the time he said he was (PCR323-24). She told them that she and Mr. Mungin had gone target practicing and she described a gun which "would have matched the type of weapon that Anthony used" (PCR324). At that point, Cofer and his co-counsel determined that "this was not going to work" (PCR324). Cofer also said he discussed this with Mr. Mungin, but that despite his explanation, "my general feeling is it kind of went over his head" (PCR325). That Charlette claimed to have seen Mr. Mungin with a gun contradicted Mr. Mungin's claim that he had given the gun to "Ice" (PCR325).

The lower court's reliance on Cofer's testimony is misplaced for a number of reasons. Significantly, the lower court failed to contemplate the testimony from Cofer wherein he acknowledged that in her interview with law enforcement, Charlette had never admitted having been involved with target practicing with Mr. Mungin and having seen a weapon (PCR326). This important information more than calls into question Charlette's recollection and her credibility. Moreover, Cofer acknowledged that Charlette was not specific in her recollection of when Mr. Mungin arrived in Pensacola (PCR365). In other words, if her recollection was that Mr. Mungin arrived in Pensacola in the evening after the mid-afternoon shooting in Jacksonville, this would not necessarily be indicative of his guilt (PCR365). If she

believed he arrived in Pensacola in the morning of the shooting, however, this could be more indicative of guilt (PCR365). Charlette was never able to provide any of this specific information when she was interviewed by Cofer (PCR366). This is a classic example of a court latching onto the "magic words" uttered by defense counsel without conducting any meaningful review of the evidence or the record.

Moreover, and critically, Cofer's decision to forego the presentation of a defense case was based on his own misunderstanding of the facts of the case. According to the police report generated as a result of a November 21, 1991,[59] interview with Mr. Mungin, Mr. Mugin stated he had taken a burgundy Ford Escort from a motel in Kingland, GA, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, Mr. Mungin went to Monticello where he was involved in a shooting, and then to Tallahassee where he was also involved in a shooting. Mr. Mungin then stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shooting. Later in the statement, Mr. Mungin said he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus. In that first statement, Mr. Mungin said that the person he was dealing with in Jacksonville was someone

[59]This police report, as well as the second report of the March 31, 1992, statement, were introduced below by the State as Exhibits 2 and 3.

named “Snow.” Mr. Mungin next related that he spent several days doing drugs in Georgia, after which he was driven back to Jacksonville, where he found the Escort stripped. He then procured another car, a Dodge, and purchased the gun back from “Snow.” Then he went to see a girl on West 28th Street and then went to Pensacola to see Charlette Dawson. He said he was in Pensacola between 7 and 8 PM on the same day, and he returned to Georgia after spending two days in Pensacola.

In his second statement to police on March 31, 1992, Mr. Mungin clarified that the person he dealt with was named “Ice,” not “Snow,” and that he gave the gun, car, and money to “Ice” in exchange for cocaine and indicated that he would be back. Mr. Mungin then discussed the shooting in Monticello and Tallahassee, and his uncle thereafter took him back to Georgia. Most important, in this statement, he stated “he retrieved the fun which he had loaned/sold to a black male along with the car.” He said it was daytime, almost evening, when he got the beige car, and he drive straight to Pensacola, stopping only for gas in Tallahassee. He arrived in Pensacola in the nighttime.

A careful reading of Cofer’s testimony reveals, however, his misunderstanding of Mr. Mungin’s account, detailed above (PCR295-96). Cofer

mistakenly believed that Mr. Mungin did not retrieve the gun from "Ice" in Jacksonville until he returned from visiting his girlfriend in Pensacola on his way back to Georgia where he was arrested at a relative's home where the gun was in his room. As a result of his misunderstanding, Cofer believed Mr. Mungin's explanation was not plausible based on his interview with Charlette. Since Cofer believed that Mr. Mungin did not regain possession of the gun until he stopped in Jacksonville on his trip from Pensacola to Georgia where he was then arrested, Charlette's account of seeing the murder weapon seemed to invalidate Mr. Mungin's account, according to Cofer's testimony. It can hardly be said that terminating investigation into the guilt phase theory was reasonable if it was based on a flawed understanding of the facts. Thus, any strategic decisions made which flowed from his misunderstanding cannot withstand scrutiny. *See Young v. Zant*, 677 F. 2d 792, 798 (11th Cir. 1982) ("where defense counsel is so ill prepared that he fails to understand his client's factual claims or the legal significance of those clams . . . , we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar").

Mr. Mungin has also established prejudice. The jury was deprived of testimony that was consistent and buttressed the defense theory that Mr. Mungin

did not commit the homicide and that Kirkland's identification was mistaken. In support of the prejudice prong, Mr. Mungin presented numerous witnesses at the hearing. The lower court failed altogether to address the extensive and unrebutted testimony adduced by Mr. Mungin which established the existence of "Ice" and also that Mr. Mungin could not have committed the murder. Edward Kimbrough's testimony credibly verified the existence of "Ice" as someone who would regularly hang out at the same place in the Moncrief area of Jacksonville selling drugs (PCR380-81). "Ice" would always be armed and always was driving different vehicles (PCR381-82), and was described as a tall man, from 190 to 250 pounds, with a "jeri-curl" hair style (PCR382). Jesse Sanders gave an even more vivid physical description of "Ice" and confirmed that his regular hangout was in the Moncrief area (PCR392-94). "Ice" was a known hustler who also knew how to make money illegally by stealing cars and selling drugs (PCR395-98). Sanders would often see Mr. Mungin in cars that "Ice" was usually in possession of (PCR398).

Brian Washington also knew Mr. Mungin at the time in question, and testified that the last time he saw Mr. Mungin was around 10:30 AM on September 16, 1990,

at a convenience store in Kingsland (PCR407-08).[60] He recounted the brief conversation they had during which Mr. Mungin said he needed a ride to Jacksonville, and Washington told him he could give him a ride but had to first take his wife to church (PCR408). After he took his wife to church, Washington picked up Mr. Mungin from his cousin, Angie Jacobs', house (PCR409). They then drove to Jacksonville and Washington dropped Mr. Mungin off somewhere near Golfair Boulevard (PCR410). About a week or so later, Washington learned that Mr. Mungin had been arrested for a homicide (PCR410). After he learned this, Washington told his mother that it could have been true because of the time frame (PCR411). No one from Mr. Mungin's legal team ever contacted him about the case, and had he been asked he would have told them what he knew (PCR411).

Angie Jacobs Glover, Mr. Mungin's first cousin, resides in Kingsland, Georgia (PCR420). In September, 1990, Mr. Mungin was living with her family in Georgia (PCR421). She was aware that Mr. Mungin had a girlfriend, Charlette Dawson, in Pensacola (PCR421). The last time she saw her cousin was when he was arrested in her house (PCR422). Prior to his arrest, Mr. Mungin had been

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[60]Washington knew it was September 16 because of several birthdays in the family in September and September 16 was a Sunday, which is the day he took his wife to church (PCR412).

gone for several days, and she recalled him telling her that he had gone to Pensacola (PCR423-24).

Phillip Levy testified that in the mid-to-late 1980s, he and Mr. Mungin became friends and would hang out, drink, and listen to music (PCR430). The last time he saw Mr. Mungin was in 1990 on a Sunday between 11:30 AM and 1:00 PM (PCR431-32). They met at Levy's aunt's house and then went to the area of 28th Street and Stuart to see if Donetta Dues, a former girlfriend of Mr. Mungin, was home (PCR433). After that, Levy and Mr. Mungin went to Levy's uncle's house, and then Mr. Mungin left to his aunt's house (PCR433-34). The last time Levy saw him was around 4:30 or 5:00 PM (PCR434). He was pretty sure this occurred on a Sunday in mid-September of 1990 (PCR435). Levy was sure it was a Sunday because when they went to see Ms. Dues, she was at church (PCR436). He did not know about Mr. Mungin's arrest for about a year after it happened because he had moved to another area of Jacksonville (PCR437-38). He did not know he had any information that would be helpful so he did not think to contact someone (PCR438). He did not see Mr. Mungin in the possession of a gun on that day (PCR441).

Finally, Mr. Mungin presented the testimony of Vernon Longworth, who also

knew Mr. Mungin from the Jacksonville area and became friendly with him (PCR477). Longworth's nephew is Philip Long (PCR478). In 1990, Longworth was residing at 28th and Stuart in Jacksonville (PCR478). The last time he saw Mr. Mungin was on a Sunday afternoon when he came to his house for a few hours to visit (PCR479). He knew it was a Sunday because it was football season and the TV was on (PCR479). Mr. Mungin asked if he could shower because it was a hot day (PCR480). Longworth also testified that Mr. Mungin had gone to Donetta Dues's house across the street to visit the child he had with Ms. Dues (PCR480). After Mr. Mungin took a shower, he and Philip and a few other guys left to go to a juke joint (PCR480). In 1992 and 1993, Longworth resided in Jacksonville and would have been available to talk with anyone from Mr. Mungin's legal team had he been contacted (PCR481).

None of this testimony was evaluated or even mentioned in the trial court's order denying relief on this claim. The court was not in a position to assess whether Mr. Mungin had been prejudiced without even mentioning or considering the evidence that constituted the prejudice. The lower court's order is thus deficient. This evidence was consistent with Mr. Mungin's account of his whereabouts as well as the facts of the case. First, Mr. Mungin indicated that he

was driven by a baser who picked him up at his aunt's house in Kingsland and drive him to Jacksonville where he was dropped off. Brian Washington testified that he picked Mr. Mungin up from his cousin's house in the morning in Kingsland and dropped him off in Jacksonville (PCR409-10). Mr. Mungin indicated in his statement that he was looking for a young lade on 28th and Stuart. Philip Levy testified that he saw Mr. Mungin about 11:30 or 1:00 PM in the afternoon and Mr. Mungin went across the street from the corner of 28th and Stuart to see if Ms. Dues, his girlfriend, was home (PCR432-33). Levy saw Mr. Mungin again around 4:30 or 5:00 (PCR434). That time would be consistent with Mr. Mungin telling the police he left Jacksonville late in the day, almost nighttime. Vernon Longworth confirmed the chronology by stating that Mr. Mungin came to his house around 1 or 2 PM in the afternoon and stayed until about 2:30 or 3:00. Longworth allowed Mr. Mungin to take a bath (PCR479-80); Levy had also testified that Mr. Mungin stated he was going to Longworth's to bathe (PCR434). Longworth also confirmed that Mr. Mungin went to see Ms. Dues (PCR480). Most significantly, the owner of the Dodge Monaco had testified at trial that her vehicle was stolen between 10:00 AM on September 15 and 1:00 PM on September 16 (R805-06). None of the witnesses presented below testified that they saw Mr. Mungin with a

vehicle. The testimony below supports Mr. Mungin's account to the police and supports his alibi.[61] Had this testimony been presented at trial, there is more than a reasonable probability of a different outcome.[62] *See Grooms v. Solem*, 923 F. 2d 88 (8th Cir. 1991) (counsel rendered prejudicially deficient performance in failing to investigate and present readily available evidence in support of defendant's alibi). Relief is thus warranted.

[61]All of these witnesses testified that they were available at the time and would have spoken with defense investigators or testified at trial had they been asked.

[62]This is particularly true given the significant error found on direct appeal at the guilt phase regarding the lack of premeditation presented by the State.

VI

THE DUVAL COUNTY PUBLIC DEFENDER'S OFFICE HAD AN ACTUAL CONFLICT OF INTEREST BASED ON PRIOR AND SIMULTANEOUS REPRESENTATION OF KEY STATE WITNESS KIRKLAND, IN VIOLATION OF MR. MUNGIN'S SIXTH AMENDMENT RIGHT TO CONFLICT-FREE COUNSEL.

The evidence adduced below established that the State's key witness, Ronald Kirkland, had not only an extensive criminal history but also a history of being represented by the Duval County Public Defender's Office, the same office that represented Mr. Mungin at trial. Records submitted below of Kirkland's cases clearly established that Kirkland had been, at times prior to Mr. Mungin's trial, represented by the Duval County Public Defender's Office in numerous cases (PCR282-86). Significantly, printouts from the Clerk's Office of Duval County established that in 1991, Kirkland was charged with three worthless check charges on which he was represented by the Duval County Public Defender's Office (PCR254; 262-66). Kirkland was again arrested on September 26, 1992, and a notation on the file reveals that the Duval County Public Defender's Office was appointed and that the cases were disposed of on October 13, 1992, by a guilty plea and withheld adjudication (PCR254). Trial counsel Cofer verified that his

former office represented Kirkland by running the history on a database provided by the Clerk of Court (PCR259).

Cofer clearly was aware of some of Kirkland's criminal history because he deposed Kirkland and asked about his criminal history (PCR261). More importantly, Cofer conceded that he may have been aware from his own records checks done in advance of the evidentiary hearing that the Public Defender's office represented Kirkland for disorderly intoxication or possibly a DUI during a period of time prior to Mr. Mungin's arrest (PCR247). Cofer also had the ability to investigate whether Kirkland had been or was being represented by the Public Defender's Office as they had a computer that would have been able to check (PCR287). In fact, Cofer himself had developed the case tracking program that the Public Defender's Office used and the database went back to the mid-1980s (PCR287).

Cofer claimed have no recollection of whether he knew that Kirkland was being represented by the Public Defender's Office during the pendency of Mr. Mungin's case (PCR246); he admitted, however, that he "may have been aware" from his "own record check" of the "possibility" that the Public Defender's Office for the Fourth Judicial Circuit had represented Kirkland (PCR247). He

acknowledged that had he known he would have shared that information with Mr. Mungin and that it was up to Mr. Mungin to determine whether he believed a motion to withdraw due to a conflict should be filed (PCR255-57). Cofer did not, however, recall disclosing to Mr. Mungin that Kirkland was being represented by the same Public Defender's Office that was representing Mr. Mungin on his capital murder case.

Mr. Mungin submits that the Public Defender's Office prior and, more importantly, simultaneous representation of both Mr. Mungin and Kirkland was an actual conflict. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Halloway v. Arkansas*, 435 u.s. 475 (1978). As a general rule, a public defender's office is the functional equivalent of a law firm and, as such, different attorneys in the same public defender's office cannot represent defendants with conflicting interests. *See Bouie v. State*, 559 So. 2d 1113 (Fla. 1990); *Turner v. State*, 340 So. 2d 132 (Fla. 2d DCA 1976). In the alternative, Mr. Mungin submits that Cofer was ineffective under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

The lower court never resolved the factual issue of whether Cofer knew that his office had previously or was simultaneously representing Kirkland at the time of Mr. Mungin's trial; the order is merely a summary rejection of the claim (PCR205-

06). However, as noted above, while Cofer had no specific recollection whether he knew, he admitted he "may" have known of the "possibility," and certainly had information in his files about Kirkland's criminal history that reflected such information. Under the *Strickland* standard, Cofer would have had a duty to investigate whether he had a conflict and to disclose that information to Mr. Mungin.[63] *Strickland*, 466 U.S. at 688 (counsel has "duty to avoid conflicts of interest"). Because of the simultaneous representation, Cofer would not have ethically been in a position to take an adverse position against Kirkland, namely to have Kirkland taken into custody on the outstanding capias or to even investigate and cross-examine Kirkland on his bias as a result of the pending criminal sentence. This failure had an adverse effect on Mr. Mungin's case. *See Hunter v. State*, 817 So. 2d 786 (Fla. 2002). Assuming that Cofer did not know that his office simultaneously represented Kirkland at the time of Mr. Mungin's trial, he was ineffective and Mr. Mungin was unable, due to Cofer's deficient performance, to even be in a position to decide for himself whether or not he wished Cofer to withdraw due to a conflict. Because Mr. Mungin cannot have been in a position to waive his right to conflict-free counsel absent his attorney providing him the

[63]Below, the State took the position that *Strickland*, and not *Cuyler*, controlled Mr. Mungin's claim (PCR189).

information, prejudice is established under these circumstances. *Compare State v. Lewis*, 838 So. 2d 1102, 1112 (Fla. 2002) (no decision to forego mitigation can be waived unless defendant is first apprised of available evidence in order to make a knowing and intelligent decision). Mr. Mungin submits that under either *Cuyler* or *Strickland*, he is entitled to relief.

VII

MR. MUNGIN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE IN VIOLATION OF THE SIXTH AMENDMENT.

It is axiomatic that a capital defendant has the right to the effective assistance of counsel at the penalty phase. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). In order to provide effective assistance, trial counsel must conduct an adequate and thorough investigation of the defendant's background, including all possible sources of information. *Wiggins, supra.* Indeed, "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated–this is an integral part of a capital case." *State v. Lewis*, 838 So. 2d 1102, 1112 (Fla. 2002). If there is a reasonable probability of a different outcome, prejudice is established.

At the evidentiary hearing, Mr. Mungin presented evidence which trial

counsel failed to present. With regard to the penalty phase, Judge Cofer had no recollection of directing the investigator, Ms. Mullaney, to find any reports involving a suicide attempt made by Mr. Mungin when he was approximately 12 years old (PCR298). Upon being shown an exhibit of such document, however, Cofer testified that he did specifically make a request to Ms. Mullaney to obtain hospital records from Georgia Medical Center concerning a hospitalization and suicide attempt involving Mr. Mungin (PCR299; Defense Exhibit 12). The actual records were introduced into evidence below (PCR300; Defense Exhibit 13).[64]

Cofer explained that his "typical method" of introducing such evidence at a penalty phase would be to provide the information to a mental health expert who could incorporate the information into his or her testimony (PCR301-02). In this case, Dr. Harry Krop was utilized as a defense penalty phase mental health expert on the issues of Mr. Mungin's potential for rehabilitation, to establish that Mr. Mungin did not suffer from an antisocial personality disorder, and to his substance abuse problems (PCR302). It would have been consistent with the penalty phase

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[64]The records reveal that Mr. Mungin, at age 12, was admitted to the hospital with an admitting diagnosis of depressive suicidal reaction of adolescence after taking an overdose of Valium (Def. Exhibit 1). He spent six days in the hospital. The records also revealed an extensive background and social history discussing the "history of emotional problems" in the family.

strategy to show the jury that Mr. Mungin's background was problematic and that he suffered from some significant mental health issues (PCR303). Cofer believed that the issue was adequately covered by Dr. Krop's testimony, as Judge Cofer's habit would have been to send the records to Dr. Krop and he would incorporate them into the mental health mitigators (PCR334).

In denying relief on this claim, the lower court concluded that Cofer "was aware" of his "practice" in death cases, but made no factfindings with respect to the claim; instead the court entered a summary rejection without analyzing the importance of the hospital records and the fact that Cofer failed to elicit Mr. Mungin's suicide attempt during the penalty phase testimony of Dr. Krop (PCR208). Certainly, the fact that Mr. Mungin had a serious suicide attempt at the age of 12 which required a 6-day stay in the hospital is important mitigation. Nor was any mention made of the social history set forth in the hospital records, including Mr. Mungin's grandmother's acknowledgment of a "history of emotional problems" in the family. This is also relevant and important mitigation that the jury should have been aware of. Mr. Mungin's sad history and childhood suicide attempt would also have gone a long way in diffusing the State's argument in closing that Mr. Mungin was akin to a "pit bull" dog which, as a puppy is "great"

but "becomes vicious" when he gets big and "starts biting other dogs and kills other dogs" (R1222). In short, the failure by counsel to elicit this important mitigation undermines confidence in the outcome, particularly in light of the close 7-5 death recommendation, the lack of the most serious aggravators, and the errors which this Court found to have permeated the guilt phase. Because "there is a reasonable probability that at least one juror would have struck a different balance," *Wiggins*, 123 S. Ct. at 2543, prejudice is established and Mr. Mungin is entitled to relief.

CONCLUSION

The foregoing authorities, the trial record, and evidentiary hearing testimony, in conjunction with the allegations on which Mr. Mungin did not get a full and fair hearing, show that a new trial and/or resentencing are warranted Accordingly, Mr. Mungin requests that his conviction and sentence of death be vacated and/or any other relief which this Court may deem just and proper.

CERTIFICATE OF FONT

I hereby certify that this Initial brief was typed in New Times Roman font, 14 pt. type.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief has been furnished by United States Mail, first class postage prepaid to Curtis French, Senior Assistant Attorney General, The Capitol, Tallahassee, FL, 32399-1050, this 18th day of January, 2005.

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