IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

v. CASE NO. SC03-780

STATE OF FLORIDA

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This case is here on appeal from the denial of Postconviction relief after evidentiary hearing.

PROCEDURAL HISTORY

On September 16, 1990, Mungin murdered Betty Jean Woods during a robbery of a convenience store. In January of 1993, he was convicted by a jury, which thereafter recommended a death sentence by a vote of 7 to 5. The trial court imposed a death sentence, finding two aggravating circumstances (prior violent felony conviction and robbery/pecuniary gain) and minimal nonstatutory mitigation.

Mungin appealed both his conviction and sentence to this Court, which affirmed Mungin's first degree murder conviction and his death sentence. Mungin v. State, 689 So.2d 1026 (Fla. 1995)(rehearings denied Feb. 8, 1996 and March 6, 1997), *cert. denied*, 522 U.S. 833, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997).

On September 16, 1998, Capital Collateral Counsel, Northern Region, filed a "shell" 3.850 motion on Mungin's behalf, while simultaneously declining to represent Mungin

(1Supp. 3-44).[1] Meanwhile, Chief Judge Moran had appointed Mark E. Olive as Mungin's Postconviction counsel, by order dated September 1, 1998 (which does not show service on CCR North) (1Supp 1-2).

By order dated January 12, 1999, Judge Moran appointed Senior Judge John D. Southwood (the original trial judge) to preside over the postconviction proceedings (1Supp 45).

By order dated March 11, 1999, Judge Southwood revoked the order appointing Mark Olive as postconviction counsel (1Supp 52-53); by separate order of the same date Judge Southwood appointed Wayne F. Henderson to represent Mungin (1Supp 54-55).

Meanwhile, various public agencies had sent files to the Records Repository accompanied by claims of exemption as to parts of their files (1Supp. 47, 48-49, 50-51. At a status hearing on May 26, 1999, Judge Southwood noted that Mr. Olive "had filed a public records demand" (2Supp 350). Mr. Henderson stated that he had traveled to Tallahassee to retrieve the Mungin records from the repository and that "three boxes" had been sealed – one from the State, one from the Sheriff, and one from the "prison" (2Supp 350). Henderson stated that he had prepared a motion to unseal

[1] The State will cite to the originally furnished record on appeal as "R," to the supplemental record as "Supp" and to the trial record as "TR."

those records or, if they could not be unsealed, for an in camera inspection of these boxes by the court (2Supp 351). When the prosecutor objected that he had not been given notice of the motion, the Court stated that "we aren't necessarily having a hearing on it," noting that Henderson "didn't even file it" (2Supp 353). Subsequently, Henderson offered to "reword" the motion and file it later (2Supp 366-366A).[2]

On July 7, 1999, Judge Southwood, acting sua sponte (according to his order), ordered the Repository to deliver the allegedly exempt documents to him for an in camera inspection of these records he had scheduled for July 14, 1999 (1Supp. 60-63). Initially, Judge Southwood invited counsel for the parties to attend the in camera inspection, but, following a change in the rules by this Court, Judge Southwood (correctly) refused to allow counsel for any party to remain present at the in camera inspection (2Supp. 387). The record reflects that Judge Southwood issued an August 16, 1999 written ruling on the exemptions claimed by the Department of Corrections (1Supp 85-86).

At some point, Mungin's Postconviction counsel Wayne Henderson informed the court that he would like to be

[2] The record does not reflect that Henderson did so, or that he filed his original motion.

relieved of his representation, citing primarily personal family concerns (2Supp. 383). The court held another status hearing on December 14, 1999 (1Supp. 88-89). At that hearing, Henderson mentioned that he thought he had filed a motion for an in camera inspection at the previous hearing (2Supp. 384). A discussion ensued as to whether the court had reviewed any records other than those from the DOC; it appeared that the court had not (2Supp. 384-90). The court noted, however, that it "might have the horse before the cart [sic]," as Henderson was seeking to get out of the case anyway (2Supp. 390-91).

Thereafter, Mungin filed a pro se motion to remove counsel (1Supp. 90-113), and Henderson filed a formal motion to withdraw (1Supp. 114). On February 10, 2000, the court revoked Henderson's appointment and appointed Dale G. Westling, Sr. (1Supp 115-18).

On September 1, 2000, Westling filed an "Amended Motion to Require Production of Court Records," in which he asked Judge Southwood to require the records repository to deliver the three sealed boxes to Duval County for review by Westling (1Supp. 157-58). Westling did not ask the court to conduct an in camera inspection. The record shows that by order shown as filed on September 11, 2000, Judge Southwood ordered the repository to deliver the Mungin

sealed boxes to the clerk of court (1Supp 161). Only the first page of this order is in the record on appeal, as supplemented, and what is in the record does not reflect whether Judge Southwood anticipated that he would conduct an in camera inspection himself, or simply allow Westling to open and review the contents of these boxes himself.

On September 14, 2000, Westling filed an amended motion for postconviction relief, raising six numbered claims for relief, all alleging ineffective assistance of counsel (1Supp. 163-85). The State filed a response to this amended motion on October 27, 2000 (1Supp. 188-93).

Mungin thereafter retained attorney Kenneth Malnik to represent him and Mr. Westling moved to withdraw (2Supp. 268). On April 3, 2001, the court accepted Westling's motion to withdraw and accepted Malnik as retained counsel (2Supp. 277-81).

On July 2, 2001, Mr. Malnik filed on Mungin's behalf a "Consolidated" amended motion for postconviction relief containing 17 numbered claims for relief (1R 1-76). The State filed a response on October 9, 2001). Following a March 8, 2002 "Huff" hearing (3Supp. 400-49), the court ordered an evidentiary hearing on claims I and IV (counsel was ineffective at the guilt and penalty phases of trial and newly discovered evidence of innocence) 1R 108-09).

The evidentiary hearing was conducted June 25 and 26, 2002. The parties filed written closing arguments, and the trial court issued an order denying relief on March 21, 2003 (2R 203-09).

STATEMENT OF THE FACTS

1. *The trial evidence*

The essential facts of the crime are set forth in this Court's opinion on direct appeal:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. 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, later identified the man as Mungin. After the shooting, a store supervisor found a $ 59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard Williams rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.
>
> First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register.

> Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland. . . .
>
> In the penalty phase, several witnesses who knew Mungin while he was growing up testified that he was trustworthy, not violent, and earned passing grades in school. Mungin lived with his grandmother from the time he was five, but Mungin left when he was eighteen to live with an uncle in Jacksonville. An official from the prison where Mungin was serving a life sentence for the Tallahassee crime testified that Mungin did not have any disciplinary problems during the six months Mungin was under his supervision. Harry Krop, a forensic psychologist, testified that he found no evidence of any major mental illness or personality disorder, although Mungin had a history of drug and alcohol abuse. Krop said he thought Mungin could be rehabilitated because of his normal life before drugs, his average intelligence, and his clean record while in prison.

Mungin v. State, supra, 689 So.2d at 1028.

In addition to these basic facts, additional facts incriminating Mungin appear from the trial record:

On September 13, 1990, a 1983 maroon Ford Escort was stolen from a motel one mile from Mungin’s residence in Kingsland, Georgia (TR 821, 836). This car was identified

as the one Mungin had used in the Monticello and Tallahassee robberies (TR 719, 738-39).

Mungin's fingerprints were recovered from the cash box in the Monticello robbery and also from a cash register receipt in the Tallahassee robbery (TR 781, 785).

Sometime before 1:00 p.m. on September 16, 1990, the maroon Escort that Mungin had used in the Monticello and Tallahassee robberies was abandoned in Jacksonville and a Dodge was stolen from the same area (less than two miles away) (TR 663). Woods was murdered shortly after 1:00 p.m. (TR 663). The Dodge was recovered two days later less than 100 yards from Mungin's home in Kingsland (TR 827). Two expended shells found in the Dodge, plus expended shells left at the scene of each of the three robberies, plus bullets recovered from the Tallahassee and Jacksonville victims, were all identified by ballistics examination as having been fired from the Raven .25 caliber semi-automatic pistol recovered from Mungin's bedroom following his arrest (TR 837-38, 885-87).

2. *Testimony presented at the Postconviction evidentiary hearing*

Trial counsel **Charles F. Cofer**, who is now a county court judge in Duval County, testified that he was an assistant public defender at the time of Mungin's trial and

was one of two attorneys appointed to represent Mungin (2R 234-35). At the time of his appointment, Judge Cofer had been an assistant public defender for more than ten years, and had been defending murder defendants for almost that long (2R 235, 236-37). Judge Cofer almost immediately filed a demand for discovery and, thereafter, specifically requested the State to disclose criminal histories of its witnesses (2R 239, 241, 243). To the best of Judge Cofer's knowledge, the State did not provide any criminal history of Ronald Kirkland (the State's witness who identified Mungin leaving the convenience store) (2R 245), but Judge Cofer acknowledged that he should have known from his own record check that Kirkland had "arrests for disorderly intoxication or two and possibly a DUI during a period of time prior to Mr. Mungin's arrest" (2R 247).[3] Judge Cofer's habit at the time of Mungin's trial would have been to do a criminal record check on all State's witnesses using identifying information contained in the homicide continuation report furnished during discovery (2R 250). He could have determined from his computer check of these

[3] The June 18, 1992 pretrial deposition of Ronald Kirkland reflects that Judge Cofer expressly asked Kirkland about, and Kirkland expressly acknowledged, two convictions for disorderly intoxication, two DUIs, plus one other conviction for which adjudication had been withheld. State's Exhibit 1 at pp. 5-7.

records that Kirkland had been represented by a public defender (2R 287). He did not specifically recall making this determination or disclosing such representation to Mungin (2R 248, 288); however, he would not have ordered these records "just to file them away," and he would have disclosed this information to Mungin and would have discussed with him whether or not he should withdraw from the case (2R 255-56).

The Fourth Circuit public defender did not have a uniform policy of withdrawing "merely" because the public defender's office had represented a State's witness at some time; "we would try to apply some common sense," looking at the type of offense and when it had occurred (2R 248-49). If it were a several-year-old minor offense without extended representation that could not be used for impeachment, the prior representation would not typically be seen as a problem (2R 249). More recent or more extensive representation for a more serious crime would be a "major situation" that would be addressed with the client (2R 249).

The record reflects that, sometime before trial, Judge Cofer obtained information that Kirkland had been arrested on September 26, 1992 on three misdemeanor worthless-check charges (2R 253-54). A notation on the records obtained by

Cofer indicated that Kirkland had been represented by the 4th Circuit public defender's office (2R 254). According to the information disclosed to Judge Cofer, the cases had been disposed of on October 13, 1992, with a plea of guilty and adjudication of guilt withheld (2R 254).

Although Judge Cofer did not explicitly recall discussing this with Mungin, he "[t]ypically" would have done so (2R 255). The public defender's office was reluctant to withdraw from major cases based on conflicts with misdemeanor cases based on a "general feeling" that "people we conflicted out of did not [fare] as well" (2R 256). In Kirkland's case, it was likely that there would only have been a very brief representation at the first appearance hearing and at sentencing, and no record in the public defender's files of conversations with Kirkland (2R 256).

The day before testifying at this hearing, Judge Cofer ran a review of the clerk's database to confirm Kirkland's representation by the public defender and learned that Kirkland had been put on 90 days probation and that violation of probation (VOP) warrants had been issued on January 11, 1993 – some two weeks prior to Mungin's trial

(2R 259-60).[4] The VOPs were recalled shortly thereafter (2R 270).

Judge Cofer's trial strategy included attacking Kirkland's identification of Mungin as the person he saw leaving the convenience store after the murder (2R 272-73). Judge Cofer chose not to recall detective Conn to testify the Kirkland's identification of Mungin had been less certain at the photo lineup than at trial, believing that, on balance, it was not worth losing the concluding argument just to establish that "one fact" (2R 274-75). Judge Cofer could not say "definitely" that, if he had known that Kirkland was on probation at the time of the trial and that a VOP had just issued, he would have called detective Conn as a witness, but he probably would have cross-examined Kirkland about it and mentioned it in closing argument (2R 275-76, 360-62).

Very early in his representation, Judge Cofer discussed the case with Mungin; although Mungin admitted the Monticello and Tallahassee shootings, he insisted he was not guilty of the Jacksonville murder and that he had an alibi involving a man named "Ice," to whom Mungin had

[4] The parties stipulated that the files for these cases had been purged and that the only documents remaining were computer docket sheets (Defense exhibits 5, 6, and 7) (2R 264-65). The State did not stipulate to the substantive accuracy of the matters stated in the exhibits (2R 265).

loaned his gun (2R 289-95). Efforts by Judge Cofer to locate anyone named "Ice" proved fruitless (2R 297-98). Furthermore, his own investigation proved the alibi "untenable," and "it was not pursued" (2R 310).

Judge Cofer was aware of a hospitalization and apparent suicide attempt by Mungin during his early adolescence (2R 300). He would typically have handled such information by disclosing it to the mental health professional retained to present mental mitigation (2R 301).

On cross-examination, Judge Cofer testified that he and Mungin had discussed the chronology of the three shootings (in Monticello, Tallahassee and Jacksonville) in detail (2R 312). The first two shootings had occurred on the same day (September 14); the Jacksonville shooting occurred two days later (September 16), and Mungin was arrested in Georgia on September 18 (2R 313). The Ford Escort identified as having been used in the Monticello and Tallahassee shootings had been stolen in Georgia on September 13, and then recovered in Jacksonville (2R 313-14). A Dodge reported stolen in Jacksonville at 1:45 p.m. on September 16 was recovered in Georgia with shell casings and bullets inside that matched all three shootings (2R

314-15). The murder weapon was found in Mungin's bedroom (2R 315).

Judge Cofer and his investigators tried to find corroboration of Mungin's alibi (2R 319). Mungin had told him that after the Monticello and Tallahassee shootings, he had returned to Jacksonville and delivered the gun to a man named "Ice" or "Snow" (2R 320). They also exchanged vehicles (2R 320). Then Mungin reported having returned to Georgia and then driven back to Pensacola to visit a girlfriend; after staying there a day or so, he returned to Jacksonville and retrieved the gun from "Ice," and still had it when he was arrested in Georgia (2R 320). Judge Cofer expected that finding "Ice" and getting his cooperation (once he was aware of why they were looking for him) would be a "daunting" task (2R 321).[5] If Ice had been located and if he had admitted committing the murder, that "would have been beautiful" (3R 504). However, it was much more likely that Judge Cofer would have been able to locate the girlfriend in Pensacola, so that was where he had started (3R 504). He and co-counsel drove to Pensacola, making stops at Monticello and Tallahassee to view the scenes of the first two shootings (2R 321). They went to

[5] Judge Cofer testified that Detective Gilbreath had tried to find "Ice," without success (3R 507)

the address in Pensacola they had been given for the girlfriend; she was no longer there, but after some investigation, they located her (2R 322-23). They talked to her about Mungin's visit and what they had done, trying to pin down just exactly when the visit had occurred.[6] During their questioning of this potential alibi witness, they discovered that, during the visit, she and Mungin had target practiced with a gun which perfectly fit the description of the murder weapon (2R 324). Judge Cofer testified that they realized immediately that "this was not going to work" (2R 324). When, after having denied any knowledge of a gun in statements to police,[7] she expressly "placed a gun matching the description of the murder weapon in Mr. Mungin's hand during the time Mr. Mungin said that he was in Pensacola, rather than in Jacksonville, that kind of brings the whole process to a screeching halt" (3R 504-05).

Judge Cofer discussed the investigation with Mungin, who initially did not realize the significance of the fact

[6] On redirect, Judge Cofer testified that the girlfriend could not recall the specific date of Mungin's arrival (2R 366). However, she had told police that Mungin had visited her in Pensacola on three separate weekends, the last being the Sunday before his arrest. State's Exhibit 2, at p. 4.

[7] See State's Exhibit 2 at p. 4 (Although she had seen the gun in Georgia, she denied having been around Mungin when he fired the gun in Georgia, and "denied ever going target practicing with Mungin in Pensacola either").

that he had been in possession of the murder weapon while, according to Mungin, he was in Pensacola *after* having given the gun to "Ice," and *during* the time the murder had occurred in Jacksonville (2R 325). In Judge Cofer's view, the testimony of the girlfriend would have "destroyed" his alibi (2R 325).[8] Mungin later asked if he could just testify about the alibi himself. Judge Cofer recommended against it; the absence of "Ice" might have been understandable, but the absence of the girlfriend would not have been (2R 329). In short, putting Mungin on the stand subject to cross-examination was "risky doing because the alibi just couldn't be corroborated" (2R 329).

Although Mungin never expressly confessed his guilt to Judge Cofer (2R 331), during Kirkland's testimony, Mungin

[8] In his Initial Brief at p. 22 (text and footnote 18), Mungin notes (a) that the girlfriend never admitted to police that she had participated in Mungin's target practice and points out (b) that if he had arrived in Pensacola the afternoon after the shooting, "this would not necessarily be indicative of his guilt." The State does not dispute the first observation, but the fact remains that what the girlfriend told Judge Cofer expressly contradicted what she had told police, thus rendering her seriously impeachable. As to the second point, a late Sunday arrival may not, by itself, have been indicative of guilt (other than that such a late arrival would have contradicted what he had told police), but it would have rendered the girlfriend's testimony pointless at best, given that Mungin's alibi depended on establishing that he was in Pensacola *without* the murder weapon at the time of the murder (which is what he told police), not *with* the murder weapon enough hours after the shooting to have given him time to drive to Pensacola after committing the crime.

told him that Kirkland "couldn't have seen him there because that's not where the car was parked" (2R 332).

Regarding the office policy regarding conflicts, Judge Cofer testified:

> You have to balance how remote the representation was, the nature of the offense, how extended or how involved the Public Defender's Office was. In misdemeanors, sometimes it's nothing more than standing next to a person at first-appearance hearing and say do you want to plead for time served and them going on their way. So you balance all of these things out, and also whether or not the offense that they were charged with is an impeachable type of offense or likely to lead to information, because, once again, you have those conflicts responsibilities for the former client and the ethical responsibilities to the former client and the responsibilities toward your present client.

(2R 335).

Judge Cofer testified that he personally had never represented Kirkland, nor had Mungin's prosecutor ever prosecuted Kirkland (2R 336-37). Judge Cofer acknowledged that there was a docket in his Mungin file that should have alerted him to the fact that Kirkland was on probation for worthless checks at the time he testified (2R 346, 354). He was not aware of any VOPs being issued or recalled with

regard to these charges (2R 354).[9] He acknowledged that the computer records sometimes contained errors (2R 373).[10]

Mungin's next witness was **Edward Kimbrough**, a convicted felon and former crack-cocaine user (2R 376-78). He is now married and owns his own business (2R 378). He was friends with Mungin and others in the mid to late 1980s (2R 379). They were acquainted with an older man named "Ice," a drug dealer from the Moncrief area of Jacksonville (2R 380-82). Ice was involved with stolen vehicles and weapons (2R 382). Kimbrough last saw Ice in the mid 1990s (2R 384).

On cross-examination, Kimbrough testified that he knew no other name for Ice; there was also a "Snow," a different person whose real name was Jesse Meeks (2R 385). Ice had no need to borrow a gun from anyone; he always had one of his own (2R 385). Kimbrough could not recall ever seeing Mungin and Ice together (2R 389-90).

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[9] Judge Cofer later testified that VOPs would issue without involvement by the Public Defender's Office or the State Attorney's Office (3R 495).

[10] Mungin notes (Initial Brief at 34, footnote 22) that Judge Southwood had a private discussion with Judge Cofer following his testimony. Judge Southwood, who is a Senior Judge, stated on the record that he had been assigned to preside over three weeks of summary pretrials in county court, that it had been a long time since he had done anything like that, that he was unsure of the new procedures, and that during a recess in the instant proceedings he wanted to "get with" Judge Cofer to "explain to me how to do it" (3R 510).

Jesse Sanders, a convicted felon now serving time, testified that he used to hang out with Mungin in the mid 1980s (2R 391-92). They "used to be on the street corners rapping" (2R 393). Sanders also met Ice, who he described as a "hustler" and a drug dealer (2R 393-94, 397). He and Mungin became involved in criminal activities with Ice (2R 395-97). Sanders had a falling out with Mungin in 1986 and they did not associate with each other afterwards (2R 398). Sanders last saw Ice in the summer of 1987 (2R 399). He never learned Ice's real name (3R 401). Sanders went to prison in 1987, got out in 1992, went back in November 7, 1994, and has been in prison ever since (2R 400).

Brian Washington, from Kingsland, Georgia (35-40 miles north of the Duval County Courthouse), was friends with Mungin (3R 407). At 10:30 a.m. on December 16, 1990, he saw Mungin at a convenience store in Kingsland; Mungin asked for a ride to Jacksonville and Washington gave him one (3R 408-09).

Victoria Glover, also from Kingsland, and Mungin's first cousin, testified that Mungin was living with her in September 1990 (3R 420-21). He had a girlfriend in Pensacola (3R 421). Mungin was arrested at her house; he had been gone for several days, to Pensacola, he said (3R 422-24).

Philip Levy, a four-time convicted felon in jail on burglary charges, testified that he was friends with Mungin (3R 429-30). He last saw Mungin in 1990, on a weekend, probably in the middle of September, probably on a Sunday, and was with him most of the day, except for an hour or two (3R 431-34, 439).

Ronald Kirkland testified that he had described to police a suspect age 28-32, five feet five inches to five feet seven inches tall, with long jeri-curls (3R 456-57). He was certain that the person whose photograph he identified was the person he saw leaving the store (3R 457).

Kirkland admitted that, since Mungin's trial, he had overused drugs prescribed to him for "two injuries" (3R 458). He denied mixing those drugs with alcohol, stating that he had not taken a drink in thirteen years (3R 458). He acknowledged having been arrested for grand theft in 1998 and that he had been represented by a public defender; he stated that adjudication had been withheld and he has not been convicted of a felony (3R 461). In 1991 he was arrested for a worthless check and DUI (3R 461-62). He could not recall having a public defender for the check charge, but recalled that he had been so represented on the DUI (3R 462). And finally, he recalled three worthless

check charges for which he went to court in 1992 and 1993 (3R 464-65). Kirkland testified that he successfully completed his 90 day period of probation (3R 465). As far as he knew, no warrant was ever issued for a violation of probation (3R 465). He did not inform anyone involved in the prosecution of the Mungin trial that he was on probation (3R 465).

Kirkland admitted being convicted on a misdemeanor charge of making a false statement in 1999 (3R 466). He also got more worthless check charges in 1999, which he attributed to a recent divorce and unemployment resulting from an on-the-job injury; he made restitution on those charges in 2000, as soon as he received his workman's compensation settlement (3R 466-67, 470). He was never arrested on these worthless check charges (3R 471).[11] Kirkland denied ever seeking help on any of these charges from the State Attorney's Office, and had not spoken the Mungin's trial prosecutor since the trial (3R 472).

Vernon Longworth testified that he has known Mungin for 20 years, through his nephew Phillip Levy (3R 477-78). He does not remember the exact date he last saw Mungin, but

[11] Judge Southwood noted that, in his experience, informations are filed in bad check cases, the defendants are notified, and if they make restitution, they are never arrested and the charges are nolle prossed (3R 470-71).

he knows it was Sunday because there was nothing to do but watch football (3R 478). Mungin dropped by at 1:00 or 2:00 p.m., and stayed until about 2:30 to 3:00 p.m. (3R 479). He left to go to a "juke joint" with Phillip Levy and a couple of others (3R 480).

On cross-examination, Longworth acknowledged that he did not know the date or even the month that this visit had occurred (3R 482). He also acknowledged that he did not know the exact time Mungin arrived or left (3R 483-84). He could not recall what they had talked about, and did not recall discussing where Mungin had been (3R 485).

Detective **Dale Gilbreath** with the Jacksonville sheriff's office testified that he provided a rough draft of a homicide continuation report to trial counsel before being deposed by him (3R 515). The only difference between the draft and the final version was the correction of typographical errors and the signature of his supervisor (3R 515). He conducted his initial interview of Mungin on November 21, 1991 (3R 518). Gilbreath had taken rough notes of that interview; he had never turned them over to the State Attorney's Office or anyone else (3R 518).[12]

[12] Trial counsel became aware during Gilreath's deposition that he had these notes, but did not ask to see them (3R 522-23).

Any necessary additional elaboration will be furnished in the State's responsive argument to each of the defense issues.

SUMMARY OF THE ARGUMENT

Mungin presents seven issues on this appeal:

1. For the first time on this appeal, Mungin argues that Judge Southwood should have recused himself sua sponte, along with every other judge in the Fourth Circuit, on the ground that whoever presided over the evidentiary hearing in this case would have to assess the credibility of lead trial counsel Charles Cofer, who is now a county judge in the Fourth Circuit. Mungin acknowledges that he did not move to disqualify Judge Southwood below. A judge's failure to recuse himself/herself sua sponte is not assignable as error subject to appellate review. Moreover, any issue of disqualification should have been raised several years ago, not for the first time on appeal. Finally, even if not barred, the claim of disqualification is utterly meritless.

2. Mungin's complaint about Judge Southwood's alleged failure to conduct an in camera inspection of state agency documents claimed to be exempt from disclosure under the public records act is likewise procedurally barred. Whatever confusion may exist regarding just exactly what

Judge Southwood was requested to do or did, Mungin waived this issue by his failure to pursue this claim below, despite ample opportunity to do so.

3. During his cross-examination of the final State rebuttal witness at the evidentiary hearing, Mungin's collateral counsel asked to view (or, alternatively, sought an in camera review by the court of) the witness' personal notes of his pretrial interview with Mungin – notes whose existence had been disclosed prior to trial, but never previously sought. Judge Southwood properly denied this request on the ground that the inquiry was outside the scope of the State's direct examination and irrelevant to any claim before the court.

4. Judge Southwood correctly denied various claims summarily, as they were either procedurally barred or otherwise clearly refuted by the record. Two of the subclaims here are near-verbatim copies of claims raised on direct appeal and so are barred here notwithstanding Mungin's incidental, unadorned, and insufficiently pled allegations of ineffective assistance of counsel. The other sub-claim (ineffectiveness for failing to object to improper prosecutorial argument) was properly denied because the arguments at issue were not improper. The

remaining subclaims are, by Mungin's own admission, meritless under settled precedent from this Court.

5. Judge Southwood correctly denied additional claims of ineffectiveness of counsel at the guilt phase after evidentiary hearing. Trial counsel was well aware of the criminal history of State's witness Kirkland. Notwithstanding various petty brushes with the law, Kirkland had never been convicted of a felony and so his criminal convictions were not, of themselves, impeaching. Mungin argues that trial counsel was ineffective for failing to discover and cross-examine Kirkland about the fact that he was on 90-day probation for worthless checks at the time of the trial and violation of probation warrants had been issued shortly before trial. However, Kirkland denied violating the terms of his probation, and the records fail to contradict his testimony; in fact the record shows that the VOPs were withdrawn very soon after having been issued. In any event, any examination of Kirkland about these alleged VOPs could not have added much to any defense impeachment of Kirkland, given his lack of knowledge that such warrants existed, or the minimal sentence he would have been subjected to at that late date even if his probation had been revoked, and the fact that Kirkland's trial testimony was consistent with the

testimony he gave in his deposition long before any VOPs were issued.

Trial counsel's decision not to call detective Conn as a rebuttal witness was reasonable trial strategy designed to preserve final closing argument. Moreover, Mungin has not shown prejudice, since Conn did not testify at the hearing as to what she might have testified if called.

Trial counsel's decision not to present the testimony of Mungin's Pensacola girlfriend as an alibi witness was reasonable. At best, her testimony would not have been totally inconsistent with his alibi, but would not have supported it; at worst, it would have destroyed it. The girlfriend did not testify, so once again Mungin has utterly failed to demonstrate any prejudice.

Finally, the evidence Mungin presented below establishes, at most, that someone named "Ice" existed. "Ice" did not testify below, and Mungin has not shown that Ice was available at the time of trial, or now, or that Ice could or would have corroborated Mungin's alibi.

6. Mungin has failed to show that trial counsel labored under an actual conflict of interest merely because other attorneys from the office of the public defender had represented Kirkland in other cases, none of which were

involved felony convictions that could have been used to impeach Kirkland. Nor has Mungin shown any prejudice.

7. Mungin's sole complaint about trial counsel's penalty phase performance is their failure to present hospital records indicating that Mungin had overdosed on his grandmother's valium when he was 12. Trial counsel testified that he was aware of these records, and gave them to their mental health expert, who testified at trial without mentioning this incident. The very records Mungin relies on also indicate that, while Mungin claimed a suicide attempt, he only took two valiums. No testimony was presented below to shed any additional light on this incident, and no mental health expert testified regarding the possible utility of this incident in mitigation. Mungin has failed to show deficient attorney performance or prejudice.

ARGUMENT

I

MUNGIN MAY NOT ARGUE FOR THE FIRST TIME ON APPEAL THAT, BECAUSE MUNGIN'S LEAD TRIAL COUNSEL IS NOW A SITTING COUNTY COURT JUDGE IN THE SAME CIRCUIT, JUDGE SOUTHWOOD SHOULD HAVE RECUSED HIMSELF

Mungin argues here for the first time that neither Judge Southwood nor any of the judges of the Fourth Circuit could ethically preside over the postconviction proceedings

in this case because "fellow Judge Cofer would have to be heard and assessed for credibility and reasonableness." Initial Brief of Appellant at 39. While acknowledging that his collateral counsel did not move to disqualify Judge Southwood or the "Fourth Circuit," Mungin argues that fundamental error occurred when Judge Southwood did not recuse himself sua sponte, citing Kalapp v. State, 729 So.2d 987 (Fla. 5th DCA 1999), which he says addressed the merits of an argument raised for the first time on appeal that a judge should have recused himself sua sponte.

In fact, the District Court in Kalapp dismissed the appeal on the ground that the defendant had failed to preserve his right to appeal. However, the court briefly discussed the issues raised "for purposes of judicial efficiency and economy and to prevent further meritless appellate challenges," and in so doing found no merit to the recusal claim. Kalapp is no authority for the proposition that a recusal claim may be raised for the first time on appeal, years after the asserted ground for recusal became known.

More to the point is Charles v. State Dep't of Children & Families Dist. Nine, 30 Fla. L. Weekly D 397 (4th DCA, February 9, 2005), which notes that "[w]hile section 38.05, Florida Statutes (2004), authorizes a judge to

disqualify herself on her own motion, the statute expressly states that a trial judge's failure to sua sponte disqualify herself "shall not be assignable as error or subject to review." In addition, while Florida Rule of Judicial Administration 2.160 (i) cautions that “[n]othing in this rule limits the judge's authority to enter an order of disqualification on the judge's own initiative,” subsection (e) thereof contains an express 10-day time limit for filing motions to disqualify.

Judge Cofer was appointed to the bench in July of 1998 (2R 235). Judge Southwood was appointed to preside over this case in January of 1999 (1Supp 45). Thus, at the time Mungin filed his brief in January of 2005, raising this issue for the first time ever, his grounds for challenging Judge Southwood had been in existence for *six full years*. Mungin’s challenge to Judge Southwood is not just a little bit too late; instead, Mungin waited about *219 times* as long as he should have to first raise this issue.

Besides being untimely under the rule, and unauthorized by statute, Mungin’s attempt to raise an issue not raised below is in contravention of the general rule that arguments not presented to the trial court are not preserved for appeal. Kokal v. State, SC01-882 (Fla., decided January 13, 2005, revised April 28, 2005), slip

opinion at 27. This claim should be summarily rejected as procedurally barred.

Furthermore, Mungin's argument may and should be rejected on the merits. This Court has at least twice previously rejected writs of prohibition raising the same claim Mungin raises here, i.e., that a judge presiding over a capital postconviction proceeding should be disqualified because he/she would assess the credibility of the defendant's original trial counsel who is now a judge. See, e.g., Melton v. State, 786 So.2d 1187 (Fla. 2001) (unpublished order denying writ of prohibition *with prejudice*); and Reese v. State, 823 So.2d 125 (Fla. 2002) (same).

It has been consistently held that a judge's personal and professional relationships, without more, are not disqualifying. MacKenzie v. Super Kids Bargain Store, Inc., 565 So.2d 1332, 1338 (Fla. 1990) (noting that "friendship, member of the same church or religious congregation, neighbors, former classmates or fraternity brothers" have been uniformly found legally insufficient when asserted in a motion for disqualification); Adkins v. Winkler, 592 So.2d 357, 360 (Fla. 1st DCA 1992) (fact that judge had longstanding relationship with attorney legally insufficient for recusal).

This Court has held that judges are not required to disqualify themselves based on an allegation that an attorney or litigant has made a campaign contribution to the political campaign of the judge or the judge's spouse, whether that contribution be in the form of a cash contribution or service on a campaign committee. MacKenzie, supra; Nathanson v. Korvick, 577 So.2d 943 (Fla. 1991). The allegations in this case should be equally insufficient legally to warrant disqualification. Furthermore, one very practical problem with a contrary holding would be exactly the same as noted by former Justice Kogan in his concurrence in MacKenzie: "there literally might be no judge in the circuit who could sit in the case;" and a "per se rule requiring disqualification" would lead to "forum shopping . . . [and] administrative chaos" 565 So.2d at 1341. The State would note that federal courts have not allowed parties to "impede the administration of justice" by indiscriminately challenging every judge in the circuit, even though it might be "possible to convene a disinterested panel in another circuit." Switzer v. Berry, 198 F.3d 1255, 1258 (10th Cir. 2000). Accord, Bolin v. Story, 225 F.3d 1234, 1238-39 (2000 WL 1263827) (11th Cir. 2000); Tapia-Ortiz v. Winter et al., 185 F.3d 8 (2d Cir. 1999).

II

MUNGIN HAS FAILED TO PRESERVE FOR REVIEW ANY COMPLAINT ABOUT JUDGE SOUTHWOOD'S ALLEGED FAILURE TO CONDUCT AN IN CAMERA INSPECTION OF RECORDS CLAIMED TO BE EXEMPT BY THE STATE ATTORNEY AND COUNTY SHERIFF

This is another unpreserved claim. Mungin argues that Judge Southwood's "failure" to conduct an in camera inspection of records for which the State Attorney and the Sheriff had claimed exemption was "error that warrants reversal at this time." Initial Brief of Appellant at 45.

Mungin acknowledges, however, that the record fails to disclose what happened to these sealed boxes (aside from the one from the DOC, which we know the court inspected), except that Judge Southwood issued an order to deliver them to Jacksonville after Mr. Westling filed a written request to see them. Judge Southwood may very well have reviewed them and, after reviewing them, disclosed everything in them to counsel. Or, they may have been delivered to Mr. Westling for the personal review by counsel that Mungin sought.

In any event, and overlooking the fact that attorney Henderson apparently never filed the motion he had drafted requesting an in camera inspection and the fact that attorney Westling's written motion did not seek an in camera inspection by the court, there remains the

significant fact that from September 11, 2000 until the conclusion of the proceedings below, there was no mention whatever of the sealed boxes, of any claim of exemption, or of an in camera inspection. And this is not a case in which the court ruled against Mungin and he simply accepted that ruling. Judge Southwood never ruled against Mungin on this issue, never denied an in camera inspection, never (insofar as the record shows) even denied Mungin's request to allow counsel to review the sealed boxes himself. Mungin has had ample time and opportunity to pursue any public records claim, including any claim that Judge Southwood forgot to review the records in camera or to rule on any claimed exemptions. By his failure to do pursue any such claims below, Mungin has waived any issue of public records or exemption or in camera inspection. This issue is controlled by Pace v. State, 854 So.2d 167 (Fla. 2003), in which this Court stated:

> Due to Pace's inaction during the year and a half between his public records request and the evidentiary hearing, we conclude that Pace has waived or abandoned any claim that he was denied public records.

854 So.2d at 180.

III

JUDGE SOUTHWOOD'S DENIAL OF MUNGIN'S BELATED REQUEST TO ORDER DETECTIVE GILBREATH TO TURN HIS PERSONAL NOTES OVER TO COUNSEL WAS NOT ERRONEOUS

Mungin argues here that Judge Southwood erred by rejecting his collateral counsel's oral request to view notes prepared before trial by Detective Gilbreath - the final witness to testify at the hearing below. Judge Southwood denied the request on the ground that the notes were irrelevant to any claim before the court and because they fell outside the scope of direct examination. The record supports that conclusion.

After the defense rested, the State called two witnesses, first recalling Judge Cofer, and then calling Detective Gilbreath. Judge Cofer was asked about the homicide continuation report written by Detective Gilbreath and whether he had been given a copy. Judge Cofer testified that he would have taken the report into account in terms of making to decision to put on an alibi defense and if so with which witnesses, because the police report included statements made to police by Mungin and by his Pensacola girlfriend (3R 490). Judge Cofer had been given a copy of the draft of the report (State's Exhibit 2) before deposing Detective Gilbreath on October 7, 1992. He later received the final draft (State's Exhibit 3, which

was identical to State's Exhibit 2 except for the correction of some typos and approval of a supervisor) (3R 501-02, 513-16). Over collateral counsel's objection that the draft report was hearsay, it was admitted in evidence "not . . . for the purpose of showing veracity or truth of the matters asserted in there, but only to show that Mr. Cofer may or may not have relied upon that information in his representation in making decisions as to what to do" (3R 490-91). Subsequently, the final report was also admitted over collateral counsel's hearsay objection (514-15).

On cross-examination, Detective Gilbreath was asked by collateral counsel if he had taken "rough notes" of the interview (3R 518). Gilbreath answered that he had, and he had them with him (3R 518). He had never turned his "rough notes over to the State Attorney's Office" (3R 519).

Collateral counsel at this juncture demanded an opportunity to "see those rough notes" (3R 519). The prosecutor objected because the notes were "not part of the 3.850 public records request" and he did not "understand where he's headed on this" (3R 520). The Court asked, "to make sure we understand where you're going," whether the issue before the court was "effective assistance of counsel" (3R 521). Collateral counsel did not answer

directly, but responded that Judge Cofer's pre-trial deposition of Gilbreath had disclosed the existence of the notes, and "if there's a discovery violation, then that may be a defense for Mr. Cofer's investigation in this case" (3R 521). Collateral counsel then cited to page 51 of the pre-trial deposition, wherein Detective Gilbreath had acknowledged to Judge Cofer that he had brought the original notes of his interview of Mungin to the deposition (3R 522). Collateral counsel asserted that "Detective Gilbreath had the notes" at that time, and that Judge Cofer "had the ability" to "attempt to get the notes and he didn't" (3R 523). Collateral counsel acknowledged that, if Judge Cofer had attempted to get the notes, he "might not have" been successful, but stated he would "like to at least examine the notes in camera to see if there's differences between the notes and the . . . report" (3R 523).

The prosecutor responded that collateral counsel's proposed inquiry was "way beyond" the scope of direct examination and he would object to defense counsel examining the notes, but not to an in camera inspection (3R 524). Judge Southwood, stating that he did not "see how it's going to go to the question of ineffective assistance of counsel," sustained the State's objection to the

disclosure of the notes, and denied the request to review the notes in camera (3R 524).

Mungin argues that the prosecutor made his beyond-the-scope-of-direct objection too late, noting that objections are waived unless made at the time the testimony is offered. Initial Brief of Appellant at 52. However, in sharp contrast to the situation in Jones v. Butterworth, 701 So.2d 76, 78 (Fla. 1997), in which no objection was interposed until *after* an out-of-state witness had completed his testimony and *had been released* (presumably, to return to California), the State's objection here was interposed here while the witness sat silently on the stand as the court and parties discussed collateral counsel's request. The State would have been hard-pressed to object sooner than it did, especially since the defense argument evolved as the discussion proceeded. Furthermore, a trial court has the discretion to consider a belated objection, and there clearly was no abuse of that discretion here.

Mungin also contends that his request was *not* outside the scope of direct. The State disagrees, as the sole purpose of offering the reports in evidence was to corroborate Judge Cofer's testimony explaining that he had been aware of the police report when formulating his strategy. The court admitted the reports solely for that

purpose, and not for the truth of the matters stated therein. Moreover, Mungin's collateral counsel could have called the witness himself if beyond-the-scope were the sole objection, and pursued his inquiry on his own direct examination. He did not do so.

Mungin has little to say about the other basis for denying the request - that the notes were not relevant to any claim raised by him in his Postconviction motion. He argues that these notes were encompassed in his public records requests and that, if they had been disclosed, then *perhaps* a claim of some sort, which Mungin does not identify, *could* have been raised in an amended Postconviction motion. There are at least two things wrong with this argument.

First, the fact that the notes existed has been known to Mungin's counsel at least since Detective Gilbreath was deposed prior to trial by Judge Cofer. However, although Mungin's original collateral counsel had requested an in camera review of the files submitted by the Sheriff's Office to the repository, as noted above (Argument II), Mungin ultimately waived any issue regarding those files. Moreover, Detective Gilbreath's personal notes do not appear ever to have been a part of the Sheriff's files, and no one acting on Mungin's behalf ever sought the production

of Detective Gilbreath's personal notes until Gilbreath testified as the very last witness at the Postconviction evidentiary hearing – some 10 years after the defense first learned of the existence of the notes.

Second, Mungin has not only failed to show that the trial court erred in ruling that the notes were irrelevant to any claim before the court, he has failed to identify what kind of additional claim he would or could have made if the notes had been furnished to him before or during the hearing.

This whole claim is nothing more than a very belated, untimely fishing expedition, lacking any basis for suspicion that the notes contain anything helpful to the defense.[13]

Mungin did not contend in his motion for postconviction relief that his trial counsel was ineffective for failing to secure the production of Detective Gilbreath's notes. Nor did he make any other issue about the notes. Furthermore, the notes were not

[13] The State would note, inter alia, that, in the pretrial deposition, Judge Cofer asked Detective Gilbreath to "reconstruct" his interview with Mungin "from your original notes" (3R 522). Detective Gilbreath answered, apparently referring to these notes (3R 522). Mungin has not demonstrated any inconsistency between these answers and anything contained in Gilbreath's official report.

subject to discovery, Geralds v. State, 601 So.2d 1157, 1160 (Fla. 1992), and Detective Gilbreath did not at any point use his notes to refresh his memory. Ibid. (citing Section 90.613, Florida Statutes). Mungin cannot demonstrate any free-standing right to demand an in camera inspection of a police officer's personal notes for the first time at the tail end of a postconviction evidentiary hearing, and Judge Southwood correctly sustained the State's objection and properly denied the defense request to conduct an in camera review of Detective Gilbreath's notes.

IV

JUDGE SOUTHWOOD PROPERLY DENIED VARIOUS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL SUMMARILY, AS THESE CLAIMS WERE PROCEDURALLY BARRED OR OTHERWISE CLEARLY REFUTED BY THE RECORD

Mungin argues that Judge Southwood erred in denying certain claims summarily without attaching or citing to portions of the record. These claims were properly denied summarily. Any error in failing to attach or cite to the record is inconsequential, because whether or not these claims are conclusively rebutted by the record is a strictly legal issue that this Court may review de novo. Because, as will be seen, each of these claims is

conclusively shown by the record to be procedurally barred, or meritless or both, Judge Southwood's summary denial of these claims may and should be affirmed.

A. Trial counsel's alleged ineffectiveness at voir dire.

Mungin contended in Claim II of his consolidated motion for Postconviction relief that trial counsel was ineffective for failing to conduct an effective voir dire examination and, more specifically in Part A thereof, for accepting the jury without objection and thus failing to preserve a Neil/Slappy[14] objection to the prosecutor's exercise of peremptory challenges on appeal (1R 22-30).

Paragraphs 1-10 of Mungin's Claim II (1R 22-26), which allege generally that trial counsel were ineffective for failing to conduct an effective voir dire examination, is insufficiently pled. The allegations fail to explain how trial counsel's voir dire examination was ineffective, other than to say that it was "undirected and purposeless." Mungin has not identified any question that trial counsel should have asked, but did not, or any question that trial counsel should not have asked, but did. In short, Mungin utterly failed to allege any facts from which this Court could find trial counsel's performance at the voir dire

[14] State v. Neil, 457 So.2d 481 (Fla. 1984); Slappy v.State, 522 So.2d 18 (Fla. 1988).

examination was deficient or prejudicial. Damren v. State, 838 So.2d 512, 518 (Fla. 2003) (conclusory allegations of ineffective voire dire examination facially insufficient). Moreover, a review of the 92-page defense voir dire examination itself refutes any claim that trial counsel's voir dire examination fell below the standard of reasonably effective assistance of counsel (T 433-525). On the contrary, the defense examination was thorough and effective.

The Neil/Slappy issue raised in part A of Claim II (1R 26-30) (there is no part B) is procedurally barred, despite Mungin's attempt to invoke the rubric of ineffective assistance of counsel. This issue was raised and rejected on direct appeal. In fact, it is obvious from a comparison of the Mungin's consolidated motion to his brief on direct appeal that subpart A of Claim II of the motion is practically a verbatim reprise of Issue I of Mungin's brief on direct appeal. Compare pp 26-30 of Mungin's consolidated amended motion for postconviction relief (1R 26-30) to pp 23-27 of his initial brief on direct appeal. The only difference is that Mungin inserted at the conclusion of his lengthy merits argument a new, one-sentence, conclusory allegation that trial counsel's failure to object to the

final composition of the jury was "error on the part of the defense counsel" (1R 30).

Matters that were raised on direct appeal of the conviction and sentence cannot be raised in a postconviction motion. E.g., Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999). Padding a procedurally barred claim with an incidental, summary, or conclusory allegation of ineffective assistance of counsel is insufficient to circumvent the procedural bar or to warrant hearing or relief. Lopez v. Singletary, 634 So.2d 1054, 1057 (Fla. 1993).[15]

Even aside from the procedural bar, this claim was summarily denied properly, as the record clearly refutes any claim that trial counsel was ineffective for failing to object to the jury as selected after initially raising a Neil/Slappy issue early in the jury selection process.

The record shows that trial counsel objected to the prosecutor's exercise of peremptory challenges after the State struck the first two black prospective jurors on the

[15] Mungin suggests the State waived a procedural bar argument at the Huff hearing. Initial Brief of Appellant at 56 (fn. 36). The State, however, never withdrew its procedural bar argument. In the State's view, the Huff hearing gives the parties the opportunity to present additional argument, and does not require restatement of all arguments previously made. While the State has, and does, present alternative argument on the merits, the State has never receded from its position that this claim is procedurally barred.

list (T 531). The judge conducted a Neil inquiry. The prosecutor explained that, at that point, he had peremptorily struck three prospective jurors, one of whom was white, because of their expressed "mixed emotions" about the death penalty (T 534, 537-38). Trial counsel took issue with this explanation as to prospective juror Galloway, arguing that she was, despite her mixed emotions, capable of recommending a death sentence, and that her answers were not distinguishable from those of prospective juror Venettozzi, whom the State had accepted (T 537). This court found that the State was justified in exercising its peremptories against those having "mixed feelings about capital punishment" (T 536), that the State's proffered reason was "racially neutral" and that the State's peremptory challenges were exercised legitimately (T 538).

The jury selection continued. Ultimately, four black citizens of Duval County were selected as jurors (T 559-60). The prosecutor asked every prospective juror how he or she felt about the death penalty. Their answers fell into five categories: (1) for it; (2) opposed to it; (3) not opposed to it; (4) depends upon the circumstances; and (5) mixed emotions (T 373-96). Defense counsel exercised all of their peremptory challenges against prospective jurors who gave answer (1). The State successfully

challenged for cause those prospective jurors who gave answer (2) and struck peremptorily those jurors who gave answer (5). Those giving answers (3) and/or (4) were struck, if at all, for other reasons.

Clearly, the prospective jurors' feelings about the death penalty were related to the facts and issues of this death-penalty case. Both parties, in fact, exercised their challenges in major part on the basis of the jurors' answers to the death-qualification questions, which were posed in substantially the same manner to each of the jurors, including Mrs. Galloway (T 373-96, 396-424).

A prospective juror's discomfort with the death penalty is a legitimate, race-neutral reason for the exercise of a peremptory challenge. Walls v. State, 641 So.2d 381 (Fla. 1994); Atwater v. State, 626 So.2d 1325, 1327 (Fla. 1993). A prosecutor's misgivings about a juror who has "mixed emotions" about the death penalty reasonably justify peremptorily challenging that juror. Happ v. State, 595 So.2d 991, 996 (Fla. 1992).

The record refutes Mungin's claim that the prosecutor was not justified in striking Mrs. Galloway despite her mixed feelings about the death penalty because the prosecutor accepted two other jurors who had equally mixed

feelings. The two additional jurors Mungin refers to were Mr. Venettozzi and Mrs. Goodman.

Mr. Venettozzi did not testify that he had mixed emotions about the death penalty. Instead, he stated: "I think it's mixed. It depends on how serious . . . I believe it depends on the circumstances. I don't think I could say yes or no without knowing." (T 374) Later, he stated that if "the person is guilty," and "it was violent, malicious, I believe in the death penalty." (T 483). Clearly, his answer falls into category (4) (depends on the circumstances), rather than category (5) (mixed emotions). Thus, the prosecutor's reason for challenging Mrs. Galloway is not equally applicable (or even applicable at all) to Mr. Venettozzi.

Mrs. Goodman was the final alternate juror in the selection process, and accepted only because the State had no peremptories left when she was selected as an alternate juror and this court denied the State's challenge for cause (T 558-59). In these circumstances, the fifth factor enumerated in Slappy was inapplicable; i.e., it cannot be said that Mrs. Goodman was a juror who was not challenged by the State.

The record shows, then, that the State did not engage "in a pattern of excluding a minority without apparent

reason." Slappy, 522 So.2d at 23. Not only did the prosecutor offer a legitimate, non-racial reason for striking Mrs. Goodman, but the fact that four African Americans ultimately served on Mungin's jury corroborates the prosecutor's asserted lack of racial animus. Taylor v. State, 583 So.2d 323 (Fla. 1991). The trial court properly overruled the challenge and there simply was no error to preserve. Thus, trial counsel could not have been ineffective for failing to object to the jury as ultimately selected. First, it cannot be said that no reasonable attorney would have failed, in these circumstances, to object to the jury as selected. Chandler v. U.S., 218 F.3d 1305 (11th Cir. 2000)(en banc)(in evaluating claim of deficient attorney performance, court's inquiry is limited to determining whether course of action taken by trial court might have been a reasonable one; counsel's performance is constitutionally deficient only if no reasonable attorney would have acted, in the circumstances, as defendant's attorney did). Second, there has been, and can be, no demonstration of prejudice.

Mungin's claim that trial counsel was ineffective for failing to preserve the Neil/Slappy issue is conclusively refuted by the record, and was summarily denied correctly.

B. Counsel's "failure" to object to prosecutorial argument.

Mungin contended in Claim III of his consolidated motion for Postconviction relief that trial counsel was ineffective for failing to object to prosecutorial closing argument, citing two instances of the prosecutor's guilt-phase closing argument and one penalty-phase argument (1R 30-33) Any substantive claim of prosecutorial misconduct is procedurally barred. Spencer v. State, 842 So.2d 52, 60-61 (Fla. 2003). Mungin's claim that trial counsel was ineffective for failing to object to prosecutorial argument is conclusively refuted by the record.

With respect to the guilt-phase arguments at issue here, Mungin has not begun to explain why it is improper to tell the jury that everyone is entitled to a trial no matter how guilty or how strong the evidence. It would seem that, if anything, this argument was beneficial to the defendant. Trial counsel's failure to object cannot have been deficient attorney performance, and could not in any event have been prejudicial.

As for the penalty phase argument, this Court has explicitly rejected claims that it is improper to tell the jury not to be swayed by sympathy. E.g., Ford v. State, 802 So.2d 1121, 1131-32 (Fla. 2001) (rejecting attack on prosecutor's argument that: "Much of the defendant's

mitigation through the testimony [] of friends and family is an attempt to get Lady Justice to peek under the blindfold and tip the scale out of sympathy. And the Court has instructed you that sympathy is not something that you should consider."); Valle v. State, 581 So. 2d 40, 47 (Fla. 1991). Here, the prosecutor merely told the jury it should not be swayed by sympathy for Mungin's grandmother.

The remainder of his argument at this juncture was merely a vivid way of explaining that sometimes people start out good but end up bad. See Reese v. State, 694 So.2d 678 (Fla. 1997) ("Reese argues that the prosecutor's use of a story about a 'cute little puppy' who 'grew into a vicious dog' was prejudicial. However, evidence of Reese's past character was presented to the jury, so it was not inappropriate for the prosecutor to argue that past character was not a determinant of present character. The story did not constitute name calling, and was not prejudicial.").

The evidence showed that, although Mungin seemed to be a pretty good kid, he fell in with a bad crowd when he got older and began to do bad things. The prosecutor did not tell the jury that Mungin's good childhood was not mitigating, but merely that this mitigation did not outweigh the aggravation. In the very next part of his

argument following that quoted by Mungin in his motion (1R 32-33), the prosecutor told the jury:

> I would submit to you the fact that this defendant as a youngster was a good person, wrestled, et cetera, was the team manager, does not outweigh the aggravating factors in this case. The aggravation definitely outweighs the mitigation in this case. So don't feel sorry because of his grandmother or aunt or–et cetera.

(T 1223). See Cargill v. Turpin, 120 F.3d 1366, 1384 (11th Cir. 1997) ("These comments conveyed no prejudicial message to the jury - only that the mitigating evidence Cargill presented was of little force.").

It was not unreasonable for trial counsel not to object to the prosecutorial argument now complained of. Put another way, it cannot be said that no reasonable attorney would have failed to object to this argument. Chandler, supra. Therefore, Mungin cannot demonstrate deficient attorney performance. Furthermore, the failure to object cannot have been prejudicial since the argument was not outside the "wide latitude" granted to attorneys in closing argument, Ford, much less sufficiently improper to "taint" the jury's recommendation of death.

Since Mungin's claim of ineffectiveness is clearly refuted by the record, the trial court properly denied this claim summarily.

C. Trial counsel's alleged failure to prepare his witness.

In Claim V of his consolidated motion for postconviction relief (1R 36-45) Mungin once again presented a nearly verbatim reargument of an issue he had raised on direct appeal (Issue IV of Mungin's initial brief on direct appeal, at pp 56-65), in which he once again claimed that fundamental error occurred when a defense witness testified during the penalty phase that while inmates serving multiple life sentences were not eligible for controlled release, they could be eligible for conditional release if their sentence was ever commuted. This fundamental-error argument was explicitly rejected on direct appeal. Mungin v. State, 689 So.2d 1026, 1030-31 (Fla. 1995). Mungin's one-sentence incidental claim of ineffective assistance of counsel, thrown in at the tail end of a ten-page, 17-paragraph claim of fundamental error lifted verbatim from his brief on direct appeal, was insufficient to resurrect this procedurally barred claim, and it should have been summarily denied. Ventura v. State, 794 So.2d 553, 559 (fn. 6) (Fla. 2001) ("attempts to circumvent the procedural bar by interjecting allegations of ineffective assistance of counsel . . . [a]s we have repeatedly emphasized, . . . are insufficient to overcome a procedural bar").

Moreover, as the State noted in its brief:

> At most, appellant's evidence was not quite as favorable as he might have liked, but appellant was still able to argue to the jury that he was ineligible for parole as a life-sentenced inmate, and that it was unlikely that the legislature would change the law to allow early release for a multi-life sentenced offender like appellant.

Answer Brief of Appellee, Case No. 81, 358 at 24.

Judge Southwood correctly denied this procedurally barred and meritless claim summarily.

D. Other errors.

Mungin concedes that his other summarily-denied claims were properly denied under settled precedent from this Court; he raised them only "to preserve them" in the event of a change in the law. Initial Brief of Appellant at 65. The State agrees that these claims were properly denied under settled precedent, and will not address them further at this juncture.

V

JUDGE SOUTHWOOD PROPERLY DENIED MUNGIN'S CLAIMS THAT TRIAL COUNSEL WERE INEFFECTIVE AT THE GUILT PHASE OF HIS TRIAL

Mungin argues that his trial counsel were ineffective for failing to impeach Kirkland by cross-examining him about the fact that at the time of the trial he was on probation for worthless checks, for failing to call

Detective Conn as a defense witness to impeach Kirkland, and for failing to investigate and present an alibi defense. The State will address each of these claims seriatum.

A. Failure to examine Kirkland about his worthless checks

Initially, the State disputes Mungin's characterization of Kirkland's testimony as the "linchpin" of the State's case. Initial Brief of Appellant at 68. Although he was certainly an important witness, the State presented plenty of additional evidence identifying Mungin as the person who had murdered Betty Jean Woods. As noted in this Court's opinion on direct appeal, the jury heard Williams-rule evidence that, within two days of the Woods murder, Mungin had shot two other store clerks. Mungin was not only positively identified as the shooter by eyewitness testimony, but his fingerprints were found on the cash box in the Monticello robbery/shooting, and on a cash receipt in the Tallahassee robbery/shooting. The Ford Escort used in these two shootings had been stolen near Mungin's home in Georgia, and abandoned in Jacksonville not far from where a Dodge similar to one used in the Jacksonville robbery/shooting was stolen. That Dodge was found near Mungin's home, containing expended shells matched to shells and bullets fired from the single weapon used in all three

shootings. The murder weapon itself was found in Mungin's bedroom.

Secondly, the State urges this Court to reject Mungin's Brady claim. It really should have been raised, if at all, as a separate issue on appeal, rather than stuck in an argument on ineffectiveness of counsel, but beyond that it is procedurally barred and meritless.

Mungin's consolidated motion for postconviction relief, filed almost three years after his initial shell motion, contains no Brady claim. Nor was such a claim mentioned at the Huff hearing held eight months later. Not until the day before the evidentiary hearing did Mungin attempt for the first time to proffer a Brady claim, arguing that, *if* the State were in possession of Kirkland's criminal history and failed to disclose it to defense counsel, a Brady violation occurred (1R 110-11). Judge Southwood's refusal to consider this belated claim (2R 226-29) was not erroneous. Jones v. State, 732 So.2d 313, 321 (Fla. 2001) (amended new claim properly denied as time barred).

Furthermore, the testimony presented establishes that the evidence at issue was equally accessible to both the State and the defense, and that, in fact, the defense was well aware of Kirkland's criminal history. As for the VOP

warrants, the testimony established that no one from either the public defenders office or the state attorney's office would have been involved in the issuance of the warrants, or received notice thereof. See Jones v. State, 712 So.2d 512, 520 (Fla. 1998) (noting that officer whose knowledge was at issue was not part of investigation team in Jones' case). Finally, for reasons set forth below, any Brady claim would fail for lack of prejudice. See United States v. Bagley, 437 U.S. 667 (1985) (Strickland standard of prejudice appropriate for Brady claims).

Judge Cofer was well aware of Kirkland's criminal history before he deposed him; indeed, he examined Kirkland about that criminal history at his pretrial deposition.[16] None of that criminal history was serious enough to have been used to impeach Kirkland. After the deposition, but before trial, Judge Cofer learned that Kirkland had been convicted on three additional misdemeanor counts of worthless checks. Additionally, he learned shortly before the evidentiary hearing that, according to computer printouts which were all that remained of the original records of the cases at issue here, VOPs had apparently

[16] In view of the considerable attention Mungin devotes to Kirkland's criminal history, it should be noted that he has no felony convictions.

been issued shortly before trial, although they were rescinded shortly thereafter.

Mungin argues here that trial counsel was constitutionally ineffective for failing to cross-examine Kirkland about the VOP warrant that apparently issued on January 11, 1993 - two weeks before Mungin's trial. The evidence and the record show that trial counsel obtained information about the worthless check charges and the probation sentences in December of 1992. However, the VOP warrant did not exist at that time.

Although acknowledging that the misdemeanor convictions themselves could not have been used in impeachment of Kirkland, Judge Cofer suggested that the fact that Kirkland was on probation might have been something he could have used in impeachment. He also acknowledged that he could have gone to the probation department to pull the capias files.

The applicable principles of law relating to ineffective assistance of counsel are well settled. This Court recently summarized them:

> In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 694

> (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. See id. at 694. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689; see also Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993). As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; see also Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995). For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. See Strickland, 466 U.S. at 695; see also Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

Spencer v. State, 842 So.2d 52, 61 (Fla. 2003). See also, Nixon v. Florida, 125 S.Ct. 551 (2004) (unless counsel completely failed to function as the client's advocate, a criminal defendant can prevail on a claim of ineffective assistance of counsel *only* by demonstrating *both* deficient attorney performance *and* actual prejudice).

Initially, it must be noted that Judge Cofer could not have cross-examined Kirkland about something Judge Cofer was unaware of. Thus, his failure to cross-examine

Kirkland about the VOPs cannot be deemed constitutionally deficient performance unless Judge Cofer performed in a constitutionally deficient manner for failing to discover them. It cannot be said that every reasonable attorney, after learning that Kirkland was on 90 days probation on misdemeanor charges, would have gone to the probation office several weeks later just to check whether or not a VOP warrant had issued.

First, Mungin has failed to demonstrate that, had trial counsel gone to the probation office, he would have discovered a legitimate basis for issuing a VOP warrant. Without such legitimate basis, there could have been no basis for impeachment. Although the nearly nonexistent records we still have at this juncture are not at all clear on this matter, a reasonable inference from the record is that there was no legitimate basis for the VOP, which is why they were withdrawn without Kirkland ever knowing about it. The only actual testimony we have about whether Kirkland complied with the terms and conditions of probation comes from Kirkland himself, and he testified that he had not violated his probation.

Second, the VOPs would have had little value in impeaching Kirkland's testimony, since neither Kirkland nor the State knew about them. Thus, there could have been no

"deal," nor any basis for the existence of the VOPs to have shaded Kirkland's testimony in any manner.

Finally, even if the VOP might have had some impeaching value, even if only by innuendo, there is no reasonable probability of a different verdict. First, any suggestion that the VOPs had influenced Kirkland to shade his testimony to make his identification more certain than it really was could have been rebutted by the State; as Judge Cofer acknowledged in the evidentiary hearing, Kirkland had already denied in his June 28, 1992 deposition that he had ever told Detective Conn that his identification was not good enough to swear in court (2R 350-51, State's exhibit 1 at pp 31-32). This prior consistent testimony would have rebutted any suggestion of recent fabrication due to a probationary sentence on charges that did not exist at the time of the deposition testimony. Shellito v. State, 701 So.2d 837 (Fla. 1997). Second, with or without Kirkland's identification, which was vigorously attacked at trial by defense counsel, the State's evidence was very strong. The Jacksonville robbery/murder was the third in a series of robberies and shootings, all of which were committed with the same gun - a gun that was found in Mungin's bedroom. Furthermore, Mungin was positively identified as the person who had

committed the first two robbery/shootings, and the car he used in the first two robberies had been stolen from near his home and then abandoned not far from the Jacksonville robbery/murder, and a car stolen from that area ended up next to Mungin's home with two expended shells from the murder weapon in it. Thus, Mungin had used the murder weapons in two shootings not long before the Jacksonville robbery/murder, had the murder weapon following the Jacksonville robbery/murder, and was directly connected to the two cars used in the three robbery/shootings.

For all these reasons, there is no reasonable probability of a different verdict if Judge Cofer had attempted to impeach Kirkland about a misdemeanor violation-of-probation warrant that Kirkland never knew about and appears to have been issued in error.

Judge Southwood properly denied relief on this claim.

B. Failure to call Detective Conn

Mungin argues here that Judge Cofer was ineffective for failing to call Detective Conn as a witness to establish that Kirkland's original identification of Mungin had been less than certain. However, Judge Cofer explained why he had not called Conn as a defense witness:

> We discussed this with Mr. Mungin, that as we got closer to trial it was our decision - Mr. De la Rionda is a very capable and very talented

> arguer, and it was our decision that unless we had something pretty important that we wanted to try to handle our case in a way so that we would reserve open and close. In other words, the sandwich in argument. On balance, Mr. Kirkland admitted during trial to most of the things that we could have utilized Detective Conn to impeach on, but with that one exception about the certainty of his identification. On balance we just felt at that 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.

(2R 275). Thus, it is clear that trial counsel was aware of the potential testimony that might have been elicited from Detective Conn and made a strategic decision (which Mungin himself joined) not to call him because the potential utility of his testimony would have been outweighed by the loss of the final argument. Such strategic decisions after adequate investigation and consideration by experienced counsel are properly accorded great deference and are seldom if ever grounds for finding deficient attorney performance. Oats v. Singletary, 141 F.3d 1018, 1023 (11th Cir. 1998); Maharaj v. State, 778 So.2d 944, 951 (Fla. 2000) ("counsel cannot be ineffective for strategic decisions made during a trial").

Moreover, Mungin has failed to demonstrate prejudice in two ways: First, he did not call Detective Conn during this evidentiary hearing or introduce her pre-trial deposition to establish what she might have said if she had

testified. Second, as noted above, given the strength of the evidence tying Mungin to the Jacksonville murder, plus trial counsel's overall effective cross-examination of Kirkland's identification of Mungin, Mungin cannot demonstrate a reasonable probability of a different verdict if trial counsel had also presented the testimony of Detective Conn.

Having failed to demonstrate deficient attorney performance or prejudice, Mungin is entitled to no relief on this claim.

C. Failure to present alibi evidence

Mungin argues here that Judge Cofer was ineffective for failing to look for "Ice," who supposedly had the murder weapon at the time Betty Jean Woods was murdered in Jacksonville; for failing to call Mungin's girlfriend Charlette Dawson to corroborate his alibi; and for failing to locate and present witnesses who could have testified that Mungin was in Jacksonville on the day of the shooting.

At the outset it must be noted that Judge Cofer was faced with a case in which Mungin had already pled guilty to the Monticello and Tallahassee shootings that had been committed with the same gun used to murder Betty Jean Woods, and had given two statements to police about his whereabouts and his travels during the 4-5 day period

during which these robbery/shootings had occurred. Any potential alibi defense would have had to fit within the confines of this chronology.

Judge Cofer had been informed that Mungin had told police (State's Exhibits 2 and 3) that he had stolen the maroon Escort from a motel in Kingsland and had driven it down to Jacksonville and from there to Monticello and Tallahassee, where he robbed and shot two different persons. He told police he had returned to Jacksonville the same day (September 14), where he "ditched" the Escort, leaving it and the gun with a man Mungin could identify in the first statement only as "Snow" and the second as "Ice." Mungin explained that he had returned to Georgia on a bus and had not wanted to carry a gun onto the bus; he told "Snow" he would be back. Mungin returned to Jacksonville two days later, catching a ride with someone he could identify only as a "baser." He found the Escort torn up and stripped. He was given a stolen Dodge. He bought the gun back with either two $20 rocks of cocaine or $40-60 cash (depending on which statement one reads). He went to see a "girl" on West 28th Street, and then drove to Pensacola to see Charlette Dawson, arriving the same day that Betty Jean Woods had been shot. Mungin admitted having taken Dawson target shooting on one occasion while

in Pensacola, but denied ever shooting the gun while he had the stolen Dodge. He stayed in Pensacola two days, and returned straight home to Georgia, where he was arrested the same day he returned.

Judge Cofer explained that it would have been a "daunting task" to find "Ice" especially if "Ice" thought the defense was trying to pin a murder on him. He attempted to locate "Ice," with the same lack of success as the State, who also had tried to find him. Judge Cofer did travel to Pensacola to talk to Charlette Dawson. She recalled Mungin being there during the general time period, but she also recalled that Mungin had used a gun that in Charlette's description matched the murder weapon. Judge Cofer felt it would not have been useful alibi testimony to prove that Mungin had the murder weapon at this time. Mungin eventually agreed with Judge Cofer that Charlette would not be a good alibi witness. They discussed having Mungin testify without presenting any corroborating evidence, but concluded that subjecting him to cross-examination without presenting additional testimony that could corroborate his own testimony would be too risky.

Mungin argues that Judge Cofer could have called Charlette Dawson as an alibi witness because her testimony about the murder weapon would not have been inconsistent

with Mungin's alibi if he had arrived in Pensacola on Sunday evening. However, Judge Cofer testified that Dawson could not say exactly when Mungin had arrived. Mungin has presented nothing to contradict that testimony; specifically, Mungin has not bothered to present testimony one way or the other from Dawson herself, on the question of just exactly when Mungin visited her in Pensacola or anything else. Thus we have no substantive evidence that a Dawson-supported alibi exists, or therefore, that, even if we assume that trial counsel was confused or otherwise inept in his evaluation of her statements, the presentation of her testimony would in reasonable probability have resulted in a different verdict. Moreover, evidence that Mungin arrived in Pensacola on Sunday evening in the possession of the murder weapon simply would not have contradicted the State's theory that Mungin shot Betty Jean Woods in Jacksonville at 1:00 p.m. that day. So even if we assume, without any testimony from her, that Dawson would have so testified, Mungin cannot show prejudice from trial counsel's decision not to call her as a witness.

In fact, no witness presented by Mungin at this hearing contradicts the State's theory in any way. On the contrary, what his witnesses establish, if anything (given their uncertainty about what Sunday they saw Mungin), is

that Mungin was in fact in Jacksonville on the day Betty Jean Woods was shot, both before and after the shooting. What none of these witnesses can do, however, is put Mungin somewhere other than at Wood's convenience store at the time of the shooting.

As for "Ice," all Mungin has presented are witnesses who claimed to have known him a decade and a half ago. Mungin has not presented Ice himself, or anyone who can say where "Ice" was at the time of the murder, or at the time of the trial, or now. Mungin can hardly fault trial counsel for failing to find Ice when his collateral counsel has not been able to find him either. Nor has Mungin ever explained how his trial counsel might have used "Ice" even if they had found him. Mungin certainly has not proved that Ice would have been willing – then or now - to testify that he had murdered Betty Jean Woods, and Mungin has presented no other witnesses who can shed any light on whether "Ice" had the murder weapon when Mungin said he did or had any other involvement in the Woods murder.

Mungin simply has failed to demonstrate that his trial counsel performed deficiently in their investigation of alibi. Furthermore, Mungin has failed to demonstrate prejudice, as nothing he has presented today establishes that he was in Pensacola at the time of the murder, or that

"Ice" was in any way involved in the murder of Betty Jean Woods or was ever in possession of the murder weapon, or in any other way provides Mungin with alibi. In short, Mungin has not demonstrated a reasonable probability of a different verdict.

Having failed to prove either deficient attorney performance or prejudice, Mungin was entitled to no relief on this claim, and Judge Southwood properly denied it.[17]

VI

JUDGE SOUTHWOOD CORRECTLY DENIED MUNGIN'S CLAIM THAT TRIAL COUNSEL LABORED UNDER A CONFLICT OF INTEREST

Mungin argues here that his trial counsel labored under a conflict of interest because State's witness Ronald Kirkland had previously been represented by the Fourth Circuit public defender's office and had been represented by that same office on bad-check charges after Mungin was arrested.

The evidence shows that Kirland had been charged with grand theft in 1988, was represented by an assistant public

[17] Mungin complains that Judge Southwood's factual findings are inadequately detailed. Initial Brief of Appellant at 69. If so, Mungin is entitled to no remedy; under any permissible interpretation of the testimony and record, Mungin has failed to demonstrate ineffective assistance of counsel. Thus, regardless of any perceived deficiency in his factual findings, Judge Southwood's denial of Mungin's claim of ineffectiveness of counsel should be affirmed.

defender, and entered a plea in exchange for withholding adjudication of guilt pending an 18 month period of probation, which Kirkland successfully completed. Defendant's Exhibit 8; State's Exhibit 1 at pp. 6-7, 2R 223-24. In addition, Kirkland was convicted in 1991 of DUI and speeding, and, later in 1991, of public disturbance. Defendant's Exhibit 4, 9 and 10; State's Exhibit 1 at pp. 6-7. Kirkland apparently was represented by an assistant public defender on the public disturbance, and, at some point on the DUI/speeding. Defendant's Exhibit 10, 2R 283-84.

Judge Cofer was aware of these charges when he deposed Kirkland on June 18, 1992. State's Exhibit 1, 2R 247. On September of 1992, after Judge Cofer had deposed Kirkland, Kirkland was charged on with three misdemeanor worthless-check charges; on October 13, Kirkland entered a plea and was given 90 days probation on each charge. Defendant's Exhibit 4, 2R 340, 344-46. Judge Cofer was aware of these charges and the probated sentences. It was unlikely, in his view, that "there would have been anything but just a very brief representation by the attorneys at first appearance hearing and at sentencing." In fact, it "would not have been likely that there would have even been notes in the file of the attorney about conversations with

[Kirkland].” Judge Cofer was not aware that a VOP had issued on January 11, 1993, or that the VOP had been recalled shortly thereafter. The VOP warrant could have been recalled simply because it had been issued in error. Judge Cofer testified that no one in either the State Attorney’s office or the Public Defender’s office would have been involved in the issuance of any VOP warrant.

Judge Cofer testified that he did not view that fact that Kirkland was on probation as being a basis of conflict, and he would not have “pulled my punches” in this murder case just because someone in his office might have represented Kirkland on the worthless check charges or any of the other misdemeanors (2R 367A-368).

None of the foregoing entitles Mungin to any relief on his conflict-of-interest claim. The right to effective assistance of counsel encompasses the right to representation free from actual conflict. Hunter v. State, 817 So.2d 768, 791 (Fla. 2002). “However, in order to establish an ineffectiveness claim premised on an alleged conflict of interest, the defendant must ‘establish that an actual conflict of interest adversely affected his lawyer’s performance.’” Id. (quoting Cuyler v. Sullivan, 446 U.S. 335, 349 (1980). In Hunter, the Court went on to say:

> A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." Cuyler, 446 U.S. at 350. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. See Herring v. State, 730 So.2d 1264, 1267 (Fla. 1998). A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. If a defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation." [Cits.]

817 So.2d at 792.

An "actual" conflict of interest exists "if counsel's course of action is affected by the conflicting representation, i.e., where there is divided loyalty with the result that a course of action beneficial to one client would be damaging to the interests of the other client." McCrae v. State, 510 So.2d 874, 877 fn. 1 (Fla. 1987). This record simply does not demonstrate such divided loyalty. Kirkland's misdemeanor cases were disposed of before Mungin's trial began - most of them long before. There is no suggestion that Kirkland's attorneys in the bad check cases were aware that Kirkland was going to be a witness in a capital trial more than three months later,

and there is no evidence that Judge Cofer had any reason to "pull his punches" in Mungin's trial simply because someone in his office had represented Kirkland on worthless-check charges (without Judge Cofer's knowledge until after the cases were disposed of) during the pendency of the pre-trial proceedings in this case.

Mungin has not demonstrated that any conflict "adversely affected his counsel's representation." Hunter, 817 So.2d at 793. Kirkland had never been convicted of any felony, and his misdemeanor convictions could not have been used to impeach him. Further, since no one in the State Attorney's office, the Public Defender's office or even Kirkland himself was aware of the VOP warrant that later was recalled, there is no "factual correlation" between the existence of the VOP and any inaction on the part of trial counsel. Id.

This is not a case in which trial counsel represented co-defendants at the same trial. See Cuyler v. Sullivan, 446 U.S. 335 (1980). It is not even a case in which trial counsel himself had previously represented a state's witness, or in which another attorney in the same public defender's office had previously or concurrently represented a State's witness on major felony charges. It is simply a case in which other attorneys in the same

public defender's office previously have represented a State's witness on misdemeanor charges. Whether Cuyler's presumption of prejudice upon proof of an effect on representation is applicable to a case in which counsel was not forced to represent co-defendants simultaneously is doubtful in light of Mickens v. Taylor, 535 U.S. 152, 174-76 (2002). Even if Sullivan is applicable, Mungin still must show an actual conflict of interest, not merely the possibility of such. Cuyler at 348 ("to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance"). This Mungin has not done. There is no indication that Judge Cofer "struggle[d] to serve two masters," id., or otherwise was inhibited in his representation of Mungin. And if Cuyler's presumption of prejudice (once an actual conflict is shown) is *not* applicable, then Mungin bears the additional burden to show, not only that an actual conflict affected his counsel's representation, but also a probable effect upon the outcome of the trial. Mickens. Mungin has not done this either.

For the foregoing reasons, Mungin is entitled to no relief on this claim.

VII

JUDGE SOUTHWOOD CORRECTLY DENIED MUNGIN'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE

Mungin's trial counsel called numerous witnesses at the penalty phase, including his grandmother, his cousin, the mother of his child, a Georgia deputy sheriff who had grown up with Mungin, a Kingsland police officer who had known Mungin since elementary school, a Georgia school administrator, a Georgia assistant superintendent of schools, a Florida classification officer with the Department of Corrections, and a forensic psychologist (Dr. Harry Krop).

Mungin presented no new mitigation witnesses at the Postconviction evidentiary hearing, and no new mental health expert testimony. His sole complaint about the penalty phase is that Judge Cofer did not present, in mitigation, hospital records indicating that Mungin had overdosed on his grandmother's valium when he was 12 years old. Although Mungin is reported to have told persons at the hospital that he had made a "suicide attempt," the records also indicate that Mungin merely took two Valium tablets so he could go to sleep. See Defendant's Exhibit 13. It is clear that Judge Cofer was aware of this hospitalization. He explained that he typically would

present such evidence to his mental health expert for incorporation into the expert's penalty-phase testimony if the expert thought it had any mitigating value. Mungin cannot and has not demonstrated that Judge Cofer performed deficiently in this regard. Nor, particularly in the absence of any postconviction testimony from Dr. Krop or any other mental health expert, has he demonstrated any prejudice. Judge Southwood correctly denied relief on this claim.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Todd G. Scher, Law Offices of Todd G. Scher, P.L., 5600 Collins Avenue #15-B, Miami Beach, Florida 33140, this 27th day of May, 2005.

_____
CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

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