IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

vs. **Case Number SC03-780**

STATE OF FLORIDA,

Appellee.
_____/

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

_____

REPLY BRIEF OF APPELLANT

_____

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ARGUMENT IN REPLY[1]

I

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

In this argument, Mr. Mungin asserted that it was fundamental error for the lower court judge, Judge Southwood, and the Fourth Judicial Circuit, to not recuse themselves from the postconviction proceedings below because Mr. Mungin's trial counsel was a sitting judge in the Fourth Judicial Circuit. The State argues that Mr. Mungin, by failing to seek recusal below, has waived his argument and that the issue is procedurally barred (AB at 28-31).[2]

While there is no dispute about the fact that Mr. Mungin's prior collateral counsel did not seek recusal of the judge or the circuit, the State's argument fails to contemplate that Mr. Mungin is raising this issue on appeal as fundamental error. Fundamental error is that type of error that is "so prejudicial as to vitiate the entire trial." *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997). Here, the fact that the presiding judge was in a position to assess the credibility of a fellow judge in the same judicial circuit is the type of error that vitiates the integrity of the entire

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[1]In the Statement of Facts provided in the Answer Brief, the State misstates or provides an incomplete recitation of certain facts and testimony. These areas will be addressed specifically in the Arguments to which those facts pertain.

[2]References to the State's Answer Brief shall be designated as (AB page #).

postconviction proceedings, *see In re McMillan*, 797 So. 2d 560 (Fla. 2001) ("no other principle is more essential to the fair administration of justice than the impartiality of the presiding judge"), and thus reversal is warranted on the basis of fundamental error.

The State attempts to distinguish *Kalapp v. State*, 729 So. 2d 987 (Fla. 5th DCA 1999), by asserting that it is "no authority for the proposition that a recusal claim may be raised for the first time on appeal" (AB at 28). This is simply not accurate. The *Kalapp* Court dismissed the appeal in that case *not* because the defendant failed to preserve the issue of judicial recusal, but rather because the defendant in that case, who appealed following the entry of a guilty plea, "did not reserve his right to appeal at the time he entered his plea or file a motion to withdraw his plea either before or after he was sentenced." *Id*. at 989. For purposes of "judicial efficiency and economy" the Court, however, went on to address the merits of the recusal claim which had not been preserved below. *Id*. While the Court did ultimately reject the *merits* of the recusal claim, it did *not* dismiss or refuse to address it because no request for recusal had been made by the defendant in the lower court. *Id*. at 989-990.

The State relies on *Charles v. State Dep't. Of Children and Families Dist. Nine*, 30 Fla. L. Weekly D397 (Fla. 4th DCA Feb. 9, 2005), as "[m]ore to the point" in this appeal (AB at 28). Significantly, *Charles*, which issued in early February of

this year, is still, as of the date of this Reply Brief, a non-final decision pending rehearing. Thus, it has little, if any, precedential value. Moreover, even if providing some value as precedent, the Fourth District's decision in that case does not reveal that the defendant in that case argued that fundamental error required the recusal sought in that case. To the contrary, Mr. Mungin *is* claiming that fundamental error required the trial judge and the Fourth Judicial Circuit to be recused from Mr. Mungin's postconviction case. Thus, *Charles* is inapposite.

The State also cites to this Court's unpublished table decisions in *Melton v. State*, 786 So. 2d 1187 (Fla. 2001), and *Reese v. State*, 823 So. 2d 125 (Fla. 2002), as support for the notion that this Court has "at least twice" previously rejected writs of prohibition in cases raising similar issues. The denial of a writ of prohibition, however, is not a denial on the merits unless the Court specifically states so or the denial is "with prejudice." *See Barwick v. State*, 660 So. 2d 685, 691 (Fla. 1995), *overruled in part, followed in part, Topps v. State*, 865 So. 2d 1253 (Fla. 2004).[3] While the Court's denial of the writ in *Melton* was indeed on the merits because it was denied with prejudice, the denial of the writ in *Reese*, despite the State's incorrect parenthetical, was not a denial with prejudice.[4] Thus,

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[3]The portion of *Barwick* that the Court receded from in *Topps* was not the portion holding that the denial of a writ of prohibition is not a ruling on the merits unless the denial is with prejudice. *Topps*, 865 So. 2d at 1258 n.6.

[4]Following the citation to *Melton*, the State's brief indicates, in a parenthetical, that the denial was with prejudice. The parenthetical following the

reliance on *Reese* for any precedential value as to the merits is misplaced. And, in any event, the State does not distinguish or even mention *Hodges v. State*, 885 So. 2d 338, 344-45 (Fla. 2003), decided *after Melton*, and cited in Mr. Mungin's Initial Brief at p. 39 n.24.

Finally, this Court's decision in *Maharaj v. State*, 684 So. 2d 726 (Fla. 1996), puts to rest any notion that the issue of recusal must be raised in the lower court in order for a defendant to raise it on appeal and for this Court to address the merits of the issue. In *Maharaj*, this Court noted that, on appeal, the defendant alleged that the trial judge who presided over the Rule 3.850 proceedings was the supervising attorney of the assistant state attorneys who prosecuted him. *Id*. at 728. Despite noting that a "specific procedure" is set out for moving to disqualify a judge and the fact that the procedure "was not followed in this case," the Court nonetheless concluded that the lower court had the obligation to disqualify itself "regardless of whether a motion to disqualify was filed" and that, under these circumstances, reversal for an evidentiary hearing "before a new judge" was warranted. *Id*.[5] If the fact that the presiding judge who summarily denied a Rule

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citation to *Reese* indicates the holding as "same" (AB at 30). This is not correct, as there is no specific conclusion in *Reese* that the denial was with prejudice.

[5]Under this Court's decision in *Maharaj*, the Fourth District's observation in *Charles* (relied on by the State here), that § 38.05, Fla. Stat. (2004), does not permit the failure of a judge to recuse himself or herself to be raised as error on appeal cannot be good law. Perhaps this is why rehearing is still pending in *Charles*. In any event, the Court's holding in *Maharaj* certainly establishes that

3.850 motion should have *sua sponte* disqualified himself because he had previously supervised the prosecutors in the case, in Mr. Mungin's case, it could not be clearer that disqualification should have been entered where the presiding judge "helped train" the trial counsel who was also a sitting judge in that circuit and whose credibility was at issue.

On the merits, the State simply argues that, without more, a judge's "personal and professional relationships" do not generally warrant recusal (AB at 30). This is not a case involving, however, church or religious congregations, fraternity brothers, or campaign contributions, and thus the cases relied on by the State are inapposite (AB at 30-31). Here, there is much more than just the fact that Judges Southwood and Cofer were on the bench in the same judicial circuit; Judge Southwood, at one point, even acknowledged that he "helped train" Judge Cofer (PCR311). For these reasons, and those set forth in his Initial Brief, Mr. Mungin submits that it was fundamental error for Judge Southwood and any other judge in the Fourth Circuit to preside over his postconviction proceedings. Reversal with directions that Mr. Mungin be provided with an impartial tribunal is warranted. *Maharaj, supra; Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988).

Charles is of no precedential value due to the fact that it is not yet final and, even if final, would appear to conflict with *Maharaj*.

II

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

In his Initial Brief, Mr. Mungin contended that the lower court failed to conduct the requisite *in camera* inspection of records claimed to be exempt by the Duval County State Attorney's Office and the Duval County Sheriff's Office. Relying on *Pace v. State*, 854 So. 2d 167 (Fla. 2003), the State argues that Mr. Mungin has somehow "waived" the issue (AB at 33). The State's argument is simply meritless.

In the first place, the State notes and is in apparent agreement with the fact that "the record fails to disclose" what really happened during the *in camera* inspection that the lower court did conduct on July 14, 1999 (AB at 32) ("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 [prior collateral counsel] for the personal review by counsel that Mungin sought"). Given the state of uncertainty, it appears that Mr. Mungin's prior request to this Court that the transcript of the July 14, 1999, *in camera* inspection hearing is and was well-taken in the view of the State *despite* the fact that the State *objected* to the unsealing of the transcript because the record supposedly was sufficient "to allow Mungin to make whatever argument he might wish to make"

regarding nondisclosure of public records (State's Response to Motion to Supplement the Record on Appeal and to Unseal Transcript of the July 14, 1999, Hearing, August 17, 1004, at 2-3). Now that Mr. Mungin has made his arguments, apparently the State agrees that the record does not completely reflect what occurred and which documents were in fact inspected by the lower court.

As for the State's argument that Mr. Mungin has "waived" this issue, the State's reliance on *Pace* is utterly misplaced and there is no "waiver" in this case. First, as to reliance on *Pace*, what occurred there was that the defendant made numerous public records requests which were ultimately denied by the trial court. *Pace*, 854 So. 2d at 180. Pace then, in his Rule 3.850 motion, raised an issue about the non-compliance by state agencies with certain public records requests. *Id*. After detailing the history of the public records litigation, the lower court denied an evidentiary hearing on Pace's claim. *Id*. Thereafter, Pace filed "similar public records requests" but, after those requests were sent, "made no complaint and filed no motion to compel with the postconviction court regarding these requests." *Id*. It was this failure that compelled the Court to find that Pace had "waived or abandoned" his public records claim. *Id.*

This case is nothing like the situation addressed in *Pace*, nor is this a case even involving an allegation that state agencies failed to comply with public records requests. Here, the outstanding issue is whether the lower court performed

the requisite *in camera* inspection of the records exempted from the Duval County State Attorney's Office and the Duval County Sheriff's Office. Despite the State's strained argument that Mr. Mungin is somehow responsible for waiving the issue, the fact is the issue of public records was addressed extensively below by collateral counsel, the State, and the lower court, the latter which acknowledged that its own error contributed to the fact that the exempted records from the State Attorney's Office and the Sheriff's Office were not sent as part of the records to be reviewed in the first *in camera* inspection (Supp. PCR388-90), and ordered that these material be forwarded to him for review (Supp. PCR161).[6] Clearly this matter was litigated as much as it could have been under the circumstances, and simply because Mr. Mungin's evidentiary hearing was finally conducted in 2002 does not mean that he "waived" any issue previously addressed by the court in earlier proceedings because he did not file periodic "objections."

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[6]The State makes the curious argument that the order entered by the court on September 11, 2000, "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" (AB at 5). The point of this argument is not clear. Is the State suggesting that the lower court would permit collateral counsel to open and review exempted materials from the State Attorney and Sheriff's Office rather than conduct the *in camera* as it was required to do? Certainly, the representatives of these agencies would not have countenanced collateral counsel disregarding the exemptions and simply "opening and reviewing" the contents of sealed exempted materials. The State attempt to thus suggest that collateral counsel may have in fact reviewed the exempted materials is simply fatuous and without any basis in this record.

III

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

In his Initial Brief, Mr. Mungin argued that the lower court erred in refusing to provide him with access to Detective Gilbreath's notes of his interviews with Mr. Mungin, thus depriving him of a full and fair evidentairy hearing. He also argued that the lower court erred in refusing to even review the notes *in camera*.

The State argues that the lower court did not err in refusing to permit Mr. Mungin's counsel from reviewing the notes during his cross-examination of Gilbreath because 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" (AB at 37). This argument, however, begs the question and provides the very reason why the lower court erred, as Mr. Mungin will address below.

In the first place, regardless of the reasoning the State employed when it decided to call Gilbreath, the fact of the matter is that once called and once he testified to the substance of the police reports, the State opened the door to the issue of whether the police reports were an accurate reflection of the rough notes, and thus it became fair game on cross-examination. *See Zerquera v. State*, 549 So.

2d 189, 192 (Fla. 1989) ("Cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief"). Thus, the fact that the State only wanted to call Gilbreath for one purpose did not exclude the possibility that, by the questions it posed to him, that it would open the door to areas that would "modify, supplement, contradict, rebut, or make clearer" his direct examination testimony. The State took the risk, opened the door, and cannot now be heard to complain that Mr. Mungin's cross-examination exceeded the scope of direct examination.[7]

The State argues that Mr. Mungin did not and cannot make a showing that the rough notes were relevant to any issue in his Rule 3.850 motion (AB at 38). Aside from the fact that fundamental principles of cross-examination permitted Mr.

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[7]Indeed, as noted in the Initial Brief, Gilbreath was questioned, on cross-examination, about his interviews with Mr. Mungin and how those interviews had been memorialized. There was no objection made by the State as to this line of questioning. It was only when the request for the rough notes was made did the State object and belatedly argue that this line of questioning exceeded the scope of direct (PCR523-24). The State argues that it would have been "hard pressed" to object earlier because the defense argument "evolved as the discussion proceeded" (AB at 37), but the record reflects that no objection was made until *after* Mr. Mungin's collateral counsel noted that the State had not objected and the court agreed (PCR519). Clearly prompted by the obvious lack of objection, the State *then* began posing objections (PCR520). The State also argues that Mr. Mungin only requested the notes "for the first time at the tail end" of the evidentiary hearing (AB at 40). Of course, it was at the "tail end" of the hearing that the State opted to call Gilbreath.

Mungin to review the notes and question Gilbreath about them once the State opened the door, *see Zerquera, supra*, the issue of Cofer's investigation into Mr. Mungin's case was the central issue to be determined and he anticipated the State to argue that Cofer's performance was not deficient because what he was told limited the parameters of his investigation (PCR523).[8] According to Cofer, he relied the information he reviewed in the police reports at issue in order to limit his investigation into Mr. Mungin's alibi (PCR319;489-50). However, it is Mr. Mungin's position that Cofer completely misunderstood the facts of Mr. Mungin's case and the facts underlying his alibi. *See* Initial Brief at 82-85. Thus, as collateral counsel argued below, the rough notes of Gilbreath's interviews with Mr. Mungin were clearly relevant to the issue of the reasonableness of Cofer's investigation based on the police reports and as such, should have been disclosed by the lower court.[9]

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[8]Indeed, the State did make this argument during its questioning of Cofer when explaining why the police reports were admissible (PCR490-91) (police report "admissible to explain why Mr. Cofer, who was Mr. Mungin's attorney at the time, did or did not do certain things").

[9]The State argues that Gilbreath's notes "do not appear ever to have been a part of the Sheriff's files" that were requested by Mr. Mungin pursuant to Fla. R. Crim. P. 3.852 (AB at 38). This is sheer speculation, and provides further justification for the unsealing of the *in camera* inspection that did take place and for a remand so that the court can review the materials that it never did. *See* Argument II, *supra*.

Finally, the State's reliance on *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992), to argue that the notes were not subject to discovery, is entirely misplaced (AB at 40). *Geralds*, a direct appeal decision, addressed a discovery issue at trial involving field notes of an FDLE analyst. The Court ultimately noted that the lower court in that case provided to the defense the notes that the witness had used to refresh her recollection, but ruled that the remainder of the notes were not discoverable. *Id*. at 1160. The State fails to articulate why this is relevant here, nor does it acknowledge that Fla. R. Crim. P. 3.852 provides a mechanism for capital defendants to obtain records that were otherwise not discoverable at the time of trial.

IV

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

A. Trial counsel's ineffectiveness during voir dire.

Not surprisingly, after urging this Court on direct appeal to find that the issue regarding the prosecution's use of race-based jury strikes unpreserved due to trial counsel's failure to object to the final composition of the jury,[10] the State now

[10]*See* Answer Brief of Appellee, *Mungin v. State*, No. 81,358 at 7 ("Initially, Appellee would question whether Appellant has preserved this issue for appeal. . . Appellee's *Neil* claim should be regarded as waived"). The Assistant Attorney

has the audacity to argue, as it did in its written response filed below, that the issue is procedurally barred because it was "raised and rejected on direct appeal" (AB at 42). While it is true that Mr. Mungin "raised" the issue on direct appeal, that the issue was "rejected" on direct appeal is an unabashedly false statement. This Court did not address the claim, agreeing with the State that the issue had not been preserved by trial counsel. *See Mungin v. State*, 689 So. 2d 1026, 1030 n.7 (Fla. 1995) ("Mungin raised two other guilt issues. Issue 1 (whether trial court erred in overruling a defense objection to the State's peremptory challenge of a black prospective juror) has not been preserved for our review"). Importantly, the Court never engaged in an alternative analysis of the merits of the claim and, just as importantly, the State never cites, discusses, or distinguishes this Court's decisions in *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001), and *Pietri v. State*, 885 So. 2d 245, 255-56 (Fla. 2004), cited in Mr. Mungin's Initial Brief at p. 56 n.36, establishing that an ineffective assistance of counsel claim is cognizable when there is a failure to preserve an issue for appellate review. Nor does the State cite, discuss, or distinguish the line of cases discussed at p. 60 of the Initial Brief indicating that this issue is one that warrants an evidentiary hearing.

General who authored the direct appeal brief is the same one representing the State in the instant proceedings urging this Court to find that the issue was "decided" on direct appeal.

The State argues that even if not barred, the record "clearly refutes" any claim that 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" (AB at 43). The State, however, fails to point to any portion of the record that "clearly refutes" the allegation that trial counsel unreasonably failed to preserve the issue by objecting to the final composition of the jury. The lower court likewise failed to attach any portion of the record to support the summary denial or otherwise explained the rationale for its denial. *See McLin v. State*, 827 So. 2d 948, 954 (Fla. 2002) ("This Court has explained that to support summary denial without a hearing, a trial court must either state its rationale in its decision or attache those specific parts of the record that refute each claim presented in the motion").

The State centers its argument on the issue of whether there was an actual violation of *Neil/Slappy* here, rather than what the issue actually is–did trial counsel unreasonably fail to know the law and fail to object to the jury's final composition in order to preserve the earlier objections and preserve the issue for appeal? Whether an attorney's failure to object in order to preserve an issue for appeal is a cognizable claim in a Rule 3.850 motion that cannot be evaluated absent an evidentiary hearing. *See, e.g. Thomas v. State*, 700 So. 2d 407, 408 (Fla. 4th DCA 1997) ("Appellant's second claim for relief was that his trial counsel was ineffective in failing to renew his objection to the state's use of a peremptory

challenge to exercise a juror where the record indicates that the juror was Hispanic, precluding the point from being raised on direct appeal . . . The allegation of failing to preserve an issue which, if well founded, could result in reversal, constitutes a preliminary basis for relief pursuant to rule 3.850"). Here, the deficiency is trial counsel's failure to preserve the issue, and the prejudice is whether trial counsel's omission precluded Mr. Mungin from raising an issue which, if well-founded, could have resulted in reversal on direct appeal.[11]

The State argues that trial counsel did not render prejudicially deficient performance because there was no underlying merit to the issue. However, the lower court made no such determination. All the lower court determined was that the record refuted the allegations (PCR411). As noted by Mr. Mungin in his Initial Brief but never mentioned by the State in its Brief, the lower court engaged in no analysis whatsoever of the underlying facts surrounding defense counsel's objections to juror Galloway. In fact, at the time the lower court denied the issue at the *Huff* hearing, the lower court had not even reviewed the direct appeal briefs nor had it even reviewed the trial record in this case (PCR536-37). *See* Initial Brief at 57-58.

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[11]The State fails altogether to address Mr. Mungin's argument that trial counsel here could not have had a reasonable strategic decision for not preserving the issue because counsel, after trial, pursued the issue in a motion for new trial (R387), and argued the issue extensively at a hearing on the motion for new trial (R1270-73). *See* Initial Brief at 59 & nn. 40, 41.

The State contends that the record refutes Mr. Mungin's claim regarding the striking of juror Galloway. Creating its own category system of juror responses, the State asserts that juror Venettozzi did not testify that he had "mixed feelings" about the death penalty but rather should be placed into its self-created category of "depends on the circumstances" (AB at 46). Thus, under this self-created classification system, the State asserts that the prosecutor's reason for challenging Galloway "is not equally applicable" to Venettozzi because Venettozzi fell into the "depends on the circumstances" category rather than the "mixed feelings" category. This argument is without any merit.

In the first place, the State's "classification" system for distinguishing between "depends on the circumstances" and "mixed feelings" is irrational and irrelevant. The State's assumption that the difference between "depends on the circumstances" and "mixed emotions" is unfounded, as is its apparent argument that jurors answering "mixed emotions" could rationally be inferred to be less favorable to the State than jurors answering "depends on the circumstances." A prospective juror can have "mixed emotions" about the death penalty and still believe that it should be imposed in every case of murder. For example, an individual could feel that the death penalty is warranted and should be imposed but still feel sadness, or "mixed feelings" that the imposition of the death penalty would cause grief and tragedy to the family of the defendant. On the other hand, a

person whose feelings about capital punishment "depend on the circumstances" could feel that the death penalty is inappropriate except in particular circumstances not present in this case, such as the defendant having confessed, or the murder having involved torture. In sum, it is impossible to tell from the State's self-created categories of "mixed emotions" and "depends on the circumstances" responses whether a "mixed emotion" juror is more or less likely to vote to impose death than is a "depending on the circumstances" juror.

Even assuming some rationality and relevance to the State's categorical nomenclature, the fact remains that Venettozzi testified that he had mixed emotions. The record shows the first "questioning" of Venettozzi:

> [Prosecutor] Venettozzi. How do you feel about the death penalty, sir?
>
> A Venireman: I think it's mixed. It depends on how serious.
>
> [Defense counsel] Excuse me, Your Honor, I couldn't hear the response.
>
> A Venireman: I believe it depends on the circumstances. I don't think I could say yes or no without knowing.
>
> [Prosecutor] Okay. Thank you, sir.

(R374).[12] The "questioning" of juror Galloway revealed the following:

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[12]Prior to this exchange, the prosecutor learned from Venettozzi that his son had been previously accused of a crime, but charges were later dropped by the State due to insufficient evidence (R365-66).

[Prosecutor] Mrs. Galloway, how long have you been working for Revlon?

[A Venireman] Eight and a half years.

[Prosecutor] You mentioned you have one child but he or she is at home?

[A Venireman] Yes, ten years old.

[Prosecutor] How do you feel about the death penalty?

[A Venireman] I have mixed emotions.

[A Prosecutor] Thank you, ma'am.

(R378-79).

The follow-up questioning by defense counsel of Venettozzi revealed the following exchange:

[Defense counsel] You also indicated, I think, that the death penalty–you believe in the death penalty depending on the circumstance. Can you tell me what you meant by that?

[A Venireman] If it's a violent–a violent–if they prove that the person is guilty, if you all prove to me that he was guilty and it was violent, malicious, I believe in the death penalty. I don't necessarily feel that death–I don't necessarily feel the death penalty goes with the guilty charge.

[Defense counsel] Okay. Do you fell as though there would be some circumstances then where you could weigh mitigation against any potential aggravation–

[A Venireman] Yes, sir.

[Defense counsel] –and vote for a life sentence?

[A Venireman] Yes.

[Defense counsel] Even if first degree murder has been proven to you?

[A Venireman] Yes.

(R483-84). The follow-up by defense counsel of Galloway revealed an identical willingness to follow the law regarding the death penalty:

> [Defense counsel] Mrs. Galloway, you said you had some mixed emotions. Have you heard what we've talked about in terms of weighing the statutory aggravations [sic] against mitigation?
>
> [A Venireman] Yes.
>
> [Defense counsel] Do you feel as though you could follow the law and the Court's instructions on the law?
>
> [A Venireman] Yes.
>
> [Defense counsel] Thank you.

(R491).

These exchanges reveal not only the uselessness of the State's system of categorizing juror responses but also that the prosecutor's reasons for striking Galloway ("mixed emotions") was pretextual when compared to Venettozzi's identical responses. Both jurors indicated mixed feelings about the death penalty, but when pressed by defense counsel,[13] both indicated an ability to impose the

[13]The prosecutor conducted no follow-up questioning of Galloway, and thus his questioning was clearly perfunctory. Without questioning Galloway further, the State had no basis for believing that her answers showed less inclination to vote for death than did Venettozzi's answers.

death penalty and follow the law as instructed by the court. This is not a situation, as asserted by the State, that Galloway expressed an unequivocal "discomfort with the death penalty" (AB at 45) (citing *Walls v. State*, 641 So. 2d 381 (Fla. 1994); *Atwater v. State*, 626 So. 2d 1325, 1327 (Fla. 1993); and *Happ v. State*, 595 So. 2d 991, 996) (Fla. 1992)). The cases cited by the State justify no such conclusion in this case. In *Walls*, the jurors that were struck did not say they had mixed emotions, they expressed "discomfort" with the death penalty. *Walls*, 641 So. 2d at 386. Here, there is no such situation. Likewise, in *Atwater*, this Court addressed a situation where "the prospective juror had difficulty answering the questions put to her and her demeanor indicated she was hesitant and uncomfortable regarding the death penalty." *Atwater*, 626 So. 2d at 1327. Here, the trial court made no such findings regarding the "demeanor" of Galloway, nor did her responses demonstrate any hesitancy or "discomfort" with the death penalty (R491). Finally, in *Happ*, contrary to the State's argument, the issue did not involve a juror who had "mixed emotions" (AB at 45). Rather, *Happ* involved the State's explanation that it struck a black juror because she was a psychology teacher at a community college, was Catholic, and "would be inclined not to believe in the death penalty." *Happ*, 596 So. 2d at 996. The Court also noted that, unlike in Mr. Mungin's case, the defense in that case "did not contest" the prosecutor's reasons. *Id*. Thus, *Happ* is completely distinguishable.

Finally, as to the State's argument that this Court's decision in *Taylor v. State*, 583 So. 2d 323 (Fla. 1991), establishes that no constitutional violation can occur because other African-American jurors ultimately sat on the jury (AB at 47), Mr. Mungin submits that *Taylor* says no such thing.[14] Indeed, *Taylor* reaffirmed the longstanding principle that "the striking of even a single black juror for racial reasons is impermissible." *Taylor*, 583 So. 2d at 327. That no Fourteenth Amendment claim can ever be sustained when other blacks serve on a jury is not in accord with the law since *Batson v. Kentucky*, 476 U.S. 79 (1986). *See, e.g. United States v. Allison*, 908 F. 2d 1567, 1571 (11th Cir. 1986) ("Under *Batson*, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown"); *Fleming v. Kemp*, 794 F. 2d 1478, 1483 (11th Cir. 1986) ("nothing in *Batson* compels the district court's conclusion that constitutional guarantees are never abridged if all black jurors but one or two are struck because of their race. On the contrary, *Batson* restates the principle that `[a] single invidiously discriminatory government act' is not `immunized by the absence of such discrimination in the making of other comparable decisions.' . . .

[14]*Taylor* addressed a claim that the trial court erred by not conducting the requisite inquiry of the State, which is not the issue in Mr. Mungin's case.

We cannot agree that *Batson* may be rendered *a priori* inapplicable by a prosecutorial game of numbers").

B. Remaining arguments.

Mr. Mungin relies on the arguments and authorities set forth in his Initial Brief to address the contentions of the State as to the remaining arguments in this claim.

V

MR. MUNGIN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT.

A. Deficient Impeachment of Ronald Kirkland.

The State initially disputes the importance of Kirkland to its case, arguing that "plenty of additional evidence" pointed to Mr. Mungin as "the person who murdered Betty Jean Woods" (AB at 53). As an example of this "plenty of additional evidence," the State merely points to *Williams*-rule evidence, which did not establish that Mr. Mungin murdered Ms. Woods. The State cannot escape from the fact that Kirkland's testimony provided evidentiary support for the State's theory of robbery and that he was the *only* witness to testify that he saw Mr. Mungin leave the scene of the crime with a paper bag. *See* Initial Brief at 68. The emphasis placed on Kirkland's testimony by the trial prosecutor in closing argument belies the State's current position that Kirkland has been

"mischaracterized" by Mr. Mungin as being the "linchpin" of the State's case (R975-76).

As to Mr. Mungin's claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *see* Initial Brief at 70, the State argues that it is procedurally barred (AB at 54). However, the State acknowledges that at the evidentiary hearing, there was testimony on the issue about whether the defense was aware of Kirkland's full criminal history (AB at 54). Thus, the State cannot establish any harm or prejudice as it did present testimony that, in its view, no *Brady* material was suppressed. By presenting evidence on the very issue it now claims is barred, the State waived any complaint.

Without citation to the record, the State argues that trial counsel Cofer was "well aware of Kirkland's criminal history before he deposed him" (AB at 55). This is flatly untrue, as Cofer's testimony establishes:

> Q And before you took that deposition on June of 1992, *it's your testimony that you had not been provided by the State a criminal history of Mr. Kirkland, correct?*
>
> A *At that point, I had not been provided that, yes.*

(PCR249-50) (emphasis added).[15]

[15]Cofer had earlier explained that he filed a demand for discovery before Kirkland's deposition and that in its discovery response, the State never indicated that any prosecution witnesses had a criminal history (PCR240-41).

The State also argues that counsel was not ineffective for failing to cross-examine Kirkland "about the VOP warrant" that issued shortly before Mr. Mungin's trial (AB at 56). However, Mr. Mungin's actual allegation is that counsel failed to impeach Kirkland about his probationary status at the time of his testimony against Mr. Mungin as well as the fact that a capias had been recalled, *see* Initial Brief at 73, not simply the fact that a warrant had issued shortly before trial. The State acknowledges that Cofer admitted he could have used this information to impeach Kirkland at trial and "could have gone to the probation department to pull the capias files" (AB at 56). However, the State also argues that Cofer could not have cross-examined Kirkland "about something Cofer was unaware of" (AB at 57). This, of course, begs the question. It is Mr. Mungin's contention that due to ineffective assistance of counsel or a *Brady* violation, Cofer was not aware of this information. Mr. Mungin submits that reasonably competent counsel would ensure that he adequately investigated the criminal history of the prosecution's principal witness. *Cf. Rompilla v. Beard*, 125 S. Ct. 2456 (2005).[16] Reasonably competent counsel would also have relied upon the State to provide

[16]In an attempt to obfuscate matters, the State suggests that the records at issue "are not at all clear on this matter" (AB at 58). The prosecutor, however, attempted to make the same argument to trial counsel at the hearing, but trial counsel testified that the entries were accurate (PCR355).

him with up-to-date and accurate information regarding criminal histories of its witnesses. *See generally Banks v. Dretke*, 124 S. Ct. 1256 (2004).

The State argues that even if Kirkland had been impeached, "there is no reasonable probability of a different verdict" because any suggestion that Kirkland was shading his testimony due to his legal troubles "could have been rebutted by the State" with the fact that Kirkland had denied in his deposition that he had told Detective Conn that his identification was not good enough to swear to in court (AB at 59). In the first place, the State misunderstands what impeachment evidence is. Impeachment with criminal history information does not have to establish a *quid pro quo* between the State and the witness in order to be admissible or to have impeaching value. *See Jean-Mary v. State*, 678 So. 2d 928, 929 (Fla. 3d DCA 1996). While the State may have been in a position to rebut the impeachment of bias, this does not mean that the jury could not have reasonably considered it when assessing Kirkland's credibility.[17]

[17]The State characterizes the defense cross-examination of Kirkland as to the identification of Mr. Mungin as a "vigorous attack" (AB at 59). The record refutes this characterization. When Kirkland was questioned about the discrepancies with prior statements regarding the height of the person he saw, Kirkland gave vague answers and simply did not recall (R678). Critically, he refused to "remember" whether he had previously told Detective Conn that he could not swear to the identification of Mr. Mungin in court (R679). This hardly constitutes a "vigorous attack" on Kirkland's identification of Mr. Mungin.

Moreover, the time frames involved here would have lent strong support to the defense impeachment, had it been presented, and refuted the State's attempt to rebut it. Initially, in 1990, when Kirkland reviewed the photo spread, he told Detective Conn that he could not swear to any identification in court. After that photo spread and 1990 statement, Kirkland began having more legal troubles and, by the time of his June, 1992, deposition, he began to deny having told Conn that his identification was not good enough to swear to in court. After his deposition, Kirkland continued to have legal troubles which persisted until the time of Mr. Mungin's trial, thus giving him an incentive to curry favor with the State (as his identification of Mr. Mungin became more certain over time) and continue to deny having told Conn that he could not swear to his identification in court.[18]

B. Failure to elicit testimony from Detective Conn.

The State argues that trial counsel made a "strategic decision" not to present the testimony of Detective Conn at trial "because the potential utility of his testimony would have been outweighed by the loss of the final argument" (AB at 61). The State fails to acknowledge the fatuous nature of this argument given the fact that trial counsel waived his opening closing argument (PCR362); thus,

[18]Of course, all of this argument makes more apparent the prejudice that accrued to Mr. Mungin by the failure to present the testimony of Conn at trial. *See* Initial Brief at 77-79.

counsel's testimony at the hearing that such a strategic decision had been made cannot withstand scrutiny.

The State next argues that Mr. Mungin cannot establish prejudice because Conn was not called at the evidentiary hearing nor was the deposition introduced below (AB at 61). There was, however, extensive testimony at the hearing about the particular testimony that Mr. Mungin alleged should have been presented at trial, and all of the parties continually referred to the testimony at issue from the deposition. Indeed, the prosecutor below, with Conn's deposition in hand, established not only what the information from Conn was, but that it could have been elicited at trial had Cofer presented it:

> Q [Prosecutor] Detective Conn was asked about what Mr. Kirkland told her?
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> A [Mr. Cofer] Correct.
>
> Q Did she not state in deposition–and I can refer you to page 54 just to make sure we get the correct quote there. Take a second to look and make sure we're–I believe it's on page 54 and 57 also.
>
> (Witness reading transcript)
>
> A On 57, and this is in response to your questions during cross in the depo, and you asked him could he swear to it in court. Answer: right. And he said he couldn't, I guess, based on the photograph itself. And her answer was: He said he couldn't based–he couldn't based on the photograph.
>
> Q Okay. I gather that could have been brought out if you had called her on your case?

A Yes.

(PCR348-49).[19]

C. Failure to adequately investigate and present favorable evidence.

The State devotes a substantial portion of its brief to addressing an issue that Mr. Mungin never raised. Mr. Mungin never claimed that trial counsel failed to call Charlette Dawson to testify at trial (AB at 62, 64, 65). Rather, Mr. Mungin alleged–and in his view, established–that trial counsel failed to adequately investigate and present favorable evidence in that he had an alibi for the day in question and that someone named "Ice" had committed the crime. Dawson's involvement in the case arises in the context of demonstrating that trial counsel unreasonably relied on her statements to curtail his investigation into Mr. Mungin's defense, *not* that there was a "Dawson-supported alibi" that should have been presented (AB at 65).

In his testimony, trial counsel Cofer testified that after speaking with Dawson, he determined that "this was not going to work" and thereafter ceased to conduct further investigation into Mr. Mungin's alibi defense, a defense which was outlined in his statements to police and in his discussions with Cofer (PCR289;

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[19]As for the State's argument that the "strength" of its case establishes the lack of prejudice, Mr. Mungin refers to pp. 78-79 of his Initial Brief, discussing the emphasis placed on Kirkland's identification during prosecution's closing argument.

293-96; 309-10; 324).[20] Indeed, the State's brief contends that what Dawson told Cofer "expressly contradicted what she had told police, thus rendering her seriously impeachable" and the information she provided was "pointless at best" (AB at 16 n.8). Mr. Mungin agrees with the State on these points, and hence it cannot be seriously questioned that Cofer's reliance on what Dawson told him in order to curb further investigation was unreasonable, even in the State's view of the evidence.[21] In other words, given the State's classification of Dawson's credibility as questionable, combined with Cofer's testimony that Dawson could not say exactly when Mr. Mungin arrived, Cofer's strategic decision for not

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[20]Without any citation to the evidentiary hearing record, the State asserts that "Mungin eventually agreed with Judge Cofer that Charlette would not be a good alibi witness" (AB at 64). However, Mr. Mungin never argued that Charlette should have been called as a witness. Moreover, the record does reveal that after Cofer spoke with Dawson, he spoke with Mr. Mungin about the interview but that "it kind of went over his head" (PCR325). It was *Cofer's* "general feeling" that Dawson's interview "destroyed" any alibi defense (PCR325), but the State's assertion that Mr. Mungin agreed with Cofer about the non-existence of an alibi defense is flatly incorrect. In fact, Mr. Mungin, prior to trial, raised concerns with the trial court that investigation into the guilt-innocence defense was taking a back seat to the penalty phase (PCR289; Defense Exhibit 11).

[21]For example, the State argues that "Cofer felt that it would not have been a useful alibi to prove that Mungin had the murder weapon" when he visited Dawson in Pensacola (AB at 64). The State fails to understand, however, that even by its own admission, the information Dawson gave to Cofer "expressly contradicted what she had told the police, thus rendering her seriously impeachable" and was "pointless at best" (AB at 16 n.8). The State's reliance on Cofer's strategic decision based on information the State itself recognizes as "seriously impeachable" and "pointless" seriously undermines its defense of Cofer's actions here.

conducting further investigation and interviewing additional witnesses is unreasonable and due no deference.[22]

The State contends that "no witness" at the hearing below "contradicts the State's theory in any way" (AB at 65). Aside from this bald statement, the State never addresses any of the witnesses presented at the hearing, nor does it address Mr. Mungin's contention in his Initial Brief that the evidence "was consistent with Mr. Mungin's account of his whereabouts as well as the facts of the case" (IB at 89). According to the State's theory, the crime occurred between 1:30 and 2:00 PM on Sunday, September 16, 1990 (R663-64). Contrary to the bald statement, without record citation, that no witnesses put Mr. Mungin somewhere other than at the convenience store at the time of the shooting (AB at 66), witness testimony at the evidentiary hearing established that Mr. Mungin had an alibi for this time frame. *See* Initial Brief at 86-90.[23] These witnesses are never meaningfully

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[22]In his Initial Brief, Mr. Mungin also explained that Cofer misunderstood the general facts underlying the alibi defense, and therefore any strategic decision to not further investigate was unreasonable (IB at 84). The State's does not address this issue at all, instead choosing to address an issue not even raised by Mr. Mungin.

[23]The State apparently questions the potential usefulness of the testimony adduced below because, in its view, they were "uncertain" about what Sunday they saw Mr. Mungin (AB at 65). In the first place, Cofer spoke with none of these witnesses prior to trial, and thus he could not have made any reasonable decision not to present their testimony at trial. Secondly, the trial court made no findings with respect to this testimony. And thirdly, it is simply incorrect to assert that none of the witnesses was certain as to which Sunday they saw Mr. Mungin. For example, Brian Washington was certain that he saw Mr. Mungin on Sunday,

discussed by the State, and were not mentioned at all in the lower court's order. Had this testimony been presented, there is more than a reasonable probability of a different outcome, and a new trial is warranted.

VI

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

Mr. Mungin relies on his Initial Brief to address the arguments raised by the State. He does, however, make one point in Reply. The State asserts that there is "no indication" that trial counsel Cofer "struggled to serve two masters" (AB at 72). However, when questioned by the lower court as to whether he or co-counsel ever actually went to look up in their files to determine if they ever represented Kirkland, Cofer acknowledged that he would "not do that" because he viewed that "as being an ethical breach toward Mr. Kirkland" (PCR336). If Cofer was not "struggling to serve two masters," there would be no ethical concerns at all regarding his office's representation of Kirkland. Because Cofer acknowledged a concern about an ethical breach toward Kirkland, Mr. Mungin submits that his claim is established.

September 16, 1990, at a time inconsistent with Mr. Mungin committing the crime (PCR407-11).

VII

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

Mr. Mungin relies on his Initial Brief to address the arguments raised by the State as to this claim.

CONCLUSION

For the foregoing reasons and those set forth in his Initial Brief, Mr. Mungin requests this Court reverse the lower court with directions that a new trial and/or resentencing be granted, and/or that an evidentiary hearing be ordered as requested in the relevant claims before this Court.

CERTIFICATE OF FONT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid to Curtis French, Senior Assistant Attorney General, The Capitol, Tallahassee, FL, 32399-1050, this 1st day of August, 2005.

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