IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN.,

Appellant,

vs. Case Number SC12-877

STATE OF FLORIDA,

Appellee.

_________________________/

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Mungin appeals the circuit court's denial of relief on his Rule 3.851 motion following an evidentiary hearing

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

"R.___."	-Record on direct appeal to this Court;
"PCR__."	-Record in first postconviction appeal;
"Supp. PCR.___"	-Supplemental Record in first postconviction appeal;
"2PCR ___"	-Record in second postconviction appeal;
"3PCR ____"	-Record in instant appeal.

REQUEST FOR ORAL ARGUMENT

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

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PROCEDURAL HISTORY

Mr. Mungin was charged by indictment filed March 26, 1992, with the 1990 first-degree murder of Betty Jean Woods in Jacksonville, Florida (R1). The guilt phase was conducted from January 25, 1993, through January 28, 1993, and resulted in a verdict of guilty of first-degree murder (R342; T1057). The penalty phase was held on February 2, 1993, after which the jury recommended the death penalty by a vote of seven (7) to five (5) (R382; T1256). On February 23, 1993, Judge John D. Southwood sentenced Mr. Mungin to death (R401; T1291). The trial court followed the jury recommendation, finding the existence of two (2) aggravating circumstances, no statutory mitigation and minimal weight to the nonstatutory mitigation that Mr. Mungin could be rehabilitated and did not have an antisocial personality. This Court affirmed on direct appeal over the dissent of Justice Anstead. Mungin v. State, 689 So. 2d 1026 (Fla. 1995), cert. denied, 522 U.S. 833 (1997) [hereinafter Mungin I].

On September 17, 1998, the CCRC-North office filed a Rule 3.850 motion on behalf of Mr. Mungin (Supp. PCR3-44).[1] On January 12, 1999, the Chief

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[1] On September 1, 1998, the Chief Judge in the Fourth Judicial Circuit entered an order appointing attorney Mark E. Olive to represent Mr. Mungin pursuant to the capital attorney registry (Supp. PCR1-2). However, CCRC-North filed the Rule 3.850 on behalf of Mr. Mungin in order to protect his rights under

Judge of the Fourth Judicial Circuit appointed Senior Judge John D. Southwood to preside over Mr. Mungin's postconviction proceedings since he had presided over the case at trial (Supp. PCR45).

A status hearing was subsequently scheduled for December 14, 1999 (Supp. PCR88. At that hearing, one of the issues discussed was whether Mr. Henderson could continue to represent Mr. Mungin due to personal and other work-related commitments (Supp. PCR384). On December 21, 1999, Mr. Mungin, pro se, filed a motion requesting the court remove Mr. Henderson from representing him given Mr. Henderson's own request at the December 14 that another attorney be appointed (Supp. PCR90-96). On February 3, 2000, Mr. Henderson formally moved to withdraw (Supp. PCR114), and on February 10, 2000, the motion was granted and attorney Dale Westling was next appointed as registry counsel (Supp. PCR114; 117).

On July 12, 2000, another status conference was conducted (Supp. PCR119), following which time the court granted Mr. Mungin and new counsel

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the chaotic situation regarding the funding of the CCRC offices at the time and the recent enactment of the attorney registry. In March, 1999, the Chief Judge issued an order revoking Mr. Olive's appointment due to Mr. Olive's position regarding the registry contract, see Olive v. Maas, 811 So. 2d 644 (Fla. 2002), and appointed Wayne F. Henderson, Esq., to represent Mr. Mungin (Supp. PCR54-55).

until August 31, 2000, in which to file an amended 3.850 motion (Supp. PCR121). On August 16, 2000, Mr. Mungin's counsel sought a further extension to September 30, 2000, in which to file the amended motion as new information had recently surfaced with warranted investigation (Supp. PCR123); the State did not object to the request (Supp. PCR124). An order granting the extension was subsequently entered (Supp. PCR125), and on September 14, 2000, a twenty-four page amended motion was filed (Supp. PCR163-185).[2] The State's response was filed on October 27, 2000, in which the State did not oppose an evidentiary hearing (Supp. PCR188-196).

The court then set a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), to take place on January 18, 2001 (Supp. PCR197). A pre-hearing conference was also set for March 7, 2001 (Supp. PCR199). During this time period, additional problems surrounding the attorney-client relationship arose between Mr. Mungin and Mr. Westling, culminating in a renewed motion by Mr. Mungin to remove Mr. Westling (Supp. PCR203-212). On March 1, 2001, Mr. Westling ultimately moved to withdraw due to irreconcilable differences (Supp.

2In a pro se motion dated August 24, 2000, Mr. Mungin sought the removal of Mr. Westling based on Mr. Westling's failure to adequately communicate and investigate the case (Supp. PCR129-156). The court ultimately denied this request (Supp. PCR159-60).

PCR268), and Mr. Mungin moved for the appointment of new counsel (Supp. PCR269-70). Following a hearing, the court entered an order granting Mr. Westling's motion to withdraw and accepting the appearance of attorney Kenneth Malnik, who had been privately retained by Mr. Mungin (Supp. PCR277-78; 280). Mr. Mungin thereafter filed a consolidated amended Rule 3.850 motion, containing seventeen (17) numbered claims for relief (PCR1-76). The State filed a response to this motion (PCR79-105).[3]

A Huff hearing was held on March 8, 2002 (Supp. PCR400-449), after which the court granted an evidentiary hearing on two claims (Claims I and IV),[4] and summarily denied the remaining claims (PCR108-09).[5] On June 24, 2003, Mr. Mungin filed two supplemental claims to his consolidated Rule 3.850 motion,

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3Mr. Malnik represented Mr. Mungin throughout the remainder of his state Rule 3.850 proceedings and through the early stages of his appeal to the Florida Supreme Court. The undersigned attorney was subsequently retained to substitute for Mr. Malnik in the Florida Supreme Court appeal proceedings.

4Claim I addressed allegations of trial counsel's ineffectiveness at the guilt phase , conflict of interest, and newly discovered evidence (PCR3; 108); Claim IV alleged ineffective assistance of counsel during the penalty phase due to counsel's failure to present certain mitigating evidence (PCR33;108).

5Claim XIV, alleging judicial bias, was withdrawn at the Huff hearing (Supp. PCR438-39). Rulings on Claims VII and XVI, which alleged cumulative error, were, at the State's request, deferred until after the conclusion of the evidentiary hearing (Supp. PCR405).

one alleging a Brady violation,[6] and the other raising a Sixth Amendment violation in light of Ring v. Arizona, 536 U.S. 584 (2002) (PCR110-11). The trial court refused to entertain the Brady claim (PCR227-29); as to the Ring claim, the lower court indicated that it would not address it until the parties had "benefit of more information" from the United States Supreme Court and the Florida Supreme Court (PCR229-30). The evidentiary hearing was conducted by the lower court on June 25 and 26, 2002. Following the evidentiary hearing, post-hearing memoranda were submitted by the parties (PCR116-151; 152-73; 175-79). Relief was denied by order entered signed on March 18, 2003, and filed with the clerk on March 21, 2003 (PCR203-09). Timely notice of appeal was entered to this Court (PCR210-11).

Following briefing and oral argument, this Court affirmed the denial of Rule 3.850 relief, and also denied Mr. Mungin's petition for state habeas corpus relief. Mungin v. State, 932 So. 2d 986 (Fla. 2006) [hereinafter Mungin II]. A timely motion for rehearing was filed and denied on June 13, 2006, and mandate issued by this Court on June 29, 2006.

Mr. Mungin thereafter filed a timely petition for a writ of habeas corpus

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

pursuant to 28 U.S.C. §2254. While that petition was pending, Mr. Mungin filed a new Rule 3.851 motion in the circuit court in and for Duval County, Florida (2PCR1-75). The motion, raising two claims, contained supporting documentation in the form of two affidavits, one from witness George Brown and the other from Mr. Mungin's trial counsel, Judge Charles C. Cofer (2PCR70-72) (Brown affidavit); 74-75 (Cofer affidavit), and a police report relevant to the issues presented in the new Rule 3.851 motion (2PCR73).[7] The State moved to strike the

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[7]In Claim I, Mr. Mungin alleged that he was denied an adequate adversarial testing at the guilt and penalty phases of his capital trial in light of newly-discovered evidence of constitutional violations as evidenced in an affidavit by George Brown (2PCR6 et seq.). Specifically, Mr. Mungin alleged that the information contained in Brown's affidavit was evidence that was exculpatory and was improperly withheld from the defense by the State, in violation of Brady v. Maryland, 373 U.S. 83 (1968). He further alleged that the information contained in Brown's affidavit established that the State knowingly presented false testimony at Mr. Mungin's trial, in violation of due process and Giglio v. United States, 405 U.S. 150 (1972). Mr. Mungin also alleged that the information contained in Brown's affidavit qualified of newly discovered evidence under Jones v. State, 591 So. 2d 911 (Fla. 1991), and that the court was required to assess this newly discovered evidence in light of its cumulative impact on the adequacy of the verdict and sentence (2PCR98-99). Finally, Mr. Mungin alleged that if the State, in the face of explicit Supreme Court law, would argue that trial counsel was not diligent in discovering the information in question, then Mr. Mungin received ineffective assistance of counsel due to the lack of adequate investigation, in violation of the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984). In Claim I, Mr. Mungin also asserted his entitlement to an evidentiary hearing (2PCR100). In Claim II, Mr. Mungin alleged constitutional violations with regard to the existing procedures for carrying out executions by lethal injection in Florida (2PCR101-102).

motion because it exceeded the page limitations set forth in Fla. R. Crim. P. 3.851(e)(2), and, after the lower court granted that motion, Mr. Mungin filed a corrected motion to comply with the page limitations (2PCR79-102). The State filed a written response in which it did not agree to the necessity for an evidentiary hearing (2PCR104-110).

On August 12, 2009, a case management hearing took place before the lower court judge. In support of relief as to Claim I, Mr. Mungin's counsel contended that this claim "requires some factual development" at an evidentiary hearing because the claim was grounded on the affidavits of George Brown and trial counsel Judge Charles Cofer, particularly given Mr. Mungin's allegations and Cofer's sworn statement that "the information contained in Mr. Brown's affidavit was never disclosed to Mr. Mungin either prior to trial or even during his first 3.851 proceedings" (T. Hearing 8/12/09 at 4). Mr. Mungin's counsel also reiterated that the information contained in Brown's affidavit established both a Brady and a Giglio violation and, additionally, constituted newly-discovered evidence (T. Hearing 8.12.09 at 4-5).

At the case management hearing, the State contended that Mr. Mungin has not established that "anything prevented [him] from being able to discover Mr. Brown and to make this claim at the first post-conviction" and that the new

information was “simply an impeachment of one of the state’s witnesses,” Ronald Kirkland, who, as the State acknowledged, was “the key witness” against Mr. Mungin at his trial (T. Hearing 8/12/09 at 9). The State also contended that no factual development was needed because even on the face of the motion, assuming the allegations to be true, did not undermine confidence in the result at trial (T. Hearing 8/12/09 at 10).

In response to the State’s arguments, Mr. Mungin’s counsel contended that his motion made allegations that the information was never previously disclosed, and that Judge Cofer’s affidavit specifically stated that he had no reason to question to veracity of the police report in question, and that if the State wanted to dispose of the need for an evidentiary hearing, it needed to concede the issue of diligence, admit that the police filed a false police report in this case, and acknowledge that the State never disclosed the truth to the defense prior to trial (T. Hearing 8/12/09 at 12). Based on the new information, Mr. Mungin emphasized that

> we now have yet more information that Mr. Kirkland was a completely unreliable witness. I mean now we have information that the police reports were in fact false with respect to what Mr. Brown related to the police at the time and that this has been going on for – since 1992, and it wasn’t until this point that this information was discovered, and of course under the Banks case which is discussed in the motion it’s the state that has the burden to disclose. It’s not the

defense's obligation to hunt and pick, you know, over the years and just come across something by happenstance which is – which is – you know, that's just not permitted.

So I submit we more than met the burden here to get an evidentiary hearing where we can present Your Honor with our witnesses.

(T. Hearing 8/12/09 at 12-13).

At the conclusion of the case management hearing, the lower court announced its intention to deny the motion without an evidentiary hearing:

THE COURT: Okay. Let me point out something in the case law. This is something that I think is important in rendering my decision, and of course in many death penalty cases that a judge hearing these motions is not the trial judge as you probably know. I mean sometimes they are and sometimes they aren't, and in it says the judge hearing this particular motion must take everything in totality and I think it would be very difficult for someone who was not the trial judge to do that, although I suppose they can read transcripts.

But it should be pointed out in this case I was the trial judge in this particular case so I have a very vivid recollection of the trial and the facts in the case and everything else.

In considering that it's my feeling that those matters set forth in the motion do not rise to the standard which is required for newly discovered evidence to grant any relief whatsoever because the evidence, physical evidence and otherwise was very overwhelming as far as I am concerned in order to convict Mr. Mungin with or without these matters that are set forth with regard to Kirkland and others, so I am going to deny the motion but I am not technically denying it until I ask the State to propose an order within 15 days.

(T. Hearing 8/12/09 at 14). Following this ruling, the lower court made it clear to

the State that the proposed order should reflect "basically some of the matters I have just talked about" (Id. at 15). When Mr. Mungin's counsel lodged an objection to the State providing a proposed order, he noted that if this was going to be the process, then "the order [should] only reflect matters that the Court discussed at the hearing and the State not add anything" (Id. at 16). The Court stated "[t]hat's correct" (Id.).

Despite counsel's stated concerns and the lower court's own statement that any proposed order should reflect exactly what the court's ruling was, the State drafted a 12-page document that far exceeded the lower court's one-paragraph oral denial (2PCR111-121). Mr. Mungin filed written objections to the State's proposed order, and requested that any Order entered by the court reflect only what the court actually ruled at the August 12 hearing, no more and no less (2PCR123-129).

Notwithstanding Mr. Mungin's objections, the lower court signed the State's proposed order and the order was filed on October 8, 2009 (2PCR130-140). A timely notice of appeal was filed, and on October 27, 2011, the Court issued its decision in Mungin v. State, 79 So. 3d 726 (Fla. 2011) [hereinafter Mungin III]. The Court reversed the summary denial issued by the lower court and ordered an evidentiary hearing and identified the two claim on which evidence

were to be taken: specifically on Mr. Mungin's claim pursuant to Giglio v. United States, 405 U.S. 150 (1972), and his claim pursuant to Brady v. Maryland, 373 U.S. 83 (1963).

Following the remand by the Court, jurisdiction returned to the Circuit Court for the Fourth Judicial Circuit in and for Duval County. A status hearing was set for December 15, 2011, to discuss a date for the evidentiary hearing (3PCR 26-27). At the status hearing, Mr. Mungin also filed a written motion to disqualify Judge Southwood (3PCR 29-34). The motion was denied as legally insufficient in a written order.[8] The parties also filed witness lists at the December 15 status hearing (3PCR 28, 35-36). Following the status hearing, the lower court scheduled the evidentiary hearing for February 3, 2012 (3PCR 37).

The hearing took place as scheduled on February 3, 2012 (3PCR 94-256). Following the hearing, the parties were permitted to and did file post-hearing memoranda limited to fifteen pages (3PCR 50-65)(State's memorandum); (3PCR 66-81) (Defense Memorandum). On March 21, 2012, the lower court entered its order denying relief to Mr. Mungin (3PCR 82-89). After a discussion of the

[8]The written order denying Mr. Mungin's motion to disqualify was not included in the record. Counsel will seek supplementation of the record with the missing order.

evidence and testimony presented,[9] the lower court provided the following analysis on the legal issues (i.e. the Brady and Giglio claims) following the evidentiary hearing ordered by this Court:

> Brady claim.
>
> In order to establish a Brady violation, the Defendant must show that "(1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." Mungin, 2011 WL 5082454 at *11 (citations omitted). To establish materiality, the Defendant must demonstrate a reasonable probability that had the evidence been disclosed, a different result would have occurred. Id. A reasonable probability is one which undermines the court's confidence in the outcome of the proceeding. Id.
>
> In reversing the Brady claim, the Supreme Court of Florida pointed out that Mr. Brown's affidavit contradicts Mr. Kirkland's testimony on a material detail – whether Mr. Kirkland could have seen the Defendant leave the convenient [sic] store right after the murder. Mungin, 2011 WL 5082454, at *17. Mr. Kirkland testified that he was the first person on the scene and identified the Defendant as leaving the store, whereas, Mr. Brown, in his affidavit, attested that he was the first person on the scene and that no one else was present while he searched for the store clerk. The court stated that if Mr. Brown's assertions were truthful, it would mean that Mr. Kirkland was untruthful during trial – a point that might have been critical to the jury. Id. The court noted that it was "left with mere speculation as to what in fact occurred, what the police knew, what the prosecutor knew, and whether Kirkland, a witness with an extensive criminal history, was lying when he testified at trial." Mungin, 2011 WL

[9]The testimony and evidence presented at the evidentiary hearing, and the lower court's view of same, will be addressed later in this Brief.

5082454, at *17-18. Thus, the matter was reversed for a hearing pertaining to Mr. Brown and the allegations that the police report was false.

Based on the testimony presented during the evidentiary hearing, this Court finds that the Defendant has not established a Brady violation. While Mr. Brown testified that he was the first and only person on the scene until he called 911, Mr. Brown testified that he did not provide this information to the police. Mr. Brown specifically stated that he did not relay this information to the officers on the scene, explaining that "the other guy" took over. At one point during the hearing, Mr. Brown testified that he did tell officers that he was nudged by someone when entering the store, however he later clarified that he was not certain whether or not he told the officers of this and stated that he was so nervous from finding someone shot that he "may not have said it." As Mr. Brown testified, this was a traumatic event for him. Additionally, Officer Conn clearly testified that Mr. Brown never told her that he was the first and only person in the store, nor did he tell her that someone bumped into him when he entered the store.

Mr. Brown's testimony may have impeached Mr. Kirkland's testimony. However, the Defendant has not established that this information was willfully or inadvertently suppressed by law enforcement or the State. To the contrary, the evidence indicates that the police and prosecutor were not aware of Mr. Brown's version of events. Thus, the Defendant's Brady claim is denied.

Further, assuming arguendo that the police and prosecutor were aware of Mr. Brown's version of events and either wilfully or inadvertently suppressed the information, the Defendant could not meet the third prong of Brady. That is, the Defendant could not establish a reasonable probability that, had Mr. Brown's testimony been disclosed, a different result would have occurred. As pointed out by Justice Polston, in the dissenting portion of his opinion, Mr. Kirkland's testimony was already significantly called into question, and the consistencies in his testimony were stressed during closing

> arguments. Mungin, 2011 WL 5082454 at *21 (Polston, J., dissenting in part and concurring in part). Additionally, defense counsel used Mr. Kirkland's testimony regarding the description of the individual leaving the store in support [of] the defense theory that it could not have been the Defendant leaving the store. Id. (Polston, J., dissenting in part and concurring in part). "[I]t is unclear whether the jury put any weight in it [Mr. Kirkland's testimony] or whether it was even incriminating." Id. (Polston, J., dissenting in part and concurring in part). Further, as pointed out by both the majority (in reference to the newly discovered evidence claim) and dissenting opinion, the jury was presented with substantial evidence that the Defendant was in fact the person who committed the murder.
> Mungin, 2011 WL 5082454 at *20-22.

(3PCR 5-7).

In disposing of the Giglio claim, the lower court's order provides as follows:

> Giglio claim.
>
> To establish a Giglio violation, a Defendant "must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false testimony was material." Mungin, 2011 WL 5082454 at *18 (citations omitted). The court noted that "the materiality prong of Giglio is more defense friendly than in a Brady claim." Id. Specifically, the evidence is deemed material if there is any reasonable probability that it could have affected the jury's verdict." Mungin, 2011 WL 5082454 at *19 (citation omitted).
>
> The Court finds that the Defendant has not established a Giglio violation. First, the Defendant has not shown that prosecutor presented or failed to correct false testimony, in that the Defendant has not shown that Mr. Kirkland's testimony was false. Instead, the Defendant has merely shown that Mr. Brown's version of events is

> inconsistent with Mr. Kirkland's version. It is not uncommon that two witnesses perceive events differently. Further, assuming arguendo that Mr. Kirkland's testimony was false, the Defendant has not shown that the prosecutor knew the testimony was false. The evidence introduced at the hearing showed that neither the police, nor the prosecutor, knew of Mr. Brown's version of events. This Court finds Mr. De la Rionda's testimony that he never knew of Mr. Brown's version of events to be credible. Additional, the testimony of Mr. Brown and Officer Conn corroborated Mr. de la Rionda's testimony. Therefore, the Defendant's Giglio claim is denied.

3PCR 88).

A timely notice of appeal was filed (3PCR 90-91), and this Brief follows.

STATEMENT OF THE FACTS

THE GUILT PHASE OF TRIAL

Because a proper evaluation of Mr. Mungin's claims require an assessment of the evidence adduced at trial, Mr. Mungin provides below a summary of the relevant evidence from trial. In the Argument section of this Brief, Mr. Mungin will provide a summary of the evidence adduced at the 2012 evidentiary hearing and argument to support his entitlement to relief. To the extent necessary, in the Argument section of this Brief, Mr. Mungin will also address some of the evidence adduced at the prior evidentiary hearing in order to provide context for the present claims under review and for the requisite cumulative analysis.

On Sunday, September 16, 1990, between 1:30 and 2:00 PM, Ronald

Kirkland stopped at the Lil' Champ store on Chaffee Road near Interstate 10, in Jacksonville (T663-64). There was a tan or cream colored compact car parked in the lot (T676). As Kirkland went in, a black man coming out of the store carrying a brown bag almost knocked him over (T664, 671). Kirkland got a brief glimpse at the man as they passed; then, because he was angry at being bumped, Kirkland turned and saw the back of the man's head (T677-78). The man coming out of the store had longish-hair done up in a "jeri curl," and had a growth of beard (T680-81). The beard could have been a couple of weeks old, but Kirkland could not give any estimate as to how old the growth appeared (T681).

Kirkland did not see anyone in the store; he got a diet coke and waited for the clerk to return (T664). A few minutes later, Kirkland noticed a woman lying on the floor behind the counter, near an open cash register (T664-65, 667). He removed two undissolved aspirins from the woman's mouth and attempted CPR; the woman started to cough blood, and Kirkland turner her on her side and noticed a wound on her head (T665). Another customer came in and called 911 (T665). The other customer also looked at the open cash register (T681). Kirkland did not know if the other customer checked both cash registers in the store (T681-82). The woman, Betty Jean Woods, a store employee, was taken to a hospital (T652, 659, 689). She died four (4) days later of a gunshot wound to her head (T639,

661).

On September 16, 1990, the day he found Ms. Woods, Kirkland told a detective he was not sure he would be able to recognize the man who had come out of the store as he went in (T682). On September 20, 1990, however, the same detective showed Kirkland six (6) or seven (7) photographs; Kirkland narrowed the pictures down to three, then picked out a photograph of Anthony Mungin (T671-674, 683). In the photography, Mr. Mungin had short hair and no beard (Exhibit 7). The officer who showed Mr. Mungin's photograph to Kirkland did not testify at trial. Kirkland also identified Mr. Mungin in the courtroom at trial (T671).

An evidence technician lifted twenty-nine (29) latent fingerprints from the crime scene (T628-29). Most were from the door, but he also looked for fingerprints on the cash registers, the safe, and the counter-top (T628-29, 631). No prints were lifted from the safe (T629). No evidence was presented of any comparison of the latent prints obtained with Mr. Mungin's fingerprints. The evidence technician also observed a purse behind the counter in the Lil' Champ store (T630). He saw no indication that the purse had been gone through (T630-31). The technician testified that the scene had been contaminated before he arrived, and that various people had walked behind the counter (T625). A shell

casing was found on the floor of the store (T621-22).

Dennis Elder, a Lil' Champ supervisor, arrived at the store at 2:15 or 2:30 PM the day of the shooting (T688-89). Police were there and Ms. Woods was being taken away by a Life Flight helicopter (T694). During a walk through the store with the police, Elder did not notice anything missing or out of place (T694).

Elder performed what he called a "cash count" (T689). This involved calculating from the cash register records the amounts taken to determine how much money was supposed to be in the store (T692093). Elder would then count the cash actually in the store and determine whether the store was over or short (T693). Elder determined that the store had $59.05 less than the register reading indicated should have been there (T694).

Elder testified that the locations in the store where cash is kept are the two cash registers, a safe, a box under one of the registers, and in clips (T690-92). The clips were to hold money customers would give to pre-pay for gas; there was a different clip for each of the four gas pumps (T691-92). After paying for gas, the clerk would give the customer change and put the pre-paid cash from the clip in the cash register, the cash box, or the safe (T691-92, 699-700).

On the day of the shooting, only one of the cash registers would have been in use (T695). The register that was not in use was in a locked down, turned off,

drawer open, drawer empty position (T696-97). The cash register that was used that day was also locked; when Elder opened it, he found approximately $57 in the drawer (T698-99). At some point, an “E” indicator was triggered on one of the cash registers (T703-04). The “E” indicates that someone has tried to open the cash register other than by entering the “amount tendered” (T704). Elder could not remember when the “E” indicator showed up (Id.).

When Elder looked, there was no money in the cash box under the register and there was no money in the clips (T705-06). He said he had no way of knowing whether when Ms. Woods was shot there was any money in the clips or in the cash box (T700). He acknowledged that a cash shortage caused by theft of money from the cash box or clips would cause a cash shortage in the amount of $59.05 only if a customer had pre-paid in that amount, which would be very odd, and he would not expect to find such an odd amount in the clips or cash box (T700-02, 706).

Elder also testified that company policy was never to have more than $50 out of the safe (T702). He said that whenever he had checked in the past, Ms. Woods had complied with that policy, and that if on the day of the shooting there had been $59.05 in the cash box, in addition to the $57 in the cash register, Ms. Woods would have been greatly over what the policy allowed (T702-03).

The medical examiner testified that Ms. Woods was shot one time, with the entrance wound above her left ear (T640, 642, Exhibit 5). The bullet traveled left to right and slightly front to back (T643). The bullet was recovered just underneath the scalp opposite the entrance wound (T643). The treating physician observed at the entrance wound a powder burn about one quarter to one half inch in diameter (T655-56). The medical examiner testified that powder burns are not present unless the shot is fired from a distance of eighteen inches or less (T649). Closer shots would cause a smaller area of powder burn (T649).

On September 18, 1990, Mr. Mungin was arrested at 614 Jim Cody Street in Kingsland, Georgia (T836-37). A search of the house at that address revealed, in a bedroom, a .25 caliber Raven semi-automatic pistol, bullets, and Mr. Mungin's Georgia identification card (T837-43).[10] The prosecution's firearms identification analyst determined that the bullet recovered from Ms. Woods had been fired from the pistol seized at 614 Jim Cody Street, and the shell casing recovered at the Lil' Champ store was ejected from the same gun (T880-85).

The State called a number of witnesses who were referred to by both parties

7The identification card, Exhibit 15 at trial, indicated that Mr. Mungin's age at the time was twenty-four (24).

as Williams-rule witnesses.[11] Before the first Williams-rule witness, the defense requested a Williams-rule instruction (T707). The trial judge told the prosecutor he did not know what the witnesses would testify to (T708), and asked which of the purposes of the Williams-rule he should instruct on (T709). The judge pointed out he could instruct on more than one purpose (Id.). The prosecutor told the court to instruct on the issue of identity, and the judge asked the prosecutor if that was all he wanted (Id.). Before the first Williams-rule witness testified, the court instructed the jury that as to the next several witnesses, the evidence they received was to be considered only for the purpose of proving the identity of the defendant (T712-13). The Williams-rule evidence was as follows:

On September 14, 1990, two (2) days before the Jacksonville shooting, at approximately 10:30 AM, Mr. Mungin drove up in a dark Ford Escort to Bishop's County Store in Monticello, Florida, near Interstate 10, came in, and asked for some cigarettes (T714, 719). William Rudd, the clerk on duty, noticed that Mr. Mungin was a clean-shaven, clean-cut young man; he thought Mr. Mungin might have been in the Navy (T725). Mr. Mungin was wearing a cap, but Rudd could see that there were no curls hanging from underneath the cap (T726). When Rudd

[11]See Williams v. State, 117 So. 2d 473 (Fla. 1960).

turned to get the cigarettes, Mr. Mungin shot him in the back (T719, 721). Rudd saw Mr. Mungin then get money from the cash box that was kept under the counter (T722). When Rudd regained consciousness, he found that the money in the cash register was also missing (T723). Mr. Mungin's fingerprint was found on the cash box (T781). The bullet was not removed from Rudd, but an expended shell was recovered in the store, and was determined to have come from the pistol that was seized at Jim Cody Road in Kingsland, Georgia (T734, 870, 884-85). Rudd testified at trial and made an identification of Mr. Mungin in the courtroom (T718-19).

The same day, September 14, 1990, at about 12:30 PM, at the Carriage Gate shopping center on Thomasville Road near Interstate 10 in Tallahassee, Florida, Thomas Barlow witnessed Meihua Wang Tsai screaming and pointing at a black male in a red hat getting into an old faded red Escort with a Georgia tag (T737-38). Barlow ran after the car and got the licence plate number, which he gave to police (T740). The driver was wearing a cap, but Barlow was able to see that the driver did not have longish "jeri curls" coming from underneath the cap; he testified that the driver's head was clean shaven in the back, or was cut close to the scalp (T742-43).

A bullet recovered from the head of Ms. Tsai was determined to have come

from the gun that was seized at Jim Cody Road (T756-58, 884-85). Apparently one bullet had gone through Ms. Tsai's hand and hit her head, but did not cause her to lose consciousness (T760-61). The bullet was removed with use of a local anaesthetic (T761). A spent shell recovered from the carpet of the Lotus Accents store at the Carriage Gate mall was determined to have been fired from the same gun (T748, 884-85). Mr. Mungin's fingerprint was found on a receipt in the Lotus Accents store (T750-52, 785).

Barlow was shown a photograph of a red Ford Escort that was stolen from the Kings Lodge in Kingsland, Georgia, on September 13, 1990, and recovered, stripped of its tires, in Jacksonville, Florida, on September 18, 1990; Barlow identified the car as the one he saw being driven away from the Carriage Gate shopping center (T739, 795-98, 820-23). Kings Lodge, from where the Escort was stolen, is about a mile from Jim Cody Road, where Mr. Mungin was arrested (T836).

In Jacksonville, about a mile from where the Escort was recovered, a four-door Dodge Monaco Royal, a big car, white with a tan vinyl roof, was stolen on September 15 or 16, 1990 (T799, 802-03, 806). The Dodge was recovered in September 18 near Kingsland, Georgia, about seventy-five (75) to one-hundred (100) yards from the house where Mr. Mungin was arrested (T826, 828). Two (2)

expended shells found in the Dodge were determined to have been used in the gun that shot Ms. Woods (T828, 853, 884-85).

At the conclusion of the Williams-rule witnesses, the trial court instructed the jurors again that such evidence was to be considered only as proof of the identity of the defendant (T829).[12]

At the close of the State's case, the defense moved for judgment of acquittal as to premeditated murder based on insufficiency of evidence of premeditation, and for judgment of acquittal as to felony murder based on insufficiency of evidence of the underlying felony of robbery (T901-05). Both motions were denied (T907). The judge instructed the jury on both premeditated murder (T1033-34), and felony murder, with robbery or attempted robbery as the underlying felony (T1034-37). The jury returned a general verdict of guilty of first-degree murder (R324; T1057).

However, on direct appeal, this Court concluded that the evidence did not support a finding of premeditated first-degree murder and thus held that "it was error to instruct the jury on both premeditated and felony murder." Mungin v.

9The firearms identification expert's testimony came after the conclusion of the collateral crimes evidence, and was not explicitly subject to the limiting instruction, although some of the expert's testimony related to the collateral crimes.

State, 689 So. 2d 1026, 1029-30 (Fla. 1995).[13] Notwithstanding the error, the Court, over the dissent of Justice Anstead, concluded that there was no reasonable possibility that the erroneous instruction contributed to Mr. Mungin's conviction and thus the error was harmless. Id. at 1030.[14]

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[13]During the August 12, 2009, case management hearing, the lower court judge, who also presided over Mr. Mungin's trial, expressed that he was "astounded" at this Court's conclusion that he had committed instructional error (T. Hearing 8/12/09 at 6).

[14]Justice Anstead would have granted Mr. Mungin a new trial based on the Court's conclusion that the evidence was insufficient to sustain a finding of premeditation. Mungin, 689 So. 2d at 1031 (Anstead, J., dissenting).

SUMMARY OF THE ARGUMENTS

1. The lower court erred in denying Mr. Mungin's Rule 3.851 motion following the evidentiary hearing ordered by this Court. Mr. Mungin established violations of Brady v. Maryland and Giglio v. United States violations. Cumulative consideration of all of the evidence that the jury did not hear is warranted under these circumstances, including the substantial evidence presented by Mr. Mungin during his first Rule 3.851 proceedings. The lower court's order denying this motion should be reversed and Mr. Mungin should be afforded a new trial.

2. The lower court erred in denying Mr. Mungin's motion to disqualify Judge Southwood from presiding over the evidentiary hearing in the case. Because Mr. Mungin's motion to disqualify was legally sufficient, this Court should determine that this case should be remanded to the circuit court with directions that the evidentiary hearing be conducted by, and the legal issues determined by, an impartial judge as guaranteed by this Court's jurisprudence and the United States Constitution.

ARGUMENTS

I

MR. MUNGIN ESTABLISHED BOTH A VIOLATION OF BRADY V. MARYLAND AND GIGLIO V. UNITED STATES, THUS A NEW TRIAL IS WARRANTED. MOREOVER, CUMULATIVE CONSIDERATION OF ALL PREVIOUS INFORMATION IS WARRANTED, BUT THE LOWER COURT FAILED TO CONDUCT A CUMULATIVE ANALYSIS IN DETERMINING THAT MR. MUNGIN WAS NOT ENTITLED TO ANY RELIEF.

A. Introduction.

Without question, Ronald Kirkland was the key prosecution witness against Mr. Mungin presented by the State at Mr. Mungin's capital trial. Without a confession or physical evidence linking Mr. Mungin to the crime scene, Kirkland=s identification of Mr. Mungin at the scene was unquestionably a critical piece of evidence for the prosecution. Moreover, Kirkland=s testimony provided evidence supporting the State=s theory of robbery; he was the only witness to testify that he saw Mr. Mungin leave the scene of the crime with a paper bag (R671). Mungin I at 1028 (AThere were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, identified the man as Mungin@). Thus, any evidence tending to impeach Kirkland=s credibility was

critical to the jury=s assessment of the State=s case. Despite the fact that the lower court concluded that George Brown's testimony "may have impeached Mr. Kirkland's [trial] testimony," (3PCR at 87), the lower court rejected Mr. Mungin's claims, concluding that he established neither a Brady nor a Giglio violation. For the reasons set forth below, the lower court erred and this Court should reverse with directions that a new trial be conducted.[15]

B. Standard of Review.

This Court reviews constitutional claims such as Brady and Giglio claims, which are legal claims, with a de novo standard of review. See e.g. Waterhouse v. State, 83 So. 3d 84 (Fla. 2012).[16] The Court will defer to any factual findings subsidiary to the legal issues only if supported by competent and substantial evidence. See Sochor v. State, 883 So. 2d 766 (Fla. 2004).

C. The Evidentiary Hearing.

At the evidentiary hearing conducted before the Court on February 3, 2012,

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[15]In the alternative, Mr. Mungin submits that the Court should reverse with directions that the evidentiary hearing be conducted again but this time before an impartial tribunal. See Argument II, infra.

[16]The importance of the Court conducting a de novo review in this case is highlighted by the fact that the lower court's legal discussion of the Brady claim and the materiality standard relies almost entirely on Justice Polston's dissenting opinion in Mungin III (3PCR 87-88).

Mr. Mungin submits that he has established the elements of both a Brady and a Giglio violation. At the hearing, Mr. Mungin presented the testimony of two witnesses: George Brown and Charles Cofer (Mr. Mungin's prior defense counsel at trial). In its case, the State presented three law enforcement officers – Charles Wells, Christie Conn, and Dale Gilbreath – as well as the trial prosecutor, Assistant State Attorney Bernardo de la Rionda.

George Brown, a lifelong resident of Jacksonville, was familiar with the Lil' Champ store because he would stop there almost every day on his way to work to purchase a drink or something to eat (3PCR 102-03). He was familiar with the victim as someone who had worked in the store for many years (3PCR 103). On September 16, 1990, Brown stopped at the store as was his custom (3PCR 104). He explained his recollection of what occurred:

> A Well, when I pulled up in the parking lot nobody was – there was nobody in the parking lot so I went inside. As I went inside somebody kind of passed by me, kind of bumped me, bumped into me, but it wasn't hard enough to make me look so I went on in the store, got my Coke and got a cake and I noticed the lady wasn't up there and she always made you feel bad because she watched you like a hawk, you know, thinking like you were going to steal something, no matter who it was, but she wasn't at the counter so I set my drink and stuff down and stood there a little bit and waited and still nobody else in there but me.
>
> So I went into the bathroom, to the customer's restroom, and yelled out, hollered in there. I said, you know, are you in there, is

> anybody in there and she didn't answer so I looked around the store and went back up front and they have a little storeroom kind of off to the side by there where the cash registers are and the door was opened up so I looked in there and didn't see her, so about that time I turned around and she was laying there in the floor with a spilled cup of water and she had a pill stuck to her lip so I thought she maybe had had a heart attack or something.
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> So I called 911 and about that time this guy came in. I don't remember his name, whatever his name was, but he came inside the store, too, and as I was talking to the lady on 911 she said roll her over on her back, so we rolled her over on her back. When we did she started making an awful, gurgling kind of funny noise and she told me, she said turn her back on her side quick so we turned her back and it wasn't – very long after that that the police officer came in and when he came in the first thing he did was like pulled her ear up and he saw that she had been shot so he was – I guess he called the Life Flight because it wasn't long before they were there, too.

(3PCR 103-05). Brown could not say anything about the person he saw leaving the store, whether male or female, white or black, height, etc. (3PCR 105-06).

Brown was certain that when he arrived at the store, there was no one else there at the time aside from the victim, Ms. Woods (3PCR 106). He was 100% certain (3PCR 106-07). He saw that one of the cash register drawers was open and empty; he did not touch the register or the register drawers (3PCR 107). Brown recalled talking to the police when they arrived; he recalled speaking with a male officer and "might have" spoken with a female officer but he was not sure

(3PCR 108-09).[17] When he was speaking with the officers he was outside of the store and "[b]y then there were a bunch of people there" (3PCR 110). Brown does not and did not know Anthony Mungin, nor did he or does he know any of the people involved in the case (3PCR 110-11). Brown has never been arrested or have any other legal problems (3PCR 111). Since the time he talked with police, no one has ever contacted him about the case until Mr. Mungin's investigator interviewed him with regard to the present testimony (Id.). After reviewing the portion of the police report where it states that Kirkland and Brown entered the store at the same time, that was not true; as he said, "I was in there by myself" (3PCR 114). When he spoke with the police, he gave them his name and address (3PCR 115). Upon questioning from the lower court, Brown testified that what he told the police officers at the scene was consistent with what his affidavit stated (3PCR115).

On cross-examination, Brown confirmed having spoken with police officers, one male and he could not recall if he also spoke with a female officer (3PCR 117). He remembered speaking with the officers and stayed at the scene as

[17]The evidence later presented established that there was a male police officer present at the scene –Charles Wells – and a female police officer, Christie Conn. Conn, however, was in plainclothes (3PCR 194), explaining why Brown may not have recalled speaking to a female police officer.

long as they needed him to stay (3PCR 117-18). Brown told the officers that someone had brushed up against him as he entered the store but it was not an event that caused him to pay much attention to (3PCR 120-21). After several questions by the prosecutor, Brown did acknowledge that he was "nervous" about finding the victim that he may not have told the police about the person brushing up against him (3PCR 125). He was, however, sure that the other man (Kirkland) came in after he (Brown) did (3PCR 129). He told the police what he was saying now (3PCR 129). "[E]verything that went on from when I went in the store until I called 911 I can remember just like I was standing there now" (3PCR 133).[18]

On redirect examination, Brown reaffirmed that he reviewed his affidavit when he signed it and that everything he stated in that affidavit was true and that he would have said something if there was any mistake in the affidavit (3PCR50).

Detective Charles Wells testified at the evidentiary hearing on behalf of the State (3PCR 87). Wells testified that, on the date in question regarding the

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[18]Charles Cofer, who represented Mr. Mungin at trial, testified that Kirkland was a critical witness for the prosecution because he identified Mr. Mungin as the person leaving the store and also made an in-court identification (3PCR 151). The information that Brown possessed would have undermined Kirkland's testimony and would have been information useful for the defense (3PCR 152). Cofer would have expected the State to disclose any information, be it exculpatory or impeachment, about the State's witnesses because "the law would require that" (3PCR 153).

homicide at the Lil' Champ convenience store, he was the first officer at the scene and came into contact with both George Brown and Ronald Kirkland (3PCR 182). He had actually been at the store about ten minutes earlier to get a cold drink, and returned when he got the call about what had happened (3PCR 187). After he returned to the store he spoke with Kirkland and Brown as well as a few other witnesses in a group at the scene (3PCR 184, 188). When asked if Brown told him that he was the first one there and the only one there, Wells did not deny that Brown said this, only that he could not "recall" (3PCR 185).[19]

Detective Christie Conn testified on behalf of the State (3PCR 192). Conn was a homicide detective on September 16, 1990, and responded to the Lil' Champ store a short time after Gilbreath arrived (3PCR 193-95). She was in plain clothes as part of her duties on that date (3PCR 194). She interviewed Ronald Kirkland and George Brown at the scene (3PCR 195). According to Conn, George

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[19]Charles Cofer also testified that his recollection, based on a review of the relevant documents, was that Wells "talked with both witnesses [Brown and Kirkland] but really couldn't distinguish as to who had told him what particulars at the time he first arrived because the sense I received was that he had a person who was down and was trying to deal with the rescue, getting the victim life-flighted out, so my review of the deposition indicates that he was not able at that point to narrow down whether Mr. Kirkland or Mr. Brown or other people told him what pieces of information" (3PCR 154-55). The State agreed that Wells did speak with both Brown and Kirkland at the store (3PCR61).

Brown told her that he had entered the store "about the same time" as Kirkland (T197). According to Conn, Brown also never mentioned that he was the only one inside the store when he arrived (3PCR 210). Nor did he say that someone bumped into him as he was leaving the store (3PCR 202). The notes she jotted down from her interactions with Brown and Kirkland were just a "handwritten shorthand" (3PCR 203).

On cross-examination, Conn explained that she spoke with Kirkland first, before she spoke with Brown (3PCR 204-05). These interactions were held in the parking lot of the convenience store where there was a lot of activity going on (3PCR 204-05).[20] She only spoke with Kirkland for a few minutes, "[f]ive minutes or less" (3PCR 205). According to Conn, Kirkland did not provide "a great wealth of information" (Id.). The information in the report about Kirkland and Brown arriving at "about the same time" actually came from Kirkland (3PCR 206). There was also nothing in her notes to establish that Brown was anything but cooperative

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[20]Although she described the scene as "pretty stagnant" when she was talking with Brown and Kirkland, she acknowledged that there was still some activity going on at the scene at the time (3PCR 204). The characterization of the scene as being active at the time of law enforcement's interactions with Brown and Kirkland is consistent with the testimony of other witnesses. See 3PCR 117 (testimony of George Brown) ("[t]here was so many people outside there at that time"); 3PCR 256 (testimony of Charles Wells) (agreeing that "the scene was somewhat chaotic").

with her questioning (3PCR 210).   He answered all the questions she had (Id.). Several weeks later Conn went to speak with Kirkland again and showed him a photo line-up (3PCR 210). Conn admitted that Kirkland said he couldn't swear in court if it was Mr. Mungin or not (3PCR210-11).

The State also presented the testimony of Dale Gilbreath, who was the lead detective on the homicide investigation (3PCR213-14). He had since left the Jacksonville Sheriff's Office and at the time of his evidentiary hearing testimony he was an investigator with the Duval County State Attorney's Office (3PCR 213). Although he did recall seeing George Brown at the scene, Gilbreath spoke to no witnesses during the investigation at the convenience store, he simply incorporated into his homicide report what Detective Conn had written in her shorthand notes (3PCR215, 219). From her shorthand notes he would summarize what she wrote and put it into the report (3PCR 217). The final homicide report was not completed, however, until November 5, 1990, after Detective Conn had secured the identification of Mr. Mungin by Kirkland (3PCR 221-22).

The State also presented the testimony of Assistant State Attorney Bernardo de la Rionda (3PCR 248). He was the prosecutor in Mr. Mungin's case, and he testified that he was unaware of George Brown's statements until Mr. Mungin's recent court filing (3PCR 249-50). Mr. de la Rionda acknowledged that

throughout the investigation and leading up to trial, he was in constant contact with Detectives Gilbreath and Conn, who would keep him apprised of any developments in the case (3PCR 252). He testified that the law was "crystal clear" that if the police knew of Brown's testimony but he, as the prosecutor, did not, he was still responsible under the law because "I am the prosecutor in the case" (3PCR 253).

D. Mr. Mungin is Entitled to a New Trial.

In Mungin III, the Court began its legal discussion by setting forth the proper standards attendant to establishing a Brady violation:

> The Fifth and Fourteenth Amendments to the United States Constitution require a prosecutor to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963). In order to establish a Brady violation, the defendant must demonstrate that (1) favorable evidence, either inculpatory, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Way v. State, 760 So. 2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding wold have been different." Way, 760 So. 2d at 913 (quoting Bagley, 473 U.S. at 682). A reasonable probability is a probability sufficient to undermine this Court's confidence in the outcome. Id.; see also Strickler, 527 U.S. at 290. However, in making this determination, a court cannot "simply discount[] the inculpatory evidence in light of the undisclosed evidence and determin[e] if the remaining evidence is sufficient." Franqui v. State,

> 59 So. 2d 82, 102 (Fla. 2011). "It is the net effect of the evidence that must be assessed." Jones v. State, 709 So. 2d 512, 521 (Fla. 1998).

Mungin III at 734.

With regard to the Giglio claim, the Court wrote:

> Mungin also asserts that this evidence establishes a Giglio violation. Under Giglio, "a defendant must show that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." Rhodes v. State, 986 So. 2d 501, 508-09 (Fla. 2008). As to the knowledge prong, in Guzman v. State, 868 So. 2d 498 (Fla. 2003), we have clarified that Giglio is satisfied where the lead detective falsely testifies at trial because the "knowledge of the detective . . . is imputed to the prosecutor who tried the case." Id. at 505.
>
> The materiality prong of Giglio is more defense-friendly than a Brady claim. See Davis v. State, 26 So. 3d 519, 532 (Fla. 2009) ("[The standard applied under the third prong of the Giglio test is more defense friendly than the test . . . applied to a violation under Brady."), cert. denied, 130 S. Ct. 3509 (2010). While under Brady, evidence is material if a defendant can show "a reasonable probability that . . . the result . . . would have been different," Way, 760 So. 2d at 913 (emphasis added), under Giglio, the evidence is considered material simply "if there is any reasonable possibility that it could have affected the jury's verdict." Rhodes, 986 So. 2d at 509 (emphasis added). Accordingly, for the reasons addressed above, we likewise hold that after reviewing the Giglio claim presented and accepting all allegations in the motion as true to the extent they are not conclusively refuted by the record, we cannot agree that the record at this point conclusively shows that the evidence pertaining to Brown would not affect the jury's verdict. Accordingly, an evidentiary hearing is needed on this claim as well.

Mungin III at 738.

Common to both claims involved is the trial testimony of the State's key witness, Ronald Kirkland. This Court in Mungin III outlined Kirkland's testimony as follows:

> In reviewing this claim, we examine Kirkland's trial testimony in even more detail. At trial, Kirkland testified that he was the first person to arrive at the location of the shooting. On his way to his girlfriend's house, he stopped by the Lil' Champ convenience store to pick up a diet coke and breath savers. As he was going into the store, a man who was carrying a brown paper bag almost knocked him down on his way out of the store. He described the man as being shorter than five feet, six inches and weighing about 130 pounds. Kirkland went into the store, picked up the items, and waited for the clerk, finally noticing that she was lying on the floor. He thought she might have had a seizure so he attempted CPR, and while he was performing CPR, another customer came in and called 911. Kirkland alleged that the other customer looked at the cash register and pulled the drawer open. An officer later came to his home and showed him six or seven pictures. Kirkland identified a picture of Mungin as the man who he saw leaving the store. He further identified Mungin in court as the man who he saw.
>
> On cross-examination, defense counsel confronted Kirkland on a number of inconsistencies. For example, although Kirkland was able to identify Mungin as the person he met, he stated he had only a glimpse of him before they bumped into each other, and since Mungin was then traveling in a different direction away from him, Kirkland saw only the back of his head. However, Kirkland was unable to recall if Mungin wore a hat and could not describe whether he was wearing a light or dark shirt. Further, Kirkland stated that Mungin had long hair that appeared to be in a Jheri-curl style and had a "good bit" of beard growth on him – a description that differed from Mungin's appearance at the time of the crime. When the police first asked Kirkland to identify the person he saw leaving the crime scene, Kirkland stated that he was not sure if he could recognize the person

> again, but he would try. When he was shown the pictures, Kirkland reviewed the photographs for approximately fifteen minutes before he picked Mungin's photo as the person that he saw.
>
> During closing argument, defense counsel stressed the following inconsistencies: at the time that Kirkland noticed the person rushing out of the convenience store, he did not realize it was a murder scene but was thinking about his upcoming date; Kirkland admitted that he saw only the back of the person's head and not his face; Kirkland admitted he saw only a glimpse as the person rushed away; Kirkland was unable to identify any of the clothing that the person was wearing; and most importantly, Kirkland described the person he saw has having a beard and hair that was "kind of long" even though other eyewitnesses to the Tallahassee shooting (which occurred two days earlier) stated that Mungin's hair was so short that it looked like he was in the military. Thus, defense counsel asserted that Kirkland's testimony supported that the person he saw leaving the store could not have been Mungin because a person would be unable to make hair grow significantly in only two days.

Mungin III at 735-36.

As this Court previously noted in this very case, the information contained in Brown's affidavit "completely contradicts" Kirkland on a "material detail: whether Kirkland could have seen Mungin leaving the convenience store right after the murder." Mungin III at 737. When the record in this case is viewed in its entirety, particularly the evidentiary hearing testimony and evidence submitted for the court's consideration, it is clear that Mr. Mungin has made out a claim of a Giglio violation and a Brady violation. As explained below, the lower court's order made certain determinations that are not supported by competent and

substantial evidence, and in light of an accurate reading of the entire record in this case, the inescapable conclusion is that Mr. Mungin is entitled to a new trial.

The lower court's order focused on the testimony of George Brown and Detective Conn. However, the order lacks competent and substantial evidentiary support on a number of key points and, in deferring to Conn's testimony to the exclusion of the actual record in this case, the lower court judge determined not to heed the Court's warning that "trial courts must decide these postconviction matters on an objective basis." Mungin III at 735 n.5 (citing Guzman v. State, 941 So. 2d 1045, 1051 n.4 (Fla. 2006)).

First, the lower court concluded that "[w]hile Mr. Brown testified that he was the first and only person on the scene until he called 911, Mr. Brown testified that he did not provide this information to the police" and that he "stated that he did not relay this information to the officers at the scene, explaining that 'the other guy' took over" (3PCR 87) (emphasis added). The lower court's conclusion that Brown testified that he did not provide this information to the police is not supported by the evidence, much less competent and substantial evidence. Brown recalled talking to the police when they arrived; he recalled speaking with a male officer and "might have" spoken with a female officer but he was not sure (3PCR

108-09).[21] When he was speaking with the officers he was outside of the store and "[b]y then there were a bunch of people there" (3PCR 110). After reviewing the portion of the police report where it states that Kirkland and Brown entered the store at the same time, Brown unequivocally testified that that was not true; as he said, "I was in there by myself" (3PCR 114). When he spoke with the police, he gave them his name and address (3PCR 115). Upon questioning from the lower court, Brown also testified that what he told the police officers at the scene was consistent with what his affidavit stated (3PCR115). He reiterated on cross-examination that he told the police what he was saying now (3PCR 129). "[E]verything that went on from when I went in the store until I called 911 I can remember just like I was standing there now" (3PCR 133). That Brown spoke with both police officers at the scene – Wells and Conn – is not in dispute. And while the testimony of Conn was in some tension with that of Brown (a tension that will be addressed below), Wells never testified that Brown did not tell him that he, and not Kirkland, was the first to arrive at the store; rather, he testified merely that he could not recall if Brown had told him that (3PCR 185). There is

[21]The evidence later presented established that there was a male police officer present at the scene –Charles Wells – and a female police officer, Christie Conn. Conn, however, was in plainclothes (3PCR 194), explaining why Brown may not have recalled speaking to a female police officer.

a huge difference between denying that Brown told Wells the information and Wells simply not being able to recall, yet the lower court did not even address Wells' testimony in the order denying relief. There is no support whatsoever in this record to substantiate the lower court's finding that Brown testified that he did not provide this information to the police,[22] and thus the lower court's finding should be disregarded. This Court owes no deference to the lower court's order in this regard.

With regard to Conn's testimony, the lower court wrote that she "clearly testified that Mr. Brown never told her that he was the first and only person in the store, nor did he tell her that someone bumped into him when he entered the store" (3PCR at 87). However, when the actual record is evaluated (something that the lower court did not do), there really is no tension between the testimony of Brown and Conn in many respects. In the first place, Conn never testified that she in fact asked Brown any of these questions;[23] and during the interviews she had with both

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[22]Moreover, on repeated occasions, Brown affirmed that the statements in his affidavit were true. Of course, in his affidavit, he also affirmed under oath that he had told the police that he, not Kirkland, was the first to arrive, a fact which he also confirmed yet again at the evidentiary hearing (3PCR 114). He also testified that the police report that stated that Kirkland was the first to arrive was not correct (Id.).

[23]In fact, Conn dodged the issue when posed this very question during the evidentiary hearing:

Brown and Kirkland, the latter of which lasted maybe five minutes, the scene was an active crime scene and was described by Officer Wells as "chaotic" (3PCR 256). The notes she relied on during her testimony were, by her own admission, shorthand notes taken at the scene (3PCR 203). The information in the police report about Kirkland and Brown arriving at "about the same time" actually came from Kirkland (3PCR 206). There was nothing in her notes to establish that Brown was anything but cooperative with her questioning and he answered all of her questions (3PCR 210). Moreover, Conn was not present when Brown spoke with Officer Wells (3PCR 184), so she would not have been in a position to know what Brown told Wells. None of these factors were considered when the lower court simply jumped to the unsupported conclusion that Brown did not tell Conn (or any law enforcement officer) that he, not Kirkland, was the first person to enter the store.

> Q Okay. Now you have testified that Mr. Brown never told you that he was the first one to arrive at the store, correct?
>
> A Correct.
>
> Q Did you ever ask him?
>
> A They arrived at the same time or about the same time.

(3PCR 206) (emphasis added).

Other critical factors about Conn's credibility were not considered by the lower court. For example, Conn testified at the evidentiary hearing that Brown had told her that "he went into the store and took a bottle of Gatorade to the counter and then waited it and after as hort time which he took to the counter (3PCR 197-98). However, during the hearing and in his affidavit, Brown testified
that he went to get "my Coke" as part of his daily routine and took it to the counter (3PCR 104). At trial, Kirkland also testified he stopped by the store to get a Diet Coke. Mungin III at 735-36 ("On his way to his girlfriend's house, [Kirkland] stopped by the Lil' Champ convenience store to pick up a diet coke and breath savers"). This fact is significant because there was only one Diet Coke can at the scene and no bottle of Gatorade found at the scene in the Lil' Champ store; according to the police reports in this case, the only beverage item observed at the scene and later taken into custody by law enforcement as evidence was a Diet Coke can unopened by the front counter of the store. Latent prints from that diet Coke can were compared to Mr. Mungin's but with negative results.[24] This is important because it further undermines Conn's testimony that Brown told her that

[24]It is not known if Kirkland's prints were compared to the latent prints found on the Diet Coke can. But assuredly if they were and there was a match, this would have supported Kirkland's testimony at trial and the State would have presented it to buttress his already shaky credibility.

he had gotten a bottle of Gatorade. Conn's testimony in this regard is contradicted by Brown himself as well as the crime scene evidence in this case. The only logical conclusion is that Brown was credible when he testified that he got the Diet Coke before going up to the counter, discovered the victim, and then Kirkland, who had stopped by to pick up a soda and breath mints before going to his girlfriend's house, arrived on the scene.

In evaluating Conn's testimony at the evidentiary hearing, the lower court also failed to consider additional important contradictions. For example, she testified that from her shorthand "notes" taken at the chaotic crime scene, she had written that two other individuals, Dawn Mitchell and Jonah Miller, arrived "at the scene apparently at the same time as the other two witnesses [Kirkland and Brown] so we have simultaneously them getting to the parking lot to the best of my understanding" (3PCR 116). However, according to the police reports and the testimony at the evidentiary hearing, Mitchell and Miller arrived at the scene around the same time that the other witnesses (Kirkland and Brown) found the victim, not at the same time that Kirkland and Brown arrived at the convenience store (3PCR 77; 174).[25] In fact, Charles Cofer, who defended Mr. Mungin at trial,

[25]Specifically, the police report states that Mitchell arrived at the scene "apparently at the same time as the other two witnesses found the victim" (3PCR 77) (quoting from Gilbreath Report, 11/5/90, at page 8 of 14) (emphasis added).

confirmed that Mitchell and Miller arrived at the scene "after Mr. Kirkland and Mr. Brown were in the store" (3PCR 175). Thus, in contradiction to Conn's testimony, relied on by the trial court, that Mitchell and Miller had also arrived at the same time as Brown and Kirkland, thus, in Conn's mind further undermining Brown's testimony, the reality is that Mitchell and Miller arrived at the store after Kirkland and Brown were already in the store. This facts further undermine Conn's evidentiary hearing testimony and further call into serious question the lower court's reliance on Conn without any meaningful evaluation of the facts in this case.

The most logical conclusion consistent with all the testimony and evidence presented at the evidentiary hearing is that Brown is and was not mistaken in what he observed, that the police reports in this case were false and/or misleading, and that Kirkland's testimony in large part was false and the State (through law enforcement agents) knew it. Brown testified that he was the first to arrive at the

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Reading this sentence logically, all it states is that Mitchell arrived at the store when the victim had already been discovered. In other words, when Mitchell arrived Brown and Kirkland were already inside the store and the victim was being tended to. This report says nothing about Mitchell observing anything about the arrival at the store of either Brown or Kirkland (3PCR 175). Thus, Conn's testimony was in fact contradictory to the very police reports in this case, a significant fact never considered by the lower court when assessing Conn's testimony when compared with Brown. Of course, of the two witnesses, Brown has the least axe to grind in the ultimate outcome of this proceeding.

convenience store, observed an individual leaving in an unhurried fashion from the store, and was alone in the store when he came upon the victim. Despite its attempts to confuse Brown, the State cannot point to any reason why Brown would lie about this point. He further testified that as he called 911, another male (Kirkland) came into the store. This version of events is logical and consistent with the evidence in the case. Despite the State's attempt to confuse Brown, Brown never wavered from his testimony that he arrived at the store first, was alone in the store, and came upon the victim while he was still alone in the store. Only then did the other person–Kirkland–enter the store. He also never told this information to the police. Given this scenario, and given Kirkland's importance to the State's case, confidence is undermined in the outcome and a new trial is warranted.

The lower court did address the materiality prong of the Brady claim, relying nearly exclusively on Justice Polston's dissenting opinion in Mungin III. Dissenting opinions are just that, dissenting opinions. The fact that Kirkland's credibility was already called into question at trial is not the polestar for determining whether a material Brady violation is established. The fact that Kirkland was cross-examined at trial about some inconsistencies in his testimony does not lead to the conclusion that the withheld information about George Brown

true testimony about what happened at the convenience store would have only provided cumulative evidence of impeachment.[26] As the Supreme Court recently wrote in a case where relief was granted on a Brady violation, “evidence impeaching an eyewitness may not be material if the State’s other evidence is strong enough to sustain confidence in the verdict,” but this is “not the case” where the witness’s testimony was the only evidence linking the defendant to the crime. Smith v. Cain, 132 S. Ct 627, 630 (2012). That there was an unbiased disinterested witness who completely contradicted Kirkland’s version of events “would not have been merely repetitious, reinforcing a fact that the jury already knew; instead, `the truth would have introduced a new source of potential bias.'" United States v. Rivera Pedin, 861 F. 2d 1522, 1530 (11th Cir. 1988) (quotation omitted). See also United States v. Nichols, 242 F. 3d 391 (10th Cir. 2000) (unpublished decision) ("some of the government's assertions of cumulativeness

[26]In assessing the materiality of the suppressed information, the Court must also consider that there was additional evidence of impeachment that was not brought out by defense counsel at trial. This claim was presented in Mr. Mungin’s first Rule 3.850 motion and, this Court, despite assuming that defense counsel was deficient in failing to discover and use Kirkland’s probationary status as impeachment evidence, concluded that no prejudice had been established because Mr. Cofer did challenge Kirkland’s testimony on other grounds. Mungin v. State, 932 So. 2d 986, 998-99 (Fla. 2006). Additionally, the Court rejected Mr. Mungin’s claim that defense counsel unreasonably failed to present the testimony of Detective Conn to testify about the weaknesses of Kirkland’s alleged identification of Mr. Mungin. Id. at 999.

ring hollow because it is at least arguable the defense could have been aided by more rather than fewer similar sightings of [John Doe #2] with Timothy McVeigh"); Washington v. Smith, 219 F. 3d 620, 634 (7th Cir. 2000) (the fact that one witness testified to defendant's alibi did not render additional alibi witnesses cumulative; the additional testimony "would have added a great deal of substance and credibility to Washington's alibi"); United States v. Scheer, 168 F. 3d 445 (11th Cir. 1999) (prosecutor's threatening remarks to his chief witness material, despite witness' impeachment with previous history of perjury, and compelling independent evidence against defendant); Singh v. Prunty, 142 F. 3d 1157 (9th Cir. 1997) (suppressed evidence of benefits promised key witness material, despite overwhelming independent circumstantial evidence against defendant); United States v. Smith, 77 F. 3d 511 (D.C. Cir. 1996) (suppressed dismissal of two counts against government witness material, even where dismissal of ten other counts was disclosed, witness had been impeached as drug user, drug dealer, and five-time convicted criminal, and witness' testimony was "merely corroborative" of other testimonial and physical evidence sufficient to prove defendant's guilt); Carriger v. Stewart, 132 F. 3d 463 (9th Cir. 1997) (where state's only direct witness impeached with burglary convictions, immunity agreement, and history of dishonesty, suppressed evidence of witness' violent crimes, psychiatric diagnosis,

and prison disciplinary record material, notwithstanding significant independent inculpatory evidence, including defendant's fingerprints on tape binding victim and defendant's possession of fruits and implements of the crime); United States v. Brumel-Alvarez, 991 F. 2d 1452 (9th Cir. 1992) (suppressed DEA memo which was highly critical of credibility of chief prosecution witness was material, despite "already impressive quantity and qualify of impeaching evidence," and government contention that memo contained "gratuitous opinions" of individual agent). Brown's testimony, which could have been used to impeach Kirkland as well as lead detective Gilbreath, would also have been powerful evidence for the jury because it had the potential to impugn the integrity and character of the entire investigation in this case. See Kyles v. Whitley, 514 U.S. 419 (1995).

When reviewing the relevant testimony from the law enforcement officers in this case, it is clear that the police reports relied on by defense counsel, as well as the testimony of Ronald Kirkland, were false and/or misleading, and that both Brady and Giglio violations have been established here. Given that Brown's testimony was entirely credible, logical, and consistent with the evidence in the case (with the exception of Kirkland's trial testimony), there can be no other conclusion but for the fact that the police reports in this case were lacking in truthfulness regarding what information Brown actually possessed and imparted to

the police on September 16, 1990. Certainly, the interviews of Brown and Kirkland at the scene were not conducted under ideal circumstances; they were hurried interactions in the parking lot of a convenience store that was in the middle of a robbery and shooting investigation. Air rescue was coming and going. Police officers were coming and going. Hurried interviews were conducted by various police officers and the manner in which the ultimate reports were prepared leaves one to suspect that the interviews of Kirkland and Brown were muddled together. But the circumstances under which these interviews were conducted does not vitiate the State's responsibility to provide an accurate police report to the defense, to provide impeachment evidence to the defense, and to refrain from presenting false testimony to a jury in a criminal case. Here, all these circumstances exist.

With regard to Mr. Mungin's claim of a violation of Giglio, the lower court concluded that no violation had been established because Mr. Mungin had not established that Kirkland's testimony was false or that "the prosecutor knew the testimony was false" (3PCR 88). However, the lower court's conclusions are not borne out by competent and substantial record support. As demonstrated in the discussion of the Brady claim, Mr. Mungin submits that he has established that Kirkland's testimony that he, not Brown, was the first to arrive at the convenience

store, was false testimony and not merely "inconsistent" with Brown's testimony. Furthermore, the lower court's legal conclusion that the prosecutor himself has to know that the evidence or testimony is false is not in accord with the law. Under Giglio, like Brady, knowledge is imputed to the prosecutor if it is only law enforcement that has the knowledge of the falsity. See Williams v. Griswald, 743 F. 2d 1533 (11th Cir. 1984) ("It is of no consequence that the facts pointed to may only support knowledge of the police because such knowledge will be imputed on the state prosecutors") (citing Schneider v. Estelle, 552 F. 2d 593 (5th Cir. 1977); Smith v. Florida, 410 F. 2d 1349 (5th Cir. 1969). Accord United States v. Antone, 603 F. 2d 566, 569 (5th Cir. 1979). Because Mr. Mungin also has established his entitlement to relief under Giglio, a new trial must be ordered at this time.

E. Cumulative Analysis.

When assessing whether Mr. Mungin is entitled to relief, the Court must also consider the cumulative effect of the prior information that the jury did not know, either because it was improperly withheld by the State or because trial counsel failed to present it. The information contained in the instant appeal, when considered cumulatively to the claims previously made by Mr. Mungin, see Mungin v. State, 932 So. 2d 986 (Fla. 2006), as well as the fact that, on direct appeal, the Court found error with regard to Mr. Mungin's conviction for

premeditated first-degree murder, establish that confidence is undermined in the jury's verdict of felony-murder, and that relief is warranted at this time.

For example, in his prior 3.851 motion, Mr. Mungin asserted that the jury did not hear of significant additional impeachment evidence of Kirkland due to trial counsel's failure to investigate (and now it is known that there is even more substantial impeachment that was never disclosed by the State). Mr. Mungin alleged that trial counsel failed to utilize critical impeachment evidence in his own file, evidence which would have given the jury a true picture of Kirkland's motivations and thus his credibility. This evidence, in the form of a pending violation of probation warrant and an outstanding capias, was neither elicited on Kirkland's cross-examination nor argued in closing arguments. In denying this claim, this Court concluded that this allegation was meritless under the prejudice prong of Strickland:

> Mungin's first subclaim is that trial counsel was ineffective for failing to sufficiently impeach the testimony of Ronald Kirkland. Specifically, Mungin argues that Cofer should have been made the jury aware that Kirkland was on probation at the time of the trial and that warrants had been issued for Kirkland's arrest on violation of probation and subsequently recalled.[]
>
> Even if Cofer's performance was deficient because he failed to discover and use Kirkland's probationary status as impeachment evidence, Mungin has failed to establish prejudice. Cofer attacked Kirkland's identification of Mungin on cross-examination of

> Kirkland, and by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, whose descriptions of the perpetrator were different from Kirkland's. In closing argument, Cofer argued extensively that due to these inconsistencies, Kirkland's identification could not be believed beyond a reasonable doubt. Moreover, Kirkland testified that he did not tell anyone from the State Attorney's Office that he was on probation and that he did not have any deals with the State in exchange for his testimony at Mungin's trial. Mungin does not allege that any deals were made. As for trial counsel's failure to inform the jury of the recalled warrants for Kirkland's arrest, because the warrants were not recalled until after the trial it cannot be said that counsel's performance was deficient.

Mungin II, 932 So. 2d at 998-99.

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

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

> much later at trial he does, showing the status of him being on probation and a warrant outstanding would tend to suggest that Mr. Kirkland had strengthened his identification because of concerns for himself.

(PCR274). He agreed that it would have been an effective argument to make under the circumstances in this case because he would have been able to argue that Kirkland was more certain at trial than he was earlier about his identification of Mr. Mungin because he had pending legal difficulties and was attempting to curry favor with the State (PCR361-62). Despite knowing that Kirkland had been on probation, he did not use this evidence to impeach him at trial.

Mr. Mungin also alleged in his prior Rule 3.851 proceeding that trial counsel, without a reasonable tactic, failed to provide the jury with information arising from the deposition of Detective Conn that Kirkland had not been able to swear in court that the person he identified as Mr. Mungin in a photo spread was the actual person he saw on the day in question. As established at the state court hearing, Detective Conn's deposition clearly contained information that would have been helpful for the defense at trial:

> Q [Prosecutor] Detective Conn was asked about what Mr. Kirkland told her?
>
> 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). This Court rejected this claim on its merits:

> Mungin also asserts that trial counsel was ineffective in failing to call Detective Christie Conn to testify regarding Kirkland's identification of Mungin in a photo spread. Specifically, Mungin asserts that according to Detective Conn's deposition testimony, Kirkland stated at the time of the identification that he could not swear in court that the man in the photograph was the same man he saw exiting the store on the day of the murder. After the evidentiary hearing, the trial court denied this claim, finding that Cofer "made a tactical decision, after discussing the possibility with the Defendant, not to call Detective Conn as a witness."
>
> Cofer testified at the evidentiary hearing that after discussing the issue with Mungin, he made a tactical decision not to call Detective Conn. Cofer stated that it was their decision that unless they had something "pretty important" to present, they wanted to try to reserve initial and final closing argument, and that on balance Kirkland admitted to most of the things that they would have used

> Detective Conn to impeach. Mungin argues that Cofer's asserted reason for failing to call Detective Conn is belied by the record, which shows that the defense team waived initial closing argument.
>
> Although trial counsel ultimately waived initial closing argument, that does not demonstrate that at the time the decision was made not to call Detective Conn, trial counsel did not intend to use both the initial and final closing. Further, Cofer stated at the evidentiary hearing that the decision was part of his trial strategy, which he discussed with Mungin and to which Mungin agreed. Mungin did not testify at the evidentiary hearing and therefore failed to present any evidence to rebut Cofer's testimony that Mungin was consulted about this decision.
>
> Even assuming that counsel's performance was deficient in this regard, we conclude that Mungin has failed to establish prejudice. As noted above, trial counsel attacked Kirkland's identification of Mungin on cross-examination by bringing out the limited time he had to actually view the perpetrator and the fact that it took him fifteen to twenty minutes to pick Mungin out of the photo lineup. Cofer also brought Kirkland's identification into question by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, who gave different descriptions of the perpetrator than did Kirkland. Accordingly, out confidence in the outcome of Mungin's trial is not undermined by Cofer's failure to call Detective Conn to testify.

Mungin II, 932 So. 2d at 999.

And, most significantly, in his prior 3.851 proceeding, Mr. Mungin alleged that trial counsel failed to adequately investigate and present favorable evidence, namely, that Mr. Mungin had an alibi for the day in question and that someone named "Ice" had committed the crime. The lower state trial court denied this

claim, relying on counsel's testimony that he did investigate and made a decision not to present the evidence in question because it was "inconsistent" with the facts of the case (PCR207). On appeal, this Court rejected the merits of Mr. Mungin's claim, finding that, although Mr. Mungin had established deficient performance, he failed to establish prejudice:

> In his final guilt phase ineffectiveness subclaim, Mungin asserts that trial counsel was ineffective for failing to pursue an alibi defense. The trial court denied this claim, finding that Cofer's testimony that the alibi defense was inconsistent with the facts of this case and that such testimony would not have benefitted Mungin was credible. The trial court concluded that Cofer's strategic decision not to pursue this defense did not result in deficient performance or prejudice. We agree. Mungin's claim that a man named "Ice" would have helped to establish his innocence is not supported by any credible evidence.
>
> The Court has rejected ineffective assistance of counsel claims alleging a failure to present an alibi defense when counsel has investigated and made a strategic decision, supported by the record, not to present the defense. See, e.g. Reed v. State, 875 So. 2d 415, 429-30 (Fla. 2004) (affirming the trial court's finding that counsel was not ineffective for failing to present an alibi defense when, after an investigation, trial counsel concluded that the available testimony provided, at best, an incomplete alibi).
>
> In this case, it appears that counsel was confused about the details of Mungin's alibi defense. However, Mungin has failed to establish prejudice. Mungin was linked to the crime by the ballistics evidence that identified the gun used in the Tallahassee and Monticello shootings, and found in Mungin's room the night he was arrested, as the same gun that was used to shoot the victim in this case. The State also presented the eyewitness testimony of Ronald

> Kirkland, who identified Mungin as the man he saw leaving the store. In addition, Mungin presented no evidence at the evidentiary hearing that trial counsel would have been able to locate "Ice" or any evidence connecting "Ice" to the gun. Although Edward Kimbrough and Jesse Sanders testified that they knew an individual who went by the name "Ice," Kimbrough had not seen "Ice" since the early or mid-1990s and Sanders had not seen him since 1987. Neither witness testified that he could have helped Cofer find "Ice" in 1992, and neither witness directly supported Mungin's claim that he gave "Ice" the gun.
>
> Equally important, Mungin's other alibi witnesses do not establish that Mungin could not have committed the murder on the afternoon of September 16, 1990. The testimony of Brian Washington, who was sure that the date he drove Mungin to Jacksonville was September 16, 1990, placed Mungin in Jacksonville on the day of the shooting. Philip Levy and Vernon Longworth remembered seeing Mungin in Jacksonville on a Sunday in September but neither could remember the exact date or time. Therefore, even assuming that the day they saw Mungin was September 16, 1990, their testimony does not provide persuasive evidence that Mungin would have been unable to commit the murder between 1:30 and 2:00 that afternoon.
>
> In light of the strong evidence linking Mungin to the crime and the weakness in the testimony of Mungin's alibi witnesses, we conclude that Mungin has failed to establish that he was prejudiced by Cofer's failure to follow up on his alibi defense. . .

Mungin II, 932 So. 2d at 999-1000.

In light of the Court's decision regarding deficient performance, it is now settled that trial counsel failed to meaningfully investigate and that Cofer's decision to forego the presentation of a defense case was based on his own

misunderstanding of the facts of the case. Mungin II, 932 So. 2d at 1000 ("In this case, it appears that counsel was confused about the details of Mungin's alibi defense"). According to the police report generated as a result of a November 21, 1991, interview with Mr. Mungin, Mr. Mungin stated he had taken a burgundy Ford Escort from a motel in Kingland, GA, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, Mr. Mungin went to Monticello where he was involved in a shooting, and then to Tallahassee where he was also involved in a shooting. Mr. Mungin then stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shooting. Later in the statement, Mr. Mungin said he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus. In that first statement, Mr. Mungin said that the person he was dealing with in Jacksonville was someone named "Snow." Mr. Mungin next related that he spent several days doing drugs in Georgia, after which he was driven back to Jacksonville, where he found the Escort stripped. He then procured another car, a Dodge, and purchased the gun back from "Snow." Then he went to see a girl on West 28th Street and then went to Pensacola to see Charlette Dawson. He said he was in Pensacola between 7 and 8 PM on the same day, and he returned to Georgia after spending two days in Pensacola.

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

Cofer's misunderstanding of Mr. Mungin's alibi and his concomitant failure to investigate resulted in prejudice to Mr. Mungin. The jury was deprived of testimony that was consistent with and buttressed the defense theory that Mr. Mungin did not commit the homicide and that Kirkland's identification was mistaken.

At the evidentiary hearing, Mr. Mungin presented extensive and unrebutted testimony which established the existence of "Ice" and also that Mr. Mungin could not have committed the murder. Edward Kimbrough's testimony credibly verified the existence of "Ice" as someone who would regularly hang out at the same place in the Moncrief area of Jacksonville selling drugs (PCR380-81). "Ice" would

always be armed and always was driving different vehicles (PCR381-82), and was described as a tall man, from 190 to 250 pounds, with a "jeri-curl" hair style (PCR382).[27] Jesse Sanders gave an even more vivid physical description of "Ice" and confirmed that his regular hangout was in the Moncrief area (PCR392-94). "Ice" was a known hustler who also knew how to make money illegally by stealing cars and selling drugs (PCR395-98). Sanders would often see Mr. Mungin in cars that "Ice" was usually in possession of (PCR398).

Brian Washington also knew Mr. Mungin at the time in question, and testified that the last time he saw Mr. Mungin was around 10:30 AM on September 16, 1990, at a convenience store in Kingsland (PCR407-08).[28] He recounted the brief conversation they had during which Mr. Mungin said he needed a ride to Jacksonville, and Washington told him he could give him a ride but had to first take his wife to church (PCR408). After he took his wife to church, Washington picked up Mr. Mungin from his cousin, Angie Jacobs', house (PCR409). They then drove to Jacksonville and Washington dropped Mr. Mungin off somewhere

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36Curiously, at trial, Ronald Kirkland testified that the man he saw coming out of the Lil' Champ store in Jacksonville had longish hair done up in a "jeri curl" (T680-81).

37Washington knew it was September 16 because of several birthdays in the family in September and September 16 was a Sunday, which is the day he took his wife to church (PCR412).

near Golfair Boulevard (PCR410). About a week or so later, Washington learned that Mr. Mungin had been arrested for a homicide (PCR410). After he learned this, Washington told his mother that it could have been true because of the time frame (PCR411). No one from Mr. Mungin's legal team ever contacted him about the case, and had he been asked he would have told them what he knew (PCR411).

Phillip Levy testified that in the mid-to-late 1980s, he and Mr. Mungin became friends and would hang out, drink, and listen to music (PCR430). The last time he saw Mr. Mungin was in 1990 on a Sunday between 11:30 AM and 1:00 PM (PCR431-32).[29] They met at Levy's aunt's house and then went to the area of 28th Street and Stuart to see if Donetta Dues, a former girlfriend of Mr. Mungin, was home (PCR433). After that, Levy and Mr. Mungin went to Levy's uncle's house, and then Mr. Mungin left to his aunt's house (PCR433-34). The last time Levy saw him was around 4:30 or 5:00 PM (PCR434). He was pretty sure this occurred on a Sunday in mid-September of 1990 (PCR435). Levy was sure it was a Sunday

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38In rejecting Mr. Mungin's claim, this Court wrote that Levy "remembered seeing Mungin in Jacksonville on a Sunday in September, but neither could remember the exact date or time." Mungin II, 932 So. 2d at 1000. However, as the evidentiary hearing testimony established, Levy last saw Mr. Mungin between 11:30 AM and 1:00 PM "[i]n the middle of September on a weekend" (PCR431-32; 435). This Court's "finding" is contrary to the record; Levy's testimony was more specific than merely that he saw Mr. Mungin "on a Sunday in September" at an undetermined time.

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

Finally, Mr. Mungin presented the testimony of Vernon Longworth, who also knew Mr. Mungin from the Jacksonville area and became friendly with him (PCR477). Longworth's nephew is Philip Long (PCR478). In 1990, Longworth was residing at 28th and Stuart in Jacksonville (PCR478). The last time he saw Mr. Mungin was on a Sunday afternoon when he came to his house at 1:00 to 2:00 PM for a few hours to visit (PCR479).[30] He knew it was a Sunday because it was football season and the TV was on (PCR479). Mr. Mungin asked if he could shower because it was a hot day (PCR480). Longworth also testified that Mr. Mungin had gone to Donetta Dues's house across the street to visit the child he had with Ms. Dues (PCR480). After Mr. Mungin took a shower, he and Philip and a

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39As did Levy, Longworth clearly testified to the time that Mr. Mungin arrived at his house, and thus the record conclusively contravenes the Court's "finding" that Longworth also failed to remember the exact time he saw Mungin on the day in question. Mungin II, 932 So. 2d at 1000.

few other guys left to go to a juke joint (PCR480). In 1992 and 1993, Longworth resided in Jacksonville and would have been available to talk with anyone from Mr. Mungin's legal team had he been contacted (PCR481).

This evidence was consistent with Mr. Mungin's account of his whereabouts in his police statements as well as the facts of the case. First, Mr. Mungin indicated that he was driven by a baser who picked him up at his aunt's house in Kingsland and drive him to Jacksonville where he was dropped off. Brian Washington testified that he picked Mr. Mungin up from his cousin's house in the morning in Kingsland and dropped him off in Jacksonville (PCR409-10). Mr. Mungin indicated in his police statement that he was looking for a young lady on 28th and Stuart. Philip Levy testified that he saw Mr. Mungin about 11:30 or 1:00 PM in the afternoon and Mr. Mungin went across the street from the corner of 28th and Stuart to see if Ms. Dues, his girlfriend, was home (PCR432-33). Levy saw Mr. Mungin again around 4:30 or 5:00 (PCR434). That time would be consistent with Mr. Mungin telling the police he left Jacksonville late in the day, almost nighttime. Vernon Longworth confirmed the chronology by stating that Mr. Mungin came to his house around 1 or 2 PM in the afternoon and stayed until about 2:30 or 3:00. Longworth allowed Mr. Mungin to take a bath (PCR479-80); Levy had also testified that Mr. Mungin stated he was going to Longworth's to bathe (PCR434).

Longworth also confirmed that Mr. Mungin went to see Ms. Dues (PCR480). Most significantly, the owner of the Dodge Monaco had testified at trial that her vehicle was stolen between 10:00 AM on September 15 and 1:00 PM on September 16 (R805-06). None of the witnesses presented below testified that they saw Mr. Mungin with a vehicle. The testimony adduced by Mr. Mungin supports Mr. Mungin's account to the police and supports his alibi, and all of these witnesses testified at the evidentiary hearing that they were available at the time of trial and would have testified if asked at trial. Had this testimony been presented at trial, there is more than a reasonable probability of a different outcome. See Grooms v. Solem, 923 F. 2d 88 (8th Cir. 1991) (counsel rendered prejudicially deficient performance in failing to investigate and present readily available evidence in support of defendant's alibi); Luna v. Cambra, 306 F. 3d 954, 962 (9th Cir. 2002) (trial counsel ineffective for failing to investigate available alibi evidence, and prejudice established when where alibi witnesses were "vague with regard to time" because alibi witnesses were nonetheless "consistent" with defendant's trial testimony); Brown v. Myers, 137 F. 3d 1154, 1158 (9th Cir. 1998) (same); Parrish v. Smith, 395 F. 3d 251 (6th Cir. 2005) (counsel rendered prejudicially deficient performance in failing to present alibi evidence). Here, it must be remembered that this Court already found on direct appeal that there was insufficient evidence

to support a verdict of premeditated murder. Mungin I, supra. As the Supreme Court has explained, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland, 466 U.S. at 696.

With regard to the reliance on the ballistics evidence presented at trial, Mr. Mungin respectfully submits that, like trial counsel Cofer, this Court was "confused" about Mr. Mungin's alibi defense. In his first statement to police resulting from a November 21, 1991, interview with Mr. Mungin, Mr. Mungin stated he had taken a burgundy Ford Escort from a motel in Kingland, GA, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, Mr. Mungin went to Monticello where he was involved in a shooting, and then to Tallahassee where he was also involved in a shooting. Mr. Mungin then stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shooting. Later in the statement, Mr. Mungin said he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus. In that first statement, Mr. Mungin said that the person he was dealing with in Jacksonville was someone named "Snow." Mr. Mungin next related that he spent several days doing drugs in Georgia, after which he was driven back to Jacksonville, where he found the Escort stripped. He then procured

another car, a Dodge, and purchased the gun back from “Snow.” Then he went to see a girl on West 28th Street and then went to Pensacola to see Charlette Dawson. He said he was in Pensacola between 7 and 8 PM on the same day, and he returned to Georgia after spending two days in Pensacola.

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

Thus, as explained above, Mr. Mungin had provided police with an explanation of how he had possession of the gun used to commit the Tallahassee and Monticello shootings, but that he did not have possession of the gun when the Jacksonville shooting took place. In light of his account, when considered in connection with the alibi evidence presented at the state court hearing, there is more than a reasonable probability that a jury, given the opportunity to evaluate all

the evidence, would have found a reasonable doubt.

F. Conclusion.

Given the importance of Kirkland's testimony, and the reliance on such by the State during closing argument, Mr. Mungin has more than established a reasonable probability of a different outcome had the jury known of the false evidence presented by the State through Kirkland and had the jury heard the testimony of George Brown. Confidence is undermined in the outcome particularly in light of the prior information gleaned from Mr. Mungin's earlier postconviction proceedings, and of course the fact that the jury was improperly instructed on premeditated first-degree murder. The singular and combined effects of all the information not known by Mr. Mungin's jury more than undermined confidence in not only its verdict, but also its 7-5 recommendation at the penalty phase that Mr. Mungin be sentenced to death.

For the foregoing reasons, Mr. Mungin submits that the lower court order denying his claims should be reversed and the Court should order a new trial at this time.

II

THE LOWER COURT ERRED IN DENYING MR. MUNGIN'S MOTION TO DISQUALIFY.

Following the return of jurisdiction to the lower court, Mr. Mungin filed a written motion to recuse Judge Southwood, alleging that Judge Southwood must recuse himself based on the following allegations:

Mr. Mungin states the following grounds for his motion:

> 1. In 1993, Mr. Mungin was tried and convicted in the circuit court in and for Duval County, Florida. Judge Southwood presided over Mr. Mungin's trial and sentenced him to death. Judge Southwood has presided over Mr. Mungin's subsequent collateral proceedings, including the most recent motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851. As to this motion, Judge Southwood denied relief without affording Mr. Mungin an evidentiary hearing.
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> 2. In denying Mr. Mungin's second Rule 3.851 motion, Judge Southwood improperly relied on his own subjective view of the case rather than conducting the requisite objective analysis demanded by the law. Indeed, in reversing Judge Southwood's decision to deny Mr. Mungin's Rule 3.851 motion without an evidentiary hearing, the Florida Supreme Court expressed its concern that Judge Southwood failed to review Mr. Mungin's case on an objective basis. See Mungin v. State, ___ So. 3d ___(Fla. Oct. 29, 2011) (slip op. at 13 n.5). Because Judge Southwood previously relied on his own subjective memory and interpretation of the case in denying Mr. Mungin's Rule 3.851 motion, Mr. Mungin has a reasonable fear that he will not receive a fair hearing before Judge Southwood at the upcoming evidentiary hearing ordered by the Florida Supreme Court. Accordingly, Mr. Mungin moves that Judge Southwood disqualify himself over this proceeding.

(3PCR 29-30). The motion was denied as legally insufficient.[31]

[31]As noted earlier, the order on the motion to disqualify was not included in the record on appeal. Counsel will move to supplement the record with the

Mr. Mungin submits that the lower court erred in denying the motion to disqualify. It is axiomatic that Rule 3.850 proceedings are governed by basic principles of due process. Moreover, "no other principle is more essential to the fair administration of justice than the impartiality of the presiding judge." In re McMillan, 797 So. 2d 560 (Fla. 2001). Accord Marshall v. Jerrico, 446 U.S. 238, 242 (1980) ("Due Process Clause entitles a person to an impartial and disinterested tribunal in . . . criminal cases"); Porter v. Singletary, 49 F. 3d 1483, 1487 (11th Cir. 1995) ("If the judge was not impartial, there would be a violation of due process"). Indeed, the due process right to a fair tribunal is so fundamental that the deprivation of such is structural error not subject to harmless-error review. Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991). Mr. Mungin submits that the fundamental right to a fair and impartial tribunal warranted the lower court's recusal from this case due to the fact that Mr. Mungin had a reasonable fear that Judge Southwood could not be impartial because this Court had expressed its concern in Mungin III about the fact that Judge Southwood had failed to review this case on an objective basis.

Because there was more than a reasonable question about whether Judge Southwood could provide a fair and impartial tribunal and fact-finder with respect

missing order.

to issues remanded by this Court for his consideration, Judge Southwood should have granted Mr. Mungin's motion to disqualify. Reversal for a new evidentiary hearing with directions that Mr. Mungin's case be assigned to another judge is warranted under the facts of this case.

CERTIFICATE OF FONT

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid to Stephen White, Assistant Attorney General, 400 South Monroe Street PL-01, Tallahassee, FL 32399, this 9th day of August, 2012.

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