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IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN.,

Appellant,

vs. **Case Number SC17-815**

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

TODD G. SCHER
FLORIDA BAR NUMBER 0899641
LAW OFFICE OF TODD G. SCHER, P.L.
1722 SHERIDAN ST.. SUITE 346
HOLLYWOOD, FLORIDA 33020
(754) 263-2349 (TEL)
(754) 263-4147 (FAX)
COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Mr. Mungin appeals the circuit court's summary denial of relief on his Rule 3.851 motion. 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 third postconviction appeal;
"4PCR____"	-Record in fourth (instant) postconviction appeal.

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND FACTS

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). Judge Southwood 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). That motion was subsequently amended with the filing of a consolidated amended Rule 3.850 motion, containing seventeen (17) numbered claims for relief (PCR1-76). The State filed a response to this motion (PCR79-105).

A limited evidentiary hearing was conducted by the lower court on June 25

and 26, 2002. Post-hearing memoranda were submitted by the parties (PCR116-151; 152-73; 175-79). Relief was denied (PCR203-09), and a timely notice of appeal was filed (PCR210-11).

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*].

Mr. Mungin thereafter timely filed a federal habeas corpus petition pursuant to 28 U.S.C. §2254. While that petition was pending, Mr. Mungin filed a new Rule 3.851 motion (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). 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 the Brown affidavit (2PCR6 et seq.). In Claim II, Mr. Mungin alleged constitutional violations with regard to lethal injection (2PCR101-102).

The circuit court (Judge Southwood) summarily denied Mr. Mungin's motion with a State-prepared proposed order (2PCR130-140). Mr. Mungin timely

appealed to this Court, which subsequently reversed and remanded for an evidentiary hearing. *Mungin v. State*, 79 So. 3d 726 (Fla. 2011) [hereinafter *Mungin III*].

On remand, the evidentiary hearing took place on February 3, 2012 (3PCR 94-256). 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. Following the hearing, the parties filed post-hearing memoranda (3PCR 50-65)(State's memorandum); (3PCR 66-81) (Defense Memorandum). On March 21, 2012, the circuit court (Judge Southwood) entered an order denying relief to Mr. Mungin (3PCR 82-89).

Mr. Mungin timely filed a notice of appeal (3PCR 90-91). On appeal, this Court affirmed the denial of relief. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013) [hereinafter *Mungin IV*].

Subsequently, Mr. Mungin returned to federal court, where he amended his habeas corpus petition with the new claims arising out of state court. That petition remains in abatement pending the outcome of the final state court litigation ongoing in Mr. Mungin's case.

On or about January 12, 2017, Mr. Mungin filed a successive Rule 3.851

motion in light of *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), along with a motion for leave to file the motion in excess of page limitations (4PCR-1-70; 71-72). On January 24, 2017, the State filed an objection to the motion to exceed the page limitations (but not a response to the actual Rule 3.851 motion) (4PCR-74-75).[1] In addition to objecting to the length of Mr. Mungin's motion, the State urged the court to give Mr. Mungin leave to amend the 3.851 motion and requested additional time for filing its response pending a ruling on the page limitation issue (4PCR-75).

No communications were forthcoming from the court regarding the pending motions until March 3, 2017, when an order denying Mr. Mungin's Rule 3.851 was received in the mail by Mr. Mungin's counsel (4PCR-76-80). The order was signed by Judge Linda McCallum, who had no previous involvement in Mr. Mungin's case as a judge (4PCR-79). The order was signed on February 28, 2017, and certified by the Clerk to have been mailed on February 28, 2017, but the envelope revealed that the order was not mailed until March 1, 2017, and not received by counsel until March 3, 2017 (4PCR-82 n.2). It was not served electronically as required.

Mr. Mungin timely filed a motion for rehearing, alleging, *inter alia*, a denial

[1] The State did not file a response to the 3.851 motion despite the mandatory language in Fla. R. Crim. P. 3.851(f)(3)(B), nor did the lower court conduct a case management hearing despite the mandatory language set forth in Fla. R. Crim. P. 3.851(f)(5)(B).

of due process as a result of the assignment of Judge McCallum to his case (4PCR-91-95). The State responded, contending, among other things, that there was "no error in appointing this successor judge" (4PCR-96-98). Judge McCallum denied Mr. Mungin's motion for rehearing in an order dated March 28, 2017 (4PCR-100-01). In so doing, Judge McCallum addressed the merits of Mr. Mungin's due process argument (4PCR-101).

Mr. Mungin timely filed his Notice of Appeal (4PCR-103-04). Shortly after docketing the notice of appeal and receiving the record, this Court *sua sponte* stayed the appeal pending disposition of *Hitchcock v. State*, No. SC17-445. Mr. Mungin thereafter moved to vacate the stay, the denial of which was entered the day after the motion was filed. On September 22, 2017, the Court issued an order to "show cause" why the trial court's order should not be affirmed in light of the Court's disposition in *Hitchcock.* Mr. Mungin filed a response to the show cause order, the State responded, and Mr. Mungin filed his reply.[2] On February 22, 2018, the Court directed further briefing on the "non-*Hurst* related issues in this case." This Initial Brief follows.[3]

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[2] During this period, Mr. Mungin also filed a motion to relinquish jurisdiction to the lower court because he had filed another Rule 3.851 motion. That request was denied. Mr. Mungin informs the Court that his Rule 3.851 motion was recently denied—following an evidentiary hearing—by Judge Angela Cox (not Judge McCallum, who, unbeknownst to Mr. Mungin or his counsel, had been removed or somehow taken off of Mr. Mungin's case). A notice of appeal was filed on April 17, 2018, but it apparently has yet to be transmitted to this Court given that, as of the preparation and filing of this brief, no case has yet been opened in that appeal.

[3] The Court's order provided that Mr. Mungin's initial brief was not to exceed twenty-five pages.

SUMMARY OF THE ARGUMENTS

1. Judge McCallum erroneously denied Mr. Mungin's motion for rehearing, which was based in part upon Mr. Mungin's discovery that Judge McCallum previously worked in the State Attorney's Office for the Fourth Judicial Circuit as a capital prosecutor when that office prosecuted Mr. Mungin and the fact that her assignment to his case had never been disclosed.

2. This Court in 2011 heard Mr. Mungin's prior collateral appeals which presented challenges to his death sentence on the basis newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (1991). Employing the proper standard of the newly discovered evidence analysis requires a determination as to the likelihood that Mr. Mungin will receive a less severe sentence if 3.851 relief is granted. In making that determination, all of the favorable or exculpatory evidence presented during all collateral proceedings that would be admissible at a new proceeding (a retrial or a resentencing) must be considered cumulatively with the newly discovered evidence. When all of the evidence that would be admissible if 3.851 relief issues in Mr. Mungin's case is considered, it is clear that at least one juror would not vote in favor of a death sentence and Mr. Mungin would receive a less severe sentence.

3. Mr. Mungin's death sentence is unreliable, in violation of the Eighth Amendment to the United States Constitution.

ARGUMENT AND CITATION OF AUTHORITY

I. MR. MUNGIN'S RIGHTS TO DUE PROCESS AND NOTICE REQUIRED JUDGE MCCALLUM TO DISCLOSE THAT SHE HAD BEEN DESIGNATED TO TEMPORARILY PRESIDE OVER MR. MUNGIN'S CASE, THUS DEPRIVING HIM OF A REASONABLE OPPORTUNITY TO OBJECT TO HER APPOINTMENT, SEEK HER DISQUALIFICATION, OR OTHERWISE ESTABLISH HER BIAS AND PREJUDICE. JUDGE MCCALLUM ERRED IN DENYING MR. MUNGIN'S MOTION FOR REHEARING.

A. Standard of Review.

This appeal arises from the summary denial of a successive motion to vacate judgment of conviction and sentence pursuant to Fla. R. Crim. P. 3.851. A summary denial of a 3.851 motion is subject to *de novo* review on appeal. *See Pardo v. State*, 108 So.3d 558, 561 (Fla. 2012); *Staples v. State*, 202 So.3d 28, 32 (Fla. 2016).

B. Chronology of Judicial Assignments in Mr. Mungin's Case.

Mr. Mungin was indicted in Duval County in 1992, and his trial, prosecuted by the Office of the State Attorney for the Fourth Judicial Circuit, was presided over by Judge John D. Southwood. Until 2017, all of the collateral proceedings in this case, subsequent to the direct appeal decision by this Court in 1995, were handled by the Office of the State Attorney for the Fourth Judicial Circuit and presided over by Judge Southwood.

On January 12, 2017, Mr. Mungin filed a successive Rule 3.851 motion, the denial of which is the subject of this appeal (4PCR-1-70). Given the mandatory nature of the relevant rules, Mr. Mungin anticipated that the next stage in the proceeding would be the filing of a response by the State, *see* Fla. R. Crim. P. 3.851 (f)(3)(B),[4] followed by an order setting a case management hearing. *See* Fla. R. Crim. P. 3.851 (f)(5)(B).[5]

But the rules were not followed. Instead, on March 3, 2017, Mr. Mungin's counsel received in the mail an order denying his Rule 3.851 motion by a judge with no prior involvement in his case; at no time was Mr. Mungin notified of the change of judicial assignment to Judge McCallum. In other words, it was not revealed until March 3, 2017, that Judge McCallum was presiding over Mr. Mungin's case.

C. Mr. Mungin Seeks Rehearing and Alleges Bias Warranting Judge McCallum's Disqualification.

On March 15, 2017, Mr. Mungin's counsel filed a timely motion for rehearing of Judge McCallum's order, in which he objected to the denial of his motion without a case management hearing by a judge who, unbeknownst to Mr. Mungin or his counsel, had been assigned to his case at some previous time:

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[4] This rule provides, in relevant part, that the state "shall" file its response to a successive Rule 3.851 motion within twenty days of its filing.

[5] This rule provides, in relevant part, that the court "shall hold a case management conference" within thirty days after the state files its response.

> Mr. Mungin seeks rehearing of Judge McCallum's Order because her assignment, without notice to Mr. Mungin, violated due process. In the short time that has passed since counsel's receipt of the Court's Order on March 3, 2017, counsel has learned that Judge McCallum was employed by the Duval County State Attorney's Office from 1986 until her appointment as a county judge in 1994. During her tenure with the State Attorney's Office, Judge McCallum handled capital prosecutions and was part of the team of capital attorneys. In at least one case during that time, she represented the State at a capital trial and penalty phase that resulted in a death sentence. Thomas Moore, the defendant in that case, is currently still on death row.
>
> Mr. Mungin was indicted in Duval County in 1992, and his trial, prosecuted by the Duval County State Attorney's Office, was conducted in 1993. Throughout this time period Judge McCallum was employed by the State Attorney's Office, handling capital prosecutions, and working with the attorneys who prosecuted Mr. Mungin. As part of the capital team during her tenure with the State Attorney's Office, each capital prosecutor including Judge McCallum had input in the decision making in other cases. Unfortunately, Mr. Mungin was unaware of Judge McCallum's assignment to Mr. Mungin's case until March 3, 2017. Judge McCallum should have disqualified herself from Mr. Mungin's case or, at a minimum, alerted the parties to her assignment.

(4PCR-91-92).

The rehearing motion went on to allege bias on Judge McCallum's behalf because a finding that Mr. Mungin was entitled to relief would necessarily mean that relief would also have to be afforded in the capital cases which Judge McCallum, as a prosecutor, handled (4PCR-93). Further, he alleged that "Judge McCallum's ruling on Mr. Mungin's motion would impact the death sentences she

was successful in obtaining and which are still intact and have yet to be carried out" (*Id.*).

The State responded to the rehearing motion and argued, as to the issue regarding Judge McCallum, that Mr. Mungin's allegations "lack[] merit" (4PCR-98). The State contended that Mr. Mungin's motion failed to assert that "the successor judge had a role in his case or had personal involvement or knowledge of his case during her time as a prosecutor" and purportedly lacked an "allegation that the results of these collateral proceedings were rendered unfair" (*Id.*).

The court ultimately denied Mr. Mungin's motion for rehearing, addressing his bias allegations as follows:

> Finally, Defendant avers his due process rights were violated when the instant proceedings were reassigned to a judge who was a former prosecutor at the time Defendant was tried and convicted. Defendant makes speculative, cursory allegations of bias, but fails to allege any specific instances of prejudice or bias of this Court. Moreover, Defendant has not shown an objectively reasonable fear he did not receive a fair ruling. Thus, this claim is legally sufficient.

(4PCR-101).

D. Mr. Mungin's Rights to Due Process and Notice Were Violated and a New Proceeding is Warranted.

In his motion for rehearing, Mr. Mungin relied on the recent decision in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). There, the Supreme Court wrote, in unmistakably clear terms, that "an unconstitutional *potential for bias* exists when the same person serves as both accuser and adjudicator in a case." *Id.*

at 1905 (emphasis added) (citing *In re Murchison*, 349 U.S. 133, 136-37 (1955)). The Supreme Court classified this as an "objective risk of bias" that was "reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'" *Id.* The Supreme Court concluded that the Due Process Clause was implicated and required disqualification of a judge who was a prosecutor where his decision making as a judge may be influenced by an inadvertent motion to validate or preserve a prosecutorial result previously obtained:

> Even if decades intervene before the former prosecutor revisits the matter as a jurist, *the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.* The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

Williams, 136 S. Ct. at 1907 (emphasis added). Judge McCallum did not address Mr. Mungin's reliance on *Williams v. Pennsylvania*.

Where, as here, the judge was previously a prosecutor and her work as a prosecutor may be invalidated by a ruling in the defendant's favor, the defendant's due process rights are implicated. *Williams v. Pennsylvania*. This is a recognition that an individual in Mr. Mungin's shoes would have a reasonable fear that the

presiding judge has an interest in the outcome of the proceedings that is adverse to him. Mr. Mungin is not in position to know with any certainty what role Judge McCallum, as a member of the capital team in the Duval County State Attorney's Office, had in his trial or collateral proceedings between 1986 and 1994. But, he understands that the team members were involved in each other's cases. That knowledge gives rise to an objectively reasonable fear. *See Cave v. State*, 660 So. 2d 705 (Fla. 1995) (recusal required because the judge had worked in State Attorney's Office at the time of the defendant's original capital trial).

Moreover, in denying Mr. Mungin's rehearing motion, Judge McCallum overlooked the gravamen of the due process problem that occurred: no notice was given to Mr. Mungin that the case had been reassigned to Judge McCallum before she denied his Rule 3.851 motion. Mr. Mungin is entitled to a full and fair postconviction proceeding. *See Holland v. State*, 503 So.2d 1250 (Fla. 1987); *Easter v. Endell*, 37 F.3d 1342 (8th Cir. 1994). Certainly, due process demands not only the presence of an impartial tribunal but notice to the defendant as to the identity of the judge presiding over his case. *Huff v. State*, 622 So.2d 982 (Fla. 1993). It is inconsistent with basic notions of fairness and due process to hide the identity of the judge from a litigant, much less a litigant in a capital postconviction case.

Mr. Mungin does know that because of the issues he raised in his 3.851 motion and the posture of his case and the posture of the *Moore* case (referred to in his motion for rehearing), Judge McCallum's ruling on his 3.851 motion would either insulate or threaten the death sentence that Judge McCallum had obtained in the *Moore* case. Accordingly under *Williams v. Pennsylvania*, Judge McCallum was required to grant Mr. Mungin's motion for rehearing and disqualify herself from the proceeding. Mr. Mungin's rights under the Due Process Clause demand no less. The matter must be reversed and remanded for compliance with basic bedrock due process.

II IF RELIEF HAD ISSUED ON MR. MUNGIN'S NEWLY DISCOVERED EVIDENCE CLAIMS THAT THIS COURT HEARD IN 2011, IT IS PROBABLE THAT HE WOULD HAVE RECEIVED A LESS SEVERE SENTENCE BECAUSE *MOSLEY V. STATE* WOULD BE CONTROLLING THE OUTCOME. IT IS EXTREMELY UNLIKELY THAT A JURY WOULD UNANIMOUSLY VOTE IN FAVOR OF A DEATH RECOMMENDATION. ACCORDINGLY UNDER *MOSLEY*, 3.851 RELIEF SHOULD NOW BE AVAILABLE.

A. Introduction.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court held that in any capital sentencing proceedings conducted in Florida after June 24, 2002, the jury had to return a unanimous death recommendation before death could be imposed as a sentence. This ruling requires revisiting Mr. Mungin's newly discovered evidence claims this Court previously rejected. *See Mungin v. State*, 79 So.3d 726 (Fla. 2011). Mr. Mungin also previously raised violations of *Brady v. Maryland,*

373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). *Id.; Mungin v. State,* 141 So.3d 138 (Fla. 2013).[6]

Under both "fundamental fairness" and "manifest injustice," revisiting an erroneously decided issue is warranted. The concept of "fundamental fairness" was the basis for collateral relief in *James v. State*, 615 So. 2d 668 (Fla. 1993), when new case law established that an issue raised by Davidson James had been erroneously decided by this Court. Because James had properly raised the claim and had been wrongly denied relief as later United States Supreme Court precedent established, his circumstances constituted a specific demonstration of fundamental unfairness which entitled him to collateral relief.

"Manifest injustice" is an exception to the law of the case doctrine. In *State v. Owen*, 696 So. 2d 715, 720 (Fla. 1997), this Court explained:

> This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case.

The manifest injustice exception to the law of the case doctrine arises from this Court's inherent equitable power to reconsider and correct a prior erroneous ruling. *See Thompson v. State*, 208 So. 3d 49, 50 (Fla. 2016) ("to fail to give Thompson

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[6] Mr. Mungin notes that he has been litigating another successive Rule 3.851 motion in the circuit court. That motion also raised new violations of *Brady* and *Giglio*, as well as newly discovered evidence. That motion was denied after an evidentiary hearing and a notice of appeal was filed in the Duval County Circuit Court. The notice has yet to be transmitted to this Court. Mr. Mungin submits that the evidence adduced in the pending litigation must also be considered with the evidence discussed in this argument.

the benefit of *Hall*, which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine.").

Mr. Mungin presented newly discovered evidence claims under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), in prior collateral proceedings. Revisiting the denial of the newly discovered evidence claims is warranted because as explained herein, the analysis of the claim was premised upon the erroneous understanding that at a new trial or penalty phase in the future the vote of six jurors in favor of a life sentence would be necessary to constitute a life recommendation. However, *Mosley v. State* has now established that at a penalty phase conducted post-2002, a life sentence is mandated if just one juror votes in favor of a life recommendation. Thus under either "fundamental fairness" or "manifest injustice," Mr. Mungin's newly discovered evidence claims must be revisited so the correct legal analysis can be conducted.

B. The Applicable Analysis of Newly Discovered Evidence Claims.

In prior Rule 3.851 motions, Mr. Mungin presented newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (Fla. 1991). Under the *Jones* standard, Mr. Mungin would be entitled to relief if he would probably receive a less severe sentence at a retrial or new penalty phase. Unlike the prejudice analyses of claims under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington,* 466 U.S. 668 (1984) which look to the effect of the evidence in

question on the outcome at the trial or the penalty phase that occurred in the past, the second prong of a newly discovered evidence claim looks forward to what will more likely than not occur at a new trial or resentencing. In *Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013), this Court explained that the second prong of the newly discovered evidence "standard focuses on the likely result *that would occur during a new trial* with all admissible evidence at the new trial being relevant to that analysis." (emphasis added). This forward looking aspect of the analysis was apparent in this Court's decision to grant a new trial in *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014). There, this Court repeatedly referenced the analysis as to what would happen at a retrial:

> In light of the evidence presented at trial, and considering the cumulative effect of all evidence that has been developed through Hildwin's postconviction proceedings, we conclude that the totality of the evidence is of "such nature that it would probably produce an acquittal on retrial" because the newly discovered DNA evidence "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability."

Hildwin, 141 So. 3d at 1181 (quoting *Jones v. State*, 709 So. 2d 512, 521, 526 (Fla. 1998).

When a newly discovered evidence claim seeks to vacate a death sentence in a capital case, the question is whether it is probable that a new penalty phase would probably yield a less severe sentence, *i.e.* a life sentence. *Johnston v. State*, 27 So. 3d 11, 18-19 (Fla. 2010). *See Bolin v. State*, 184 So. 3d 492, 498 (Fla. 2015) ("If,

as here, the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial."); *Melton v. State,* 193 So. 3d at 886 ("it is improbable that Melton would receive a life sentence"). In circumstances like those presented here when qualifying newly discovered evidence is found, the reviewing court must consider the qualifying newly discovered evidence along with all of the other favorable evidence presented in prior postconviction proceedings that would be admissible at a resentencing, and determine whether a resentencing would probably result in the imposition of a life sentence.

The issue raised by a newly discovered evidence claim is whether a new trial or a resentencing is warranted. In deciding whether a new trial or resentencing should be ordered, the reviewing court must look to whether the new trial or resentencing–if granted– would probably produce a different outcome. *Armstrong v. State,* 642 So. 2d 730, 735 ("Only when it appears that, on a new trial, the witness's testimony will change to such an extent as to render probable a different verdict will a new trial be granted."). When a resentencing is sought on a newly discovered evidence claim, the court looks to see whether it is likely that the outcome of a resentencing would produce a less severe sentence, *i.e.* here, a life sentence.

The standard for measuring a newly discovered evidence claim was adopted in *Jones v. State*, 591 So. 2d at 915, when this Court receded from an earlier stricter standard:

> Upon consideration, however, we have now concluded that the *Hallman* standard is simply too strict. The standard is almost impossible to meet and runs the risk of thwarting justice in a given case. Thus, we hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed.

This Court's formulation of the standard was prompted by concerns that the older stricter standard risked thwarting justice. The *Jones* standard was designed to facilitate the interests of justice and insure that criminal proceedings produce reliable outcomes. This is in keeping with *Johnson v. Mississippi*, 486 U.S. 578, 586-87 (1988) ("A rule that regularly gives a defendant the benefit of such postconviction relief is not even arguably arbitrary or capricious. [Citations] To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily."). Under *Johnson*, relief is warranted when new evidence shows that materially inaccurate evidence was considered by the jury.

In capital cases in which a death sentence has been imposed, there is heightened need for a reliable determination to impose death as a penalty. *Johnson v. Mississippi*, 486 U.S. at 584 ("The fundamental respect for humanity underlying

the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In fact, this heightened need for reliability when a death sentence is imposed has led this Court to recognize a special category of newly discovered evidence claims.

When Mr. Mungin's newly discovered evidence claim was considered by this Court in 2011, this Court did not consider that at a post-2002 resentencing one single juror voting in favor of a life recommendation precluded the imposition of a death sentence.

C. The Admissible Evidence Shows That A Less Severe Sentence Is Likely At A Resentencing.

In *Swafford v. State*, this Court indicated the evidence to be considered when evaluating whether a different outcome was probable included "evidence that [had been] previously excluded as procedurally barred or presented in another proceeding." *Swafford*, 125 So.3d at 775-76. The "standard focuses on the likely result that would occur during a new trial with all admissible evidence at the new trial being relevant to that analysis." *Id*. (emphasis added).

When the Court reviews this case, it must be first remembered that, on direct appeal, the Court determined, *as a matter of law,* that there was insufficient evidence of premeditation presented by the State and that the trial court had erred in not granting a judgment of acquittal. *Mungin v. State,* 689 So.2d 1026, 1029

(Fla. 1995) [*Mungin I*]. However, the Court, over a dissenting opinion, upheld the conviction because it determined that there was sufficient evidence to sustain a verdict for felony murder given (1) evidence that Mr. Mungin entered the store carrying a gun, (2) that $59.05 was missing from the store, (3) that money from the cash box was gone, (4) that someone tried to open a cash register without knowing how, and (5) Mungin left the store carrying a paper bag. All of these factors rest on the assumption that it was actually Mr. Mungin who entered the store, took the money, and left the store carrying a paper bag. That assumption has been substantially undermined since the 1995 direct appeal opinion, and the current litigation pushes this case into the realm of reasonable doubt once and for all.

As presented in prior proceedings, the State's case for guilt was thin at best, relying substantially the testimony of Ronald Kirkland, who was the lynchpin of the State's case against Mr. Mungin. Without a confession or physical evidence linking Mr. Mungin to the crime scene, Kirkland's identification of Mr. Mungin at the scene was unquestionably a critical piece of evidence for the prosecution; he was the only witness to testify that he saw Mr. Mungin leave the scene of the crime with a paper bag (R671). *See Mungin I* at 1028 ("There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, identified the man as Mungin"). In prior proceedings, Mr. Mungin

presented evidence substantially undermining Kirkland's credibility—evidence that this Court must assess cumulatively along with the evidence presented in this motion when determining whether the outcome of Mr. Mungin's guilt or penalty phase was constitutionally undermined. For example, the Court has noted that the testimony of George Brown, presented at the prior evidentiary hearing, "does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting . . . " *Mungin v. State,* 141 So.3d 138, 146 (Fla. 2013) [*Mungin III*]. The Court has also noted that the jury in Mr. Mungin's case was not presented with additional evidence undermining Kirkland's credibility, such as the fact that he had been on probation at the time of trial. *Mungin v. State,* 932 So.2d 986, 998-99 (Fla. 2006) [*Mungin II*]. The jury also did not know that Kirkland had told Detective Conn that, at the time he made his identification of Mr. Mungin in the photo display, he could not swear in court that the man in the photo was the same man he saw exiting the store on the day of the murder. *Mungin II* at 999. In short, there is now substantial evidence now in this record to further undermine the credibility of an-already dubious eyewitness identification. Yet the jury was not made aware of this additional evidence wholly undermining whatever credibility Kirkland may have had. Mr. Mungin's jury also never knew that he had an alibi for the time of Ms. Wood's murder.[7] The jury never knew this because trial counsel

[7] The crime in Jacksonville for which Mr. Mungin was convicted occurred on Sunday, September 16, 1990, at 1:55 PM. According to a police report by Officer Rick Cornaire dated September 16,

failed to investigate the alibi. The Court placed the blame squarely on trial counsel Cofer, who it found "was confused about the details of Mungin's alibi defense." *Mungin II* at 1000.

The Court, in 2011, also rejected a newly discovered evidence claim regarding the testimony of George Brown, whose testimony, the Court found, "completely contradicts Kirkland on a material detail: whether Kirkland could have seen Mungin leaving the convenience store right after the murder." *Mungin*, 79 So.3d at 737. Despite remanding the Brown-related claim for an evidentiary

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1990, car owner Sharon Gannon saw her car parked in front of her house (610 Carlton Street) on Saturday, September 15, 1990, at 8:00 PM. On Sunday, September 16, 1990, at 1:00, she observed that her car was gone. She mentioned someone named Lynn Huff as the person who probably had stolen it. In other words, according to this police report, the car was stolen between Saturday, September 15, 1990, at 8:00 PM, and Sunday, September 16 1990, at 1:00. According to Detective Gilbreath's homicide report at page 12, Debron Sibley stated that he had taken Mr. Mungin to Jacksonville on September 15, 1990, at approximately 6:30 PM and took him back to Kingsland, Georgia, at approximately 9:00 PM. This establishes that Mr. Mungin could not have stolen the car on Saturday, September 15, 1990, as set forth in Officer Cornaire's report.

Additional information regarding the events taking place on Sunday, September 16, 1990, also not known to the jury, is relevant to the issues before the Court. Brian Washington, who testified at Mr. Mungin's first evidentiary hearing, testified that he saw Mr. Mungin on Sunday, September 16, 1990, at 10:30 AM at Mom and Pop Store in Kingsland, Georgia (E.H.T. at 190-193). Washington testified that he picked up Mr. Mungin at Angie's house to take him to Jacksonville, Florida, at 10:37 AM. They arrived on Golfair Blvd. at 11:37 AM on 27th Street. According to Philp Levy's testimony at Mr. Mungin's first evidentiary hearing (E.H.T. at 213-224), Levy saw Mr. Mungin on Sunday in the middle of September, 1990, at his aunt's house at 1104 West 27th Street between 11:30 AM and 1:00 PM. They hung out at Levy's aunt's house for a while and then went to the corner of 28th Street. Then Levy saw Mr. Mungin go into Donetta Dues's house on 28th Street. After, Mr. Mungin went to Vernon Longworth's house directly across the street. The last time Levy saw Mr. Mungin was between 4:30 PM and 5:30 PM. He was not driving a car (E.H.T. at 224). And according to Vernon Longworth's testimony at Mr. Mungin's first evidentiary hearing, he last saw Mr. Mungin on Sunday September 16, 1990, when Mr. Mungin came to his house. Mr. Mungin stayed at his house until 2:30 or 3:00 PM. Like Levy, Mr. Longworth did not see Mr. Mungin driving a car.

hearing to explore whether there were violations of *Brady* and/or *Giglio*, the Court rejected the newly discovered evidence aspect to the claim: "We deny this claim because the information provided by Brown is not of such a nature that it would probably produce an acquittal on retrial." *Id.* at 738 (emphasis in original). This conclusion must also be revisited in light of *Mosley,* particularly as to the effect of the newly discovered evidence, cumulatively with the other evidence unknown to the jury, on Mr. Mungin's sentence.

When all of this is considered cumulatively, along with the fact that even in 1992 the jury did not return a unanimous death recommendation, it is extremely likely that a less severe sentence would have resulted and/or will result at resentencing governed by the post-2002 law set forth in *Mosley.*

D. Conclusion.

When the proper newly discovered evidence analysis is conducted in light of the post-2002 law established in *Mosley v. State*, it is clear that a less severe sentence would have resulted at a post-2002 resentencing or will result at a future resentencing. Thus, it is clear that Mr. Mungin's death sentence is unreliable and stands in violation of the Eighth Amendment. Under "fundamental fairness" and/or under the "manifest injustice" exception to the law of the case doctrine, Rule 3.851 relief must issue.

III MR. MUNGIN'S DEATH SENTENCE IS RIDDLED WITH UNRELIABILITY AND STANDS IN VIOLATION OF THE EIGHTH AMENDMENT DEMAND FOR HEIGHTENED RELIABILITY IN CASES IN WHICH A DEATH SENTENCE IS IMPOSED.

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the Supreme Court discussed the Eighth Amendment's requirement that death sentences be reliable and free from arbitrary factors:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special " '*need for reliability in the determination that death is the appropriate punishment'" in any capital case. See Gardner v. Florida*, 430 U.S. 349, 363–364, 97 S.Ct. 1197, 1207–1208, 51 L.Ed.2d 393 (1977) (WHITE, J., concurring in judgment)(quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991–92, 49 L.Ed.2d 944 (1976)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 884–885, 887, n. 24, 103 S.Ct. 2733, 2747, 2748, n. 24, 77 L.Ed.2d 235 (1983).

Johnson, 486 U.S. 584-85 (emphasis added).

Mr. Mungin's case is filled with indicia of unreliability. In Mosley, this Court wrote:

> In this case, where the rule announced is of such fundamental importance, the interests of fairness and "cur [ing] individual injustice" compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990).

Mosley, 209 So. 3d at 1282. The importance of the heightened reliability demanded by the Eighth Amendment was recognized in *Mosley* to be of fundamental importance. Heightened reliability in capital cases is a core value of the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972).

The circumstances of Mr. Mungin's case and the layer upon layer of error establish the unreliability of the death sentence imposed over a 7-5 death recommendation. Materially inaccurate information was clearly before the jury and part of the State's case for a death sentence in violation of *Johnson v. Mississippi*. For Florida's death penalty to remain constitutional, this Court must work to insure that death sentences are reliable. This Court's duty to insure death sentences are reliable does not end when the direct appeal is over. It does not end when the initial round of collateral litigation concludes. Standards of decency evolve. As science marches forward and better tools emerge for insuring reliability, the evolving standards of decency must keep up. It cannot be acceptable to say if it was reliable enough for 1992, it does not matter that we can see now that it is not in fact reliable. It is offensive to the Eighth Amendment to ignore the stain of unreliability simply because a case is old.

Mr. Mungin's unreliable death sentence stands in violation of the Eighth Amendment. This Court must exercise its inherent equitable powers and vacate the death sentence.

CONCLUSION

In light of the foregoing arguments, this Court must vacate Mr. Mungin's death sentence and remand for a new penalty phase. In the alternative, the Court should reverse and remand this case for reconsideration before an impartial tribunal.

Respectfully submitted,

/s/ Todd G. Scher

TODD G. SCHER
Florida Bar No. 0899641
Law Office of Todd G. Scher, P.L.
1722 Sheridan Street #346
Hollywood, FL 33020
Tel: (754) 263-2349
Fax: (754) 263-4147
tscher@msn.com
Attorney for Petitioner

I HEREBY CERTIFY that a true copy of the foregoing pleading was filed on this Court's electronic filing portal, which will serve all counsel of record in this matter, on this 26th day of April, 2018.

/s/ Todd G. Scher
TODD G. SCHER

6**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Todd G. Scher
TODD G. SCHER