No. _____

IN THE

Supreme Court of the United States

ARTHUR JAMES MARTIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether trial counsel's failure to investigate and present evidence that significantly undermines the State's case is deficient performance that results in prejudice?

2. Whether a state court is required to conduct a cumulative error analysis of violations of *Brady*, *Giglio*, and/or *Strickland*?

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Petitioner, **ARTHUR JAMES MARTIN**, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee below. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the judgment and decision of the Florida Supreme Court. *Martin v. State*, Nos. SC18-214 & SC18-1696, 2020 WL 238546 (Fla. Jan. 16, 2020).

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at 2020 WL 238546 (Fla. Jan. 16, 2020), and is attached to this petition as Exhibit 1. (App. 1). Petitioner's Motion for rehearing was denied on February 26, 2020, and is attached to this petition as Exhibit 2. (App. 62).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying relief on January 16, 2020, and denied rehearing on February 26, 2020.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

PROCEDURAL HISTORY[1]

Petitioner was indicted for first-degree murder on January 7, 2010. (R. 187-89). His trial began on March 26, 2012. (T. 1-827). The jury found him guilty as charged on March 28, 2012. (R. 740-41). Petitioner's penalty phase was thereafter held on April 2, 2012. (T. 658-827). The jury recommended death by a vote of 9 to 3 the same day. (R. 757). On August 3, 2012, the trial court sentenced Petitioner to death. (R. 839-63; 1268-74).

Petitioner appealed his conviction and sentence on direct appeal to the Florida Supreme Court. The following issues were raised on direct appeal: (1) the trial court erred in making improper findings of fact and giving insufficient consideration in mitigation to Petitioner's retarded intellectual functioning; (2) the trial court erred in failing to consider, find, and weigh as a mitigating circumstance that Petitioner had a history of drug and alcohol abuse; (3) the trial court erred in finding the aggravating circumstances that the homicide was committed in a cold, calculated, and premeditated manner and was especially heinous, atrocious, or cruel; and (4) the death penalty is unconstitutionally imposed because Florida's sentencing procedures are unconstitutional under the Sixth Amendment pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002).

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[1] The abbreviation "T." will be used to refer to Petitioner's trial, and "R." will be used to refer to the record on appeal as compiled for Petitioner's direct appeal *Martin v. State*, 151 So. 3d 1184 (Fla. 2014). The abbreviation "PCR." will be used to refer to Volume 1 Corrected (Unredacted) postconviction record on appeal as compiled for Petitioner's state postconviction proceeding in *Martin v. State*, Nos. SC18-214 & SC18-1696, 2020 WL 238546 (Fla. Jan. 16, 2020).

As to Issue 1, the Florida Supreme Court found that the court did not abuse its discretion in assigning some weight to defendant's low cognitive functioning. As to Issue 2, the court held that because trial counsel failed to propose Petitioner's history of drug and alcohol abuse as a nonstatutory mitigating circumstance, he was not entitled to relief. As to Issue 3, the court held that the heinous, atrocious, and cruel aggravator, as well as the cold, calculated, and premeditated aggravator, were supported by competent substantial evidence. Finally, as to Issue 4, the court concluded that Petitioner's *Ring* claim was without merit and declined to reconsider *Bottoson* and *King*. There was no petition for writ of certiorari to this Court filed following Petitioner's direct appeal.

On February 18, 2016, Petitioner filed a motion for postconviction relief under Fla. R. Crim. P. 3.851. (PCR. 249-528). The motion was amended three times prior to the evidentiary hearing: (1) March 15, 2016 (PCR. 557-809); (2) March 31, 2016 (PCR. 1066-1318); and (3) September 30, 2016 (PCR. 1484-1737). The court granted Petitioner a new penalty phase pursuant to *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

An evidentiary hearing was held on Petitioner's guilt phase claims on August 23 and 24, 2017, and November 9, 2017. (PCR. 3418-3758). On January 8, 2018, the court denied relief on all guilt-phase claims. (PCR. 3138-3245).

Petitioner appealed the lower court's ruling to the Florida Supreme Court. Simultaneously, Petitioner filed a state court petition for writ of habeas corpus. The Florida Supreme Court affirmed the denial of Petitioner's postconviction motion.

Martin v. State, Nos. SC18-214 & SC18-1696, 2020 WL 238546 (Fla. Jan. 16, 2020). The court denied rehearing on February 26, 2020.

While Petitioner's motion for rehearing was pending, the Florida Supreme Court decided *Poole v. State*, No. SC18-245, 2020 WL 3116597 (Fla. Jan. 23, 2020), "reced[ing] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id*. at *15.

On March 5, 2020, the State filed a motion in the Florida Supreme Court for rehearing/clarification or for remand for reconsideration in light of *Poole*. Petitioner filed a motion to strike this motion, as improper, untimely, and procedurally barred. On April 1, 2020, the Florida Supreme Court issued an order staying Petitioner's proceedings in both the circuit court and the Florida Supreme Court pending disposition of *State v. Okafor*, No. SC20-323 and *State v. Jackson*, No. SC20-257. [2]

[2] The majority in *State v. Poole* was comprised of the dissenters in *Hurst v. State* (Chief Justice Canady and Justice Polston) and the two new Justices (Justice Lawson and Justice Muniz). After *Poole* was decided, prosecutors across the state of Florida began filing motions, like the one filed in Petitioner's case, to reinstate death sentences vacated under *Hurst v. State. Poole* was just one of a number of cases in which Justice Canady's court has turned its back on Florida Supreme Court precedent. *See Phillips v. State*, 2020 WL 2563476 (Fla. May 21, 2020) (The Florida Supreme Court receded from *Walls v. State*, 213 So. 3d 340 (Fla. 2016), which held that *Hall v. Florida* applied retroactively); *Bush v. State*, 2020 WL 2479140 (Fla. May 14, 2020) (The Florida Supreme Court abrogated an established heightened standard of review governing circumstantial evidence cases); and *Pedroza v. State*, 291 So. 3d 541 (Fla. 2020) (The Florida Supreme Court reversed its prior precedent in *Johnson v. State*, 215 So. 3d 1237 (Fla. 2017), that held juveniles could not be sentenced to terms longer than 20 years in prison without an opportunity for release). In *Okafor and Jackson*, the Florida Supreme Court stands poised to make yet another radical decision that could deprive Petitioner of his penalty phase relief.

FACTS RELEVANT TO QUESTIONS PRESENTED

I. THE TRIAL

Petitioner's capital trial lasted less than three days. There was no physical evidence linking Petitioner to the crime. The entire case rested on the credibility of eyewitness testimony. Petitioner's jury selection began the morning of March 26, 2012, and concluded just a few hours later. Opening statements were given, and two witnesses were called before the court adjourned for the day. His trial resumed the following morning at 9:00 am, and was concluded at approximately 2:30 p.m. Petitioner did not take the stand and defense counsel called no witnesses. The next morning, the case resumed at 8:15 a.m., whereby counsel for the State and the defense gave closing arguments. The jury began deliberations at 11:27 a.m. and rendered its verdict at 12:45 p.m. The deliberation time—one hour and eighteen minutes—included a question by the jury concerning possible penalties and the time the jurors spent eating lunch. It took the jurors roughly an hour to find Petitioner guilty of premeditated first-degree murder.

A. Opening Statements

During opening statements, the prosecutor told the jury that Petitioner and his co-defendant, Franklin Batie, drove to the Weber 5B Apartments in Jacksonville. (T. 259). Upon their arrival at the apartments, Petitioner got out of the car, and Batie remained in the driver's seat. (T. 259). As Batie was sitting in his car, he saw an SUV pull up and park just past him on the right-hand side of his car. He thought he recognized the driver. (T. 259). Batie then told Petitioner about his run-in with the

driver, Javon Daniels. (T. 260). According to the State, Petitioner grabbed Batie's .45-caliber semiautomatic pistol with an extended clip from the car, walked several steps over to the SUV where Daniels was still sitting in the driver's seat, and started shooting. (T. 260). When the shooting started, Daniels attempted to climb out through the passenger side of his SUV. (T. 260). The State asserted that Petitioner walked around the front of the SUV and to the passenger side of the SUV, continuing to fire. (T. 260). Petitioner then got back into the car with Batie and drove away. (T. 260-61). Moments later, Daniels died in his vehicle as a result of multiple gunshot wounds. (T. 261).

Defense counsel had no clear trial strategy, as evidenced by his opening statement. Counsel told jurors that it was their job "to decide what really happened out there, the actual absolute truth." (T. 262). Then asserted, "[t]his is a case about identification . . . we want to make sure we have identified the right person who did the shooting out there that day." (T. 262). Defense counsel told the jurors it was Batie who had a motive to kill Daniels, and that the reason Batie recognized Daniels was that Batie and another friend had been shot a few days earlier by Daniels. (T. 263). Counsel concluded his opening remarks by telling jurors "[w]e're just looking for the truth as to what happened out there." (T. 264).

B. The State's Case

The State called Allison Crumley as its first witness. She was at the Weber 5B Apartments on that day visiting her uncle. (T. 267). She was inside the house and heard gunshots. (T. 268). She heard about eight gunshots before looking outside

through her living room window. (T. 268). Crumley testified that she saw a black male shooting at a car. (T. 269). She described him as "tallish" and "kind of heavyset, big" with a big belly and "low cut" haircut. (T. 269-70). She stated that the shooter was standing a couple feet away from the vehicle he was shooting into. (T. 271). She did not observe the entire incident because her uncle told her to get down. (T. 271). She was given a lineup by police and stated, "I don't know if it was him but it looked something like the guy that I seen (sic)." (T. 274).

Lauren Burns lived at the Weber 5B Apartments and was outside her apartment, sitting on the steps with her four kids when the shooting occurred. (T. 307). She saw that a gray SUV and a white car were involved in the shooting. (T. 308). She heard a gun cock, and then she looked up and saw the shooting. (T. 309). She testified the shooter was holding a handgun with a long clip and shooting into the SUV, from approximately ten feet away. (T. 309-10). She testified that, in response to the shooting, she tried to grab her kids as fast as she could and run into the house. (T. 311). When shown a photospread by law enforcement officers, Burns identified Petitioner as the shooter. (T. 310-11).

Sebastian Lucas, Burns' brother-in-law, also testified at trial. (T. 328). He was sitting on the steps with Burns and the kids when the shooting occurred. (T. 329). He described a white Ford Crown Vic and a white SUV as being involved in the shooting. (T. 329). The SUV was parked in front of the last or third apartment building. (T. 330). He described the shooter as being a medium short, heavyset black male, with a low haircut and beard. (T. 330). Lucas testified that he saw the shooter walk from the

Crown Vic to the SUV and open fire using a black handgun with an extended clip. (T. 331). The shooter went to the driver's side first. (T. 331). After the shooter fired through the driver's side, Daniels tried to escape out through the passenger side, but the shooter "walked around and opened fire and shot him back down in the car." (T. 331).

During cross-examination, Lucas testified that he observed three people in the SUV. (T. 335). The front seat passenger got out of the car and there was one other occupant in the back seat on the passenger side. (T. 335). Prior to the shooting, he saw the front seat passenger walking around and talking to people. (T. 336). The SUV was parked at the second entrance to the apartments, and the Ford Crown Vic was parked in front of the first entrance. (T. 337). After the shooting started, the back seat occupant, who was never identified, jumped out on the passenger side. (T. 336). Lucas testified that the shooter had a low haircut and a full beard, that he had never seen the shooter in that area before, and that "there's no other heavyset low cut dude in that area." (T. 341-42).

Ronnie McCrimager testified that he was at home across the street from the Weber 5B Apartments when the shooting occurred. (T. 346). He heard the gunshots and looked out his window. (T. 347). The shooter had his back to him, but McCrimager could see the shooter firing into the white SUV. (T. 347). The shooter was facing the driver's side of the SUV. (T. 348). McCrimager described the shooter as around "five eight, five seven" and "sort of round-shaped, heavyset." (T. 348). He testified that he could not see the shooter's face. (T. 348). After the shooting, McCrimager got into the

SUV where Daniels had been shot and tried to help. (T. 349). McCrimager testified that his vision was not that good and that he could only see out of one eye. (T. 349-50). During cross-examination, he stated that as the shooting began, he got down on the ground inside his house. (T. 353). When the gunfire stopped, he got back up and the shooter was gone. (T. 353). He also testified that the officer who conducted the photospread insisted that he knew the shooter and continued hassling him about it. (T. 354).

Franklin Batie, Petitioner's co-defendant, pleaded guilty to second-degree murder and testified against Petitioner at trial. (T. 355; 358). Batie testified that he met Petitioner through Petitioner's nephew, with whom Batie had previously attended college. (T. 356). Batie admitted that the .45 ACP Masterpiece firearm and the white Ford Crown Vic used in relation to this case were his. (T. 357). Batie testified that, a few days before this incident, he and a friend of his had been shot. (T. 358-359). He heard a rumor describing the person who shot him as Daniels, though he did not know the individual's name. (T. 359).

Batie testified that, on October 28, 2009, he drove his white Crown Victoria to Petitioner's house. (T. 359-60). Batie had his gun in the back seat. (T. 364). Petitioner asked Batie to take him over to the Weber 5B Apartments to see Cory Davis. Batie parked on a grassy area near the road. (T. 362). Petitioner got out of the car and began talking to Davis. (T. 362). Batie saw the SUV pull up and saw the person in the passenger seat get out. (T. 363). When the SUV initially pulled up he recognized the driver as the person who shot him. (T. 363). Batie pulled his gun out and held it in

his lap. (T. 364). Then, he threw the gun on the passenger seat. (T. 364). He told Petitioner that the driver was the person who shot him. (T. 364). Batie testified that, upon hearing this, Petitioner took Batie's gun, went to the driver's side of the SUV, and started shooting. (T. 365). Batie moved his car up beside Petitioner, while keeping an eye on the passenger who had previously gotten out of the SUV. (T. 365). When Batie got directly beside Petitioner, he told him to get in the car. (T. 366). At this point, Petitioner was still at the driver's side door. (T. 366). Batie testified that he pulled up a little bit farther but where he could still see Petitioner. (T. 366). Petitioner ran straight to Batie's car and got into the passenger side. (T. 367).

Tasheana Hart testified that she was living at the Weber 5B Apartments on the day of the shooting. (T. 392-93). She testified that she knew Petitioner by a nickname. (T. 393). When asked how long she had known him, she stated, "I don't know. A couple of years . . . [c]ouple of months." (T. 393). She testified that the SUV pulled up first and then the white car pulled up. (T. 394). She stated that she saw Petitioner shoot Daniels. (T. 394). She claimed to have spoken with Petitioner about the shooting when she saw him a few days after the shooting. (T. 395). She testified that he offered her money "not to tell." (T. 395).

C. Closing Arguments

The State began their closing by arguing: "Javon Daniels didn't do anything to deserve being turned into target practice." (T. 511). He then continued to make inflammatory remarks throughout his closing argument, such as, "even in neighborhoods like this people don't want premeditated murderers turning their

neighborhoods into shooting galleries" (T.513); and that Petitioner's presumption of innocence "has now been blown away just like he did to Javon Daniels." (T.546).

The State also used closing argument to belittle defense counsel's theories. Where trial counsel attempted to emphasize the areas of reasonable doubt, the State told jurors that defense counsel had asked them "to take a trip at warp factor nine down speculation highway." (T.591).

Defense counsel's closing argument was neither eloquent nor organized. *See Martin*, 2020 WL 238546, at *18. If counsel did have a strategy, it was certainly not apparent. Defense counsel began his closing remarks by telling jurors "what we're looking for here today is the truth." (T. 547). Defense counsel continued:

> This trial is seeking the absolute truth. It's not about relative truth or speculative truth or imaginary truth or the possibility that – of issues. We're looking for the absolute truth that fits affirmatively together of actually what happened . . . .

(T. 548).

Trial counsel attempted to attack the photo identifications made by the witnesses, but nonsensically he also vouched for the way in which they were conducted. (T. 549-50, 554). Counsel even attempted to challenge Batie's photo identification of Petitioner, despite the fact that Batie testified that he drove Petitioner over to the apartments on the day of the shooting and that he knew Petitioner. (T. 569). Ironically, after making statements about finding the truth, counsel went on to speculate wildly about whether this was a set-up (T. 564-65, 588-89).

Then, presumably in an attempt to argue lack of evidence, defense counsel argued that there was a lack of evidence because there were no fingerprints or DNA that matched Petitioner. However, this argument was less than cogent:

> [T]here were latent fingerprints on the exterior and interior of that white Ford Crown Victoria which could identify who was there more than likely. Now the car we know was picked up several days later but latent fingerprints have a way of remaining because of the oil that's on your fingers. You can't even see them. They're there and there wasn't any evidence that the car was wiped clean and maybe these fingerprints were put on later. Even though there's a small gap there isn't any information that someone may have wiped all of [Petitioner's] fingerprints off.

(T. 572-73).

Finally, defense counsel initially argued that there was no premeditation because Petitioner had no motive, but then did an about-face, seemingly conceding premeditation: "We have nothing to tell us premeditation except the State's illustration of walking around the vehicle." (T. 581-83).

II. THE POSTCONVICTION EVIDENTIARY HEARING

During his postconviction proceedings, Petitioner asserted claims based on ineffective assistance of counsel for failing to investigate and prepare a defense for trial by: (1) failing to investigate and present witnesses to support the misidentification aspect of his defense; and (2) failing to utilize the discovery from the State to effectively cross-examine eyewitnesses and challenge the credibility of their testimony. *See Strickland v. Washington*, 466 U.S. 668 (1984). Because of trial counsel's failure to investigate and prepare for trial, he did not have a cohesive defense and was ill equipped to challenge the State's case. Additionally, during these

postconviction proceedings, Petitioner asserted claims that the State withheld material evidence and presented false testimony. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1973). This material evidence would have impeached and undermined the police investigation of this case, as well as testimony presented identifying Petitioner as the shooter.

A. Trial counsel's lack of investigation into the facts of Petitioner's case and his lack of preparation for trial.

From the beginning, and by all indications, Petitioner's case was simply not a priority to his attorneys. Trial counsel's billing records reflect that he only met with Petitioner a total of seven times, or less than nine hours, from the date he was appointed until trial. (PCR. 2425-2649). He even went an entire year without visiting Petitioner at the jail. (PCR. 2425-2649). Counsel claimed that his billing records were not entirely accurate, despite having signed, under penalties of perjury, an Affidavit Verifying Attorney's Fees, Costs or Related Expenses, certifying that his attorney's fees for which he billed "true, accurate, reasonable, and necessary". (PCR. 2425-2649).

Although four investigators were consecutively appointed by the trial court to assist with the preparation of Petitioner's case, none of them conducted an actual investigation into the facts of the case. This was further evidence of trial counsel putting Petitioner's case on the proverbial "back burner". (PCR. 3567-3592). Rather, trial counsel testified that, "I don't need an investigator if I'm doing things myself unless there's something specifically that I want the investigator to do." (PCR. 3469). He further stated that he did not feel that he needed an investigator for the guilt

phase in Petitioner's case because he had enough information to do the investigation himself. (PCR. 3469).

When asked what efforts he made to investigate the case, trial counsel responded that he took depositions of witnesses and drove to the crime scene. (PCR. 3462-63). He did not take any photographs of the crime scene location. (PCR. 3463). He did not speak to any witnesses at the crime scene – neither people at the apartment complex nor people at neighboring houses. (PCR. 3463). The murder took place just before dark, yet counsel did not go to the scene at the approximate time of the murder in order to observe lighting conditions. (PCR. 3463-64). Counsel stated that he went to the crime scene in the afternoon because "it's a high crime area. I'm not going to ride around in my car out in this area. It's too dangerous, too much to ask to go out there at night." (PCR. 3464).

This failure to investigate and prepare meant that trial counsel did not have a cohesive defense to present to the jury. When trial counsel was asked about his defense at trial, he had no coherent answer. At one point, he stated that he was "trying to avoid premeditation." (PCR. 3452-55). He also stated that he looked at challenging the heinous, atrocious, and cruel aggravator as part of his defense. (PCR. 3454). He further stated, "my theme was misidentification and that came about because of our trial strategy and who I prevented in coming and putting – being called as witnesses. In other words, I eliminated – tried to eliminate premeditation. Also I raised some doubt in the testimony of Batie who was the key witness there, and so identification was a major issue." (PCR. 3456).

Trial counsel testified that his theme or strategy for the case was based upon his review of police reports and his review of the discovery from the State, including sworn statements and depositions. (PCR. 3457-58). He agreed that, as lead counsel in a capital case, one of his responsibilities is to evaluate the case. (PCR. 3458). He also agreed that another one of his responsibilities is to prepare a defense for his client. (PCR. 3459). Finally, he agreed that one has to investigate what evidence exists before evaluating possible defenses. (PCR. 3459). When asked what investigations he did to attempt to corroborate his theory of defense, trial counsel once again stated that he took depositions, drove to the crime scene, and reviewed witness statements. (PCR. 3459-63).

B. Ineffective assistance of counsel for failure to investigate and present the testimony of Willie McGowan.

Despite trial counsel's testimony that he reviewed discovery from the State as part of his investigation into the case, he failed to follow up with witnesses listed in police reports as having been witnesses to the shooting. Willie McGowan was one such witness. McGowan rode in the car with the victim to the apartment complex and witnessed the shooting. (PCR. 2258; 2266-67; 2270-71). He told police that he looked right at the shooter and could identify him again. (PCR. 2267; 2270-71). Police showed McGowan two photospreads, which both included Petitioner. (PCR. 2278). McGowan picked Petitioner out of both photospreads and stated, "this looks like the guy but it's not him." (PCR. 2278).

When asked about these statements contained in police reports, trial counsel stated: "[T]hat singular statement alone isn't going to carry this case. It wasn't

enough for me to try to get him into court…" (PCR. 2747). Trial counsel never attempted to speak to McGowan and never took his deposition. Trial counsel further claimed that he had, in fact, investigated McGowan because he reviewed his statement in the police reports. (PCR. 3493-94). Inexplicably, trial counsel claimed that McGowan's testimony would have been detrimental if he appeared at trial because McGowan told police that he looked the shooter right in the face. (PCR. 3494).

C. Ineffective assistance of counsel for failure to effectively cross-examine Sebastian Lucas.

Trial counsel agreed that witness credibility was important in this case. (PCR. 3452). Trial counsel further agreed that it would be important to know if a witness gave two inconsistent statements. (PCR. 3442). Yet, counsel had to look no further than the pretrial discovery to find inconsistent statements from witnesses. (PCR. 2232-2287).

Sebastian Lucas was an eyewitness to the shooting who initially told police that he did not see anything. (PCR. 2274). However, at trial, Lucas gave a detailed account of what he witnessed and identified Petitioner as the shooter.

At the postconviction hearing, evidence was presented that the day after the shooting occurred, Lucas told police that he "heard the shooting, but he did not see anything that would assist with the investigation." (PCR. 2274). This information was contained in police reports turned over to trial counsel in pretrial discovery. Trial counsel failed to cross-examine Lucas on this drastic change in his testimony.

Six days after the shooting, Lucas told law enforcement that he had information regarding the shooting and provided a sworn statement to prosecutors.

(PCR. 2278). Subsequently, during his deposition, Lucas was asked whether he had spoken to anyone else or obtained any additional information about the shooting from the date of the incident until he gave a statement to prosecutors. (PCR. 2932-33). He explained that another witness who did not testify at trial, Filette Kirkland, spoke with Lauren Burns about the shooting. (PCR. 2932-33). Burns then relayed this information to him. (PCR. 2932-33). Trial counsel took this deposition and had this information, but failed to impeach Lucas at trial about having gained information about the shooting from a secondhand source. Trial counsel never cross-examined Lucas about whether he was testifying to events that he actually witnessed firsthand or inadmissible hearsay that he heard from other sources.

In attempting to justify his failure to cross-examine Lucas about his drastic change in testimony, trial counsel claimed that his strategy was to minimize testimony that identified Petitioner as the shooter. (PCR. 3197).

D. *Brady*/*Giglio* violations involving Tasheana Hart.

At the evidentiary hearing, Tasheana Hart recanted her trial testimony where she identified Petitioner as the shooter and claimed that she saw him after the shooting where he offered her money to keep quiet.

She admitted that she was interviewed by police but did not see the shooter. (PCR. 3672). She testified that she was facing the passenger side of the victim's car, and the shooter was on the driver's side of the victim's car. (PCR. 3673). She stated that the shooter never came around to the passenger side of the vehicle where she could see him. (PCR. 3673).

Hart testified that Detective Nelson continually harassed her and told her what she needed to say about the shooting: (1) that Petitioner was the shooter; and (2) that he offered to pay her money. (PCR. 3673-74). At the evidentiary hearing, she admitted that her testimony at trial was not true. She did not see the shooter and Petitioner never offered her anything to keep quiet. (PCR. 3674).

When Hart went to the police annex prior to Petitioner's trial, she told Detective Nelson that she didn't "want to do it anymore and he was like, well, you have to because you're sworn in pretty much, just basically like bullying me, you're going to tell, you're going to tell, you're going to testify." (PCR. 3675).

Hart testified that she would frequently see Detective Nelson around her neighborhood in his Impala. (PCR. 3676). Detective Nelson would show her pictures of Petitioner and tell her that she had "better pick him." (PCR. 3676). Hart testified that she felt pressured by Detective Nelson to testify against Petitioner. (PCR. 3676). Detective Nelson threatened her with jail, saying she would go to jail if she didn't testify. (PCR. 3676-77). "Being a minor that's scary. That's scary and you don't want to go to jail." (PCR. 3677). Hart was a juvenile – just 15 or 16 years old – when the offense occurred. (PCR. 3674).

Hart also testified that she told a man from the State Attorney's Office that she did not want to go forward with her testimony. (PCR. 3677). She described him as a tall, white man with black hair and wearing a blue suit. (PCR. 3677). "I don't know whether he's a prosecutor but he was part of the case." (PCR. 3677). She came into contact with him at the Omni Hotel when the State put her up there before the

trial and one other time at the police annex building. (PCR. 3677-78). She "told him most of the things that was said I didn't see or they didn't occur and he kind of like brushed over his shoulder. I still had to testify so he brushed it over his shoulder obviously." (PCR. 3678). Hart was adamant that any information she previously testified to about seeing the shooter, the shooter being Petitioner, or Petitioner offering her money to keep quiet was not true and that she was told what to say by Detective Nelson. (PCR. 3698).

FLORIDA SUPREME COURT'S RULINGS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

In response to Petitioner's ineffective assistance of counsel claim relating to counsel's failure to investigate Willie McGowan, the Florida Supreme Court concluded that trial counsel was deficient for failing to investigate Mr. McGowan further. *Martin*, 2020 WL 238546, at *6.

> When a witness to a homicide states that he looked the suspect in the eye and could identify him again, and then fails to identify the [Petitioner] from photospreads, any reasonable trial counsel who defense strategy is based upon misidentification would at least speak to that witness, even if counsel ultimately decides not to call him for strategic reasons.
>
> …
>
> [B]ecause misidentification was part of the defense them, [trial counsel] should have at least inquired into McGowan's failure to identify [Petitioner] as the shooter.

Id.

However, the court also found that Petitioner could failed to demonstrate prejudice. *Id*. The court held:

> To demonstrate prejudice in this context, [Petitioner] would first have to show that [trial counsel's] personal contact with McGowan would have uncovered additional information that could have influenced [trial counsel's] strategic decision not to call McGowan as a witness. [Petitioner] did not present any evidence suggesting that McGowan's trial testimony would have differed from his statements to police, and the trial court correctly concluded that [trial counsel's] decision to avoid calling McGowan as a witness constituted reasonable trial strategy given the information known to [him].

Id.

Accordingly, in response to Petitioner's ineffective assistance of counsel claim relating to counsel's failure to present the testimony of Willie McGowan, the court concluded that trial counsel was not deficient for ultimately failing to present McGowan as a witness. *Id*. at *16. The court found that trial counsel's decision not to present McGowan was reasonable, given that part of counsel's trial strategy was to negate premeditation in hopes of obtaining a conviction for second-degree murder. *Id*.

In response to Petitioner's ineffective assistance of counsel claim relating to counsel's failure to effectively cross-examine Sebastian Lucas, the Florida Supreme Court held that trial counsel was deficient for failing to cross-examine Lucas with respect to his initial statement to police that he did not possess any information relevant to the investigation. *Id*. at *11.

> This statement did not include damaging facts or a physical description of the shooter. It simply stated that Lucas heard the shooting but did not see anything that would assist in the investigation. The change in Lucas's version of events is dramatic – from seeing nothing to providing compelling testimony of an execution-style murder. Given the lack of damaging information in Lucas's initial statement, there was no reasonable basis for [trial counsel] not to address the inconsistencies between this statement and his trial testimony.

Id. Ultimately, though, the court found that Petitioner could not demonstrate prejudice. *Id*. at *12.

II. *BRADY/GIGLIO* CLAIMS

In response to Petitioner's *Brady* and *Giglio* claims, the Florida Supreme Court held that Petitioner failed to demonstrate that the State willfully or inadvertently suppressed favorable evidence or knowingly presented false testimony with respect to Tasheana Hart. *Id*. at *20-21. In doing so, the court deferred to the circuit court's findings as to Hart's credibility. *Id*.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PREPARE FOR THE GUILT PHASE OF PETITIONER'S CAPITAL TRIAL

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. *Strickland* requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance. *Id*. at 669. In the context of ineffective assistance of counsel claims, this Court has stated:

> [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.
>
> *Id*. at 696.

Ignored by the Florida Supreme Court in its opinion is the fact that trial counsel violated Petitioner's Sixth Amendment rights by failing to investigate and execute a coherent trial strategy. Trial counsel not only failed to give the jury a clear picture of his defense, but he failed to present evidence by way of defense witnesses and cross-examination that he could have used to support his arguments to jury. Notably, he failed to investigate and present the testimony of Willie McGowan to support misidentification, which trial counsel claimed was part of his strategy. He also failed to cross-examine Sebastian Lucas as to his dramatically inconsistent statements about the shooting. This sort of haphazard representation is not what is envisioned by the Sixth Amendment. *See Williams v. Taylor*, 529 U.S. 362, 369 (2000) (counsel was found ineffective for offering testimony of a witness they had never interviewed, offering testimony that revealed defendant's previous criminal history, failing to investigate or present significant mitigation of abuse, neglect, repeated head injuries and intellectual disability).

In addressing Petitioner's claim that trial counsel was ineffective for failing to investigate and present the testimony of Willie McGowan, the court found that trial counsel was deficient for failing to investigate McGowan but not for ultimately failing to call him as a witness. No prejudice was found in either instance by the court.

Although the court noted that part of trial counsel's defense was misidentification, its opinion overlooks the fact that McGowan was a witness who could have been called at trial to support a misidentification defense. *See Martin*,

2020 WL 238546, at *6. In fact, there was significant prejudice in not calling McGowan, who definitively stated that Petitioner was not the shooter. (PCR. 2278).

The Florida Supreme Court stated, "When a witness to a homicide states that he looked the suspect in the eye and could identify him again, and then fails to identify the defendant from photospreads, any reasonable trial counsel whose defense strategy is based upon misidentification would at least speak to that witness…" *Martin*, 2020 WL 238546, at *6. Petitioner could not agree more. However, the court went on to hold that in order to demonstrate prejudice, Petitioner would first have to show that trial counsel's contact with McGowan would have uncovered additional information that could have influenced trial counsel's strategic decision not to call him as a witness. The court then stated that there was no evidence suggesting that McGowan's trial testimony would have differed from his statements to police. *Id*. That is precisely the point. McGowan told police that that he looked directly at the shooter and could identify him again. (PCR. 2267; 2270-71). When shown two different photospreads, which included Petitioner, McGowan picked Petitioner out of both photospreads and stated, "this looks like the guy but it's not him." (PCR. 2278). This surely would have supported a misidentification defense, nothing more needed to be uncovered.

The court focuses on the idea that McGowan would have testified to evidence that would have been detrimental to Petitioner and therefore, trial counsel's ultimate strategy not to call him as a witness was reasonable. *Martin*, 2020 WL 238546, at *7, *16. Specifically, the court points to McGowan's statements as to: the "execution-style

of the shooting"; the shooter asking McGowan where he could buy some marijuana; the shooter firing at McGowan as he ran towards the vehicle to help the victim. *Id.* at *7, *15-16. However, in focusing on these details, the court ignores the fact that if the defense was misidentification, then the manner of the shooting, and whether the shooter fired at McGowan or asked McGowan where to buy drugs, is wholly irrelevant.

The court gives deference to trial counsel, who stated that in addition to misidentification, another part of his strategy was to negate premeditation, and therefore, not calling McGowan as a witness was reasonable. *Id.* at *16. In doing so, the court overlooks the argument that it is illogical to argue these two defenses simultaneously – (1) that Petitioner was not the shooter; and (2) that Petitioner did not commit this murder with premeditation. The court overlooks the point that Petitioner was prejudiced simply by trial counsel attempting to argue these incongruous defenses at the same time. Moreover, there was already testimony about the nature of the shooting, so any further testimony by McGowan as to how the shooting occurred would not have been detrimental to Petitioner at trial. Furthermore, McGowan's statements that the shooter fired at him could have easily been addressed by the same argument – misidentification. Finally, trial counsel's claims that he did not call McGowan as a witness in order to avoid any mention of drugs is utterly unreasonable. Such testimony could have been addressed through a motion in limine preventing the mention of drugs. When considered in the context of a capital murder case, the mere mention of drugs is trivial, and simply cannot be

outweighed by the prejudice of not presenting a witness to support a misidentification defense. Counsel was not only deficient for failing to investigate Willie McGowan, but he was also deficient for failing to call him as a witness at trial, and Petitioner was prejudiced by this deficient performance of trial counsel.

In addressing Petitioner's claim that trial counsel was deficient for failing to effectively cross-examine Sebastian Lucas, the Florida Supreme Court concluded that trial counsel was deficient, yet found no prejudice. *Id*. at *11. In making such a finding, the court fails to consider such deficient performance in the context of a misidentification defense.

Although the court found that, "[t]he change in Lucas's version of events is dramatic – from seeing nothing to providing compelling testimony of an execution-style murder"; and "there was no reasonable basis for [trial counsel] not to address these inconsistencies", the court nonetheless held that Petitioner could not demonstrate prejudice because three other witnesses identified Petitioner as the shooter. *Id*. at *12.

This reasoning overlooks how such testimony would have affected trial counsel's misidentification defense. Despite trial counsel arguing misidentification to the jury, he failed to present any evidence supporting this defense. As argued *supra*, he failed to call a witness who would have said that Petitioner was not the shooter. Here, he failed to show that one of the witnesses, who testified at trial that Petitioner was the shooter, initially gave a dramatically different statement to police that he could not identify the shooter. This was evidence that would have supported a

misidentification defense. Trial counsel would have been able to argue that Lucas initially could not identify Petitioner as the shooter. In other words, he could have argued that there was reasonable doubt as to whether Petitioner was the shooter. This evidence of reasonable doubt regarding the identity of the shooter undermines confidence in the outcome of the guilt phase.

Furthermore, the court's finding that Petitioner could not demonstrate prejudice because three other witnesses – Batie, Burns, and Hart – identified Petitioner as the shooter overlooks the problems with the testimony of each of those witnesses. Batie, as the co-defendant, had an obvious bias and motive to testify against Petitioner. In exchange for his cooperation against Petitioner, he was allowed to plead to second-degree murder and did not face the death penalty. Burns testified that she was sitting on the steps with her children when the shooting started and quickly moved to get everyone inside her apartment. Her focus was on her children and getting them to safety. Moreover, Lucas testified in his deposition that he, Burns, and Filette Kirkland gained additional information about the incident through neighborhood gossip in the days following the shooting. Finally, Hart recanted at the postconviction evidentiary hearing and stated that her trial testimony identifying Petitioner as the shooter a lie. When taken in conjunction with Lucas's drastic change in testimony, as well as the statements by McGowan, the State's case against Petitioner is significantly undermined.

This Court should grant review in order to assess the Florida Supreme Court's assessment that there was no prejudice to Petitioner based upon trial counsel's

failure to investigate McGowan and his failure to effectively cross-examine Lucas; and the assessment that trial counsel was not deficient in failing to call McGowan as a witness at trial.

II. THIS COURT SHOULD REVIEW WHETHER A STATE COURT IS REQUIRED TO CONDUCT A CUMULATIVE ERROR ANALYSIS OF *BRADY*, *GIGLIO*, AND/OR *STRICKLAND*

In *Brady v. Maryland*, 373 U.S. at 87, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." The defendant is entitled to a new trial if he establishes that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985) (internal quotations marks omitted); *see also Kyles v. Whitley*, 514 U.S. 419, 433 (1995). A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *See Kyles*, 514 U.S. at 434, 436-37 n.10. Thus, in evaluating whether relief is warranted upon a claim that the State failed to disclose exculpatory evidence, the undisclosed or undiscovered information must be evaluated cumulatively to determine whether confidence is undermined in the outcome. In the *Brady* context, the "prejudice" evaluation of the withheld evidence must be considered "collectively, not item-by-item." *Kyles*, 514 U.S. at 436.

Moreover, the standard for determining whether the "prejudice" prong of *Strickland* has been satisfied is identical to the legal standard for determining

"materiality" under *Brady*. *See Banks v. Dretke*, 540 U.S. 668, 698-99 (2004) (holding evidence is "material" under *Brady* where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different); *Kyles*, 514 U.S. at 433-34 (holding that *Brady* materiality standard is identical to the prejudice prong of *Strickland*). As such, Petitioner contends that the prejudice inquiry for ineffective assistance of counsel claims and for *Brady/Giglio* claims must be combined so that any prejudice from deficient performance of counsel and any prejudice from failure to disclose evidence favorable to the defense must be considered cumulatively. *See Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003) (noting the Tenth Circuit's practice of aggregating all errors in cumulative analysis, even those based on diverse legal claims, including *Strickland* and *Brady*).

In the instant case, Petitioner submits that the Florida Supreme Court failed to conduct a cumulative review of Petitioner's evidence of ineffective assistance of counsel in conjunction with the State's withholding of exculpatory evidence and presentation of false testimony.[3] Had cumulative analysis of this evidence occurred, the state court would have found: (1) that counsel rendered ineffective assistance of counsel under *Strickland*; (2) that the State withheld material evidence under *Brady*; and (3) that the State presented false testimony under *Giglio*.

[3] Florida courts must conduct exactly this analysis on newly discovered evidence. See *Hildwin v. State*, 141 So. 2d 1178, 1184 (2014) citing *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013)("In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so there is a 'total picture' of the case and 'all the circumstances of the case.").

The Florida Supreme Court also incorrectly relied on the circuit court's credibility determinations as to both the ineffective assistance of counsel claims and the *Brady*/*Giglio* claims.

The circuit court deferred to trial counsel's explanations about his "strategy" for failing to investigate and present the testimony of Willie McGowan and for failing to effectively cross-examine Sebastian Lucas on his drastic change in testimony about the shooting. However, poor decisions cannot be excused simply by categorizing them as strategy. *See Sears v. Upton*, 561 U.S. 945, 953 (2010)(The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.").

Furthermore, the circuit court outright rejected Hart's testimony as not credible. *Martin*, 2020 WL 238546, at *20. In reaching that conclusion, the circuit court noted that Hart was argumentative and uncooperative during her evidentiary hearing testimony. *Id*. The circuit court also concluded that the State's witnesses were more credible and persuasive than Hart. *Id*.

These findings overlook the fact that Hart never wanted to be involved in this case. (PCR. 3698). Even at Petitioner's trial, the State commented that she was "a girl of few words," since her description of the shooting consisted of a mere three sentences. (T. 394; 522). Nearly a decade later, Hart was still reluctant to be involved in these proceedings. She avoided coming to court during the first week of the evidentiary hearing. Petitioner had to request a continuance of the proceedings in

order to get Hart to court to testify. She was subsequently brought to court by an investigator with Petitioner's defense team.

However, prior to Hart's testimony at the evidentiary hearing, the State attempted to speak with her regarding the recantation of her trial testimony. Police told her mother that Hart would be charged with perjury if she came to the hearing and testified differently than she had at trial. (PCR. 3028-32; 3594).

Hart expected to be arrested after testifying, which was exactly what happened. Her demeanor was consistent with a person who has very reluctantly been brought to court for a matter she never wanted to be involved in. Her combativeness was consistent with her situation, and her demeanor at trial even gives credence to her assertions that she felt threatened by the State.

As this Court noted in *Kyles*, 514 U.S. at 419, the issue presented by *Brady* and *Strickland* claims concerns the potential impact upon the jury at the capital defendant's trial of the information and/or evidence that the jury did not hear because the State improperly failed to disclose it or present it. It is not a question of what the judge presiding at the postconviction evidentiary hearing thought of the unpresented information or evidence. Similarly, the judge presiding at the trial cannot substitute his credibility findings and weighing of the evidence for those of the jury in order to direct a verdict for the State. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977). The Constitution protects a right to a trial by jury, and it is that right which *Brady* and *Strickland* serve to vindicate.

In addressing the cumulative view of the evidence presented by Petitioner at the postconviction hearing, the Florida Supreme Court only assessed evidence that was admitted in Petitioner's original trial that supported the State's theory.

The court addressed cumulative error only in the context of Petitioner's ineffective assistance of counsel claims, finding:

> Because the two deficiencies we identified in the performance of counsel taken together are not sufficient to establish the requisite prejudice, [Petitioner's] claim of cumulative error fails.

Martin, 2020 WL 238546, at *18.

In addressing the *Brady* and *Giglio* claims, the court found:

> [T]here was no evidence to support [Petitioner's] claim that Nelson threatened Tasheana into implicating [Petitioner], or that she informed the prosecution prior to trial that her statements were untrue and was instructed she had to testify nonetheless.

Martin, 2020 WL 238546, at *20. Essentially, it was Hart's word against the State's and the court found the State's witnesses more credible.

However, when considered cumulatively, the entirety of this evidence paints a picture of heavy-handed tactics used by police and prosecutors in order to get a conviction at all costs, combined with defense counsel that was wholly unprepared to defend Petitioner at trial. This in no way comports with Petitioner's due process rights to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The court fails to consider that at a new trial, the jury would hear that another eyewitness to the shooting was shown a photospread and said that Petitioner "looks like the guy but it's not him." (PCR. 2278). In addition, the jury would hear that Lucas

initially told police that he did not see anything, in stark contrast to his trial testimony. The jury would hear that police threatened Hart to identify Petitioner as the shooter and to testify at his trial as to that information. They would hear that Hart's testimony involving heavy-handed police tactics is, in fact, corroborated by McCrimager's testimony that police were pressuring him to pick Petitioner out of the photospread, despite his insistence that he did not see the shooter's face.

The testimony at trial identifying Petitioner as the shooter was questionable at best. Batie had an obvious bias and motive as the co-defendant. His testimony earned him a plea for second-degree murder and a ten-year prison sentence. Burns had her attention diverted trying to get her children to safety inside her apartment when the shooting occurred. Hart has since recanted her testimony. Crumley and McCrimager testified about the shooting, but could not identify the shooter. At a new trial, this would all be considered cumulatively by the jury, in addition to the fact that there was no physical evidence placing Petitioner at the crime scene. The State's case hinged on eyewitness testimony alone. Taken together this evidence of ineffective assistance of counsel, as well as *Brady* and *Giglio* violations by the State undermine confidence in the guilty verdict and require relief.

Petitioner submits that this Court should grant certiorari to review whether the state court was required to conduct a cumulative error analysis of violations of *Brad*, *Giglio*, and/or *Strickland* presented at his postconviction proceeding.

CONCLUSION

Petitioner, Arthur James Martin, requests that certiorari review be granted.

Respectfully submitted,

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