NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF

CORRECTIONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

VOLUME 2 OF 2

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Appendix H

Judgment, United States District Court, Middle District of Florida, *Mungin v. Sec'y, Fla. Dep't of Corr.*, Case No. 3:06-cv-00650-BJD-JBT (August 16, 2022)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ANTHONY MUNGIN,

Plaintiff,

v. Case No. 3:06-cv-650-BJD-JBT

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS
and ATTORNEY GENERAL,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That pursuant to the Courts Order entered on August 15, 2022, the Second Amended Petition for Writ of Habeas Corpus (Doc. 30) is DENIED, and this case is DISMISSED WITH PREJUDICE.

Date: August 16, 2022

ELIZABETH M. WARREN,
CLERK

s/JR Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. § 1291**: Final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. § 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983) (citing Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945)). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(b); Perez-Priego v. Alachua County Clerk of Court, 148 F.3d 1272 (11th Cir. 1998). However, under 28 U.S.C. § 636(c)(3), the Courts of Appeals have jurisdiction over an appeal from a final judgment entered by a magistrate judge, but only if the parties consented to the magistrate's jurisdiction. McNab v. J & J Marine, Inc., 240 F.3d 1326, 1327-28 (11th Cir. 2001).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b). Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S.Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. § 1292(a)**: Under this section, appeals are permitted from the following types of orders:
   i. Orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions; However, interlocutory appeals from orders denying temporary restraining orders are not permitted.
   ii. Orders appointing receivers or refusing to wind up receiverships; and
   iii. Orders determining the rights and liabilities of parties in admiralty cases.

   (d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the order or judgment appealed from is entered. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend or reopen the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time to file an appeal may be reopened if the district court finds, upon motion, that the following conditions are satisfied: the moving party did not receive notice of the entry of the judgment or order within 21 days after entry; the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice, whichever is earlier; and no party would be prejudiced by the reopening.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court lacks jurisdiction, i.e., authority, to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

Appendix I

Order, Supreme Court of the United States, No. 21-6472:
Mungin v. Florida, 142 S.Ct. 908 (Jan. 24, 2022)

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 24, 2022

Clerk
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Anthony Mungin
v. Florida
No. 21-6472
(Your No. SC18-635)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

Appendix J

Opinion, Florida Supreme Court, No. SC18-0635:
Mungin v. State, 320 So. 3d 624 (Fla. Feb. 13, 2020)

Supreme Court of Florida

No. SC18-635

ANTHONY MUNGIN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

February 13, 2020
CORRECTED OPINION

PER CURIAM.

Appellant, Anthony Mungin, challenges an order denying his third successive motion for postconviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In 1993, Mungin was sentenced to death for the first-degree murder of Betty Jean Woods. The facts of the murder were stated

in the opinion on direct appeal:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.

Mungin v. State, 689 So. 2d 1026, 1028 (Fla. 1995).

One of the State's witnesses was Malcolm Gillette, a deputy sheriff who played a relatively minor role in the police investigation. Deputy Gillette testified at trial that he stood by while other officers executed a search warrant and arrested Mungin. Gillette testified that he discovered a beige Dodge Monaco in a parking lot near where Mungin was arrested. Gillette ran the license plate and learned that the car was stolen, so he called for a tow truck to transport it to an impound lot. He filled out the relevant paperwork, including an "inventory and vehicle storage receipt."

Gillette testified at trial that he saw two spent shell casings in the stolen car, but on the inventory and vehicle storage receipt, Gillette made a notation indicating he saw "nothing visible" in the car.

The jury found Mungin guilty and recommended death, and we affirmed the conviction and sentence. *Id.* Mungin's judgment became final when the United States Supreme Court denied certiorari review in October 1997. *Mungin v. Florida*, 522 U.S. 833 (1997).

On September 25, 2017, Mungin filed his third successive postconviction motion.[1] Attached was an affidavit signed by Deputy Gillette dated September 24, 2016. Gillette swore he did not see any shell casings in the Dodge Monaco and that, before the trial, he did not review the paperwork he had filled out. Mungin claimed that Gillette's affidavit gave rise to inferences of evidence tampering.

---

1. We affirmed the denial of Mungin's initial postconviction motion and habeas petition. *Mungin v. State*, 932 So. 2d 986 (Fla. 2006). We reversed in part the summary denial of his first successive postconviction motion and remanded for an evidentiary hearing on two claims. *Mungin v. State*, 79 So. 3d 726 (Fla. 2011). On appeal following the evidentiary hearing, we affirmed the order denying relief. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013). We affirmed the denial of his second successive postconviction motion. *Mungin v. State*, 259 So. 3d 716 (Fla. 2018).

Mungin alleged that the State committed a *Brady*[2] violation by failing to divulge that Gillette saw no shell casings and committed a *Giglio*[3] violation by allowing Gillette to give false testimony at trial. Alternatively, Mungin alleged that defense counsel was ineffective by failing to speak to or cross-examine Deputy Gillette, and that the information in Gillette's affidavit was newly discovered evidence that was likely to produce an acquittal at retrial.

The State argued that Mungin's claims were procedurally barred, but the postconviction court held an evidentiary hearing and ultimately denied Mungin's claims on the merits, without addressing the State's procedural argument.

ANALYSIS

Generally, postconviction claims in capital cases are untimely if filed more than a year after the judgment and sentence became final. Fla. R. Crim. P. 3.851(d). For an otherwise untimely claim to be considered timely as newly discovered evidence, it must be filed

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2. *Brady v. Maryland*, 373 U.S. 83 (1963).

3. *Giglio v. United States*, 405 U.S. 150 (1972).

within a year of the date the claim became discoverable through due diligence. *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013). It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim. *Rivera v. State*, 187 So. 3d 822, 832 (Fla. 2015).

Mungin's claims are untimely, for he filed the instant postconviction motion nearly twenty years after his judgment and sentence became final, and his claims became discoverable through due diligence more than a year before the motion was filed. Deputy Gillette signed his affidavit on September 24, 2016, but Gillette was a known witness who was available to the defense since Mungin's 1997 trial. *See Mills v. State*, 684 So. 2d 801, 805 n.9 (Fla. 1996) (finding a lack of due diligence where the witness with allegedly new information "was available and known to the defense").

In fact, Deputy Gillette was not merely known to the defense, he was Mungin's close friend and former wrestling partner. He visited Mungin in prison and wrote him letters. Gillette testified at the evidentiary hearing that he had been in contact with the defense team "over the last twenty years on and off" and that he had discussed his affidavit with an investigator "probably a dozen

times" over several months before eventually signing it. The third successive postconviction motion offers no explanation as to why Gillette's evidence could not have been ascertained long ago by the exercise of due diligence. *See* Fla. R. Crim. P. 3.851(d)(2)(A).

Because all claims raised in Mungin's third successive postconviction motion became discoverable through due diligence more than a year before the motion was filed, Mungin's claims are procedurally barred as untimely. Accordingly, we affirm the order denying postconviction relief.[4]

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,
Angela M. Cox, Judge - Case No. 161992CF003178AXXXMA

Todd G. Scher of Law Office of Todd G. Scher, P.L., Hollywood, Florida,

---

4. Because Mungin's claims were procedurally barred, they were properly denied; it matters not that the postconviction court denied them on the merits. *See Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979) ("[T]he decision of the trial court is primarily what matters, not the reasoning used.").

for Appellant

Ashley B. Moody, Attorney General, and Lisa A. Hopkins, Assistant Attorney General, Tallahassee, Florida,

for Appellee

Appendix K

Order, Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 20, 2018)

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1992-CF-03178-AXXX

DIVISION: CR-C

STATE OF FLORIDA

v.

ANTHONY MUNGIN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTIONS AND SENTENCES

This matter comes before this Court on Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Evidentiary Hearing," filed by collateral counsel on September 25, 2017, pursuant to Florida Rule of Criminal Procedure 3.851.

I. FACTS AND PROCEDURAL HISTORY

On January 28, 1993, a jury found Defendant guilty of First-Degree Murder for the death of Betty Jean Woods ("Ms. Woods"). On February 2, 1993, by a vote of seven to five, the jury recommended Defendant be sentenced to death. On February 23, 1993, this Court sentenced Defendant accordingly.

The facts of the case are set forth here. This summary is excerpted from the opinion of the Florida Supreme Court:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After

the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.

Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25–caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.

Jurors also heard Williams[1] rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.

First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.

Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

The judge instructed the jury on both premeditated murder and felony murder (with robbery or attempted robbery as the underlying felony), and the jury returned a general verdict of first-degree murder.

In the penalty phase, several witnesses who knew Mungin while he was growing up testified that he was trustworthy, not violent, and earned passing grades in school. Mungin lived with his grandmother from the time he was five, but Mungin left when he was eighteen to live with an uncle in Jacksonville. An official from the prison where Mungin was serving a life sentence for the Tallahassee crime testified that Mungin did not have any disciplinary problems during the six months Mungin was under his supervision. Harry Krop, a forensic psychologist, testified that he found no evidence of any major mental illness or personality disorder, although Mungin had a history of drug and alcohol abuse. Krop said he thought Mungin could be rehabilitated because of his

[1] Williams v. State, 110 So. 2d 654 (1959).

> normal life before drugs, his average intelligence, and his clean record while in prison.

Mungin v. State, 689 So. 2d 1026, 1028 (Fla. 1995).

This Court found two statutory aggravators: (1) Defendant was previously convicted of a felony involving the use or threat of violence to another person; and (2) Defendant committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. Id. This Court found no statutory mitigating factors and gave minimal weight to the non-statutory mitigation that Defendant could be rehabilitated and was not antisocial. Id.

On April 9, 1997, the Florida Supreme Court issued a Mandate affirming Defendant's conviction for First Degree Murder and sentence of death.[2] Mungin v. State, 689 So. 2d 1026, 1027 (Fla. 1995). On October 6, 1997, the United States Supreme Court issued an Order denying Defendant's petition for writ of certiorari. Mungin v. Florida, 522 U.S. 833 (1997).

II. POSTCONVICTION PROCEDURAL HISTORY AND PRIOR CLAIMS

Defendant raised a series of Rule 3.851 Motions since the Florida Supreme Court affirmed his conviction and sentence. In Defendant's "Consolidated Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend ("Consolidated Motion")," filed on July 3, 2001, Defendant raised seventeen claims. This Court ordered an evidentiary hearing on claims one and four. This Court conducted an evidentiary hearing on June 25 and 26, 2012. Following the evidentiary hearing, this Court denied Defendant's Consolidated Motion in an Order entered on March 21, 2003. Defendant appealed, raising seven claims. In a Mandate issued on June 29, 2006, the Florida Supreme Court affirmed this Court's denial of Defendant's Consolidated Motion. Mungin v. State, 932 So. 2d at 1004.

[2] On September 7, 1996, the Florida Supreme Court issued its opinion affirming Defendant's conviction and sentence.

On October 10, 2003, collateral counsel filed Defendant's "Petition for Writ of Habeas Corpus" with the Florida Supreme Court in case number SC03-1774. On January 24, 2005, collateral counsel filed Defendant's "Amended Petition for Habeas Corpus." In his Petitions, Defendant raised four grounds for relief. On April 6, 2006, the Florida Supreme Court denied Defendant's Petitions, and on June 13, 2006, denied Defendant's Motion for Rehearing.[3] Mungin, 932 So. 2d at 1004.

On April 21, 2008, collateral counsel filed Defendant's "Corrected Motion to Vacate Judgments of Conviction and Sentence Pursuant to Fla. R. Crim. P. 3.851 with Request for Evidentiary Hearing" ("Successive 3.851 Motion 1"). On October 8, 2009, an Order was entered summarily denying Successive 3.851 Motion 1. The Florida Supreme Court reversed and remanded the Giglio[4] and Brady[5] claims to this Court for an evidentiary hearing, but denied the newly discovered evidence claim. Mungin v. State, 79 So. 3d 726, 729 (Fla. 2011). This Court conducted an evidentiary hearing on February 3, 2012. Following the evidentiary hearing, this Court denied Defendant's Successive 3.851 Motion 1's Brady and Giglio claims in an Order entered on March 21, 2012. In a Mandate issued on August 16, 2013, the Florida Supreme Court affirmed this Court's denial of Defendant's Successive 3.851 Motion 1. Mungin v. State, 141 So. 3d 138, 147 (Fla. 2013).

On January 12, 2017, collateral counsel filed Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentences" ("Successive 3.851 Motion 2"). On February 28, 2017, this Court entered an Order summarily denying Defendant's Successive 3.851 Motion 2. On April 25, 2017, Defendant filed a Notice of Appeal of this Court's February 28, 2017 Order. The appeal remains pending in the Florida Supreme Court. As result, on October 5, 2017, collateral

[3] On June 29, 2006, the Florida Supreme Court issued its mandate.
[4] Giglio v. United States, 405 U.S. 150 (1972).
[5] Brady v. Maryland, 373 U.S. 83 (1963).

counsel filed a "Motion to Stay Appellate Proceedings and to Relinquish Jurisdiction to the Circuit Court, in and for the Fourth Judicial Circuit" to allow the trial court to make a determination on the instant Successive 3.851 Motion. On October 19, 2017, the Florida Supreme Court denied the Motion to Stay Appellate Proceedings and to Relinquish Jurisdiction to the Circuit Court, in and for the Fourth Judicial Circuit, and declared this Court could proceed on ruling on the instant Motion due to its unrelated claims.

III. PROCEDURAL HISTORY OF INSTANT MOTION

On September 25, 2017, collateral counsel filed Defendant's Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Evidentiary Hearing. On October 13, 2017, the State filed its Response to Defendant's Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Evidentiary Hearing

On November 6, 2017, this Court held a Case Management Conference and heard legal argument on Defendant's Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Evidentiary Hearing. Through its Order on the Case Management Conference and Setting the Evidentiary Hearing entered on November 9, 2017, this Court determined it was necessary to grant Defendant an evidentiary hearing on all sub-claims of Ground One.

This Court conducted Defendant's postconviction evidentiary hearing on January 12, 2018, during which the following persons were present: Mr. Bernardo de la Rionda, Esq., Assistant State Attorney; Ms. Lisa Hopkins, Esq., Assistant Attorney General; and Mr. Todd Scher, Esq., collateral counsel for Defendant. During the evidentiary hearing, Defendant presented four witnesses: (1) Mr. Charles Cofer ("Mr. Cofer"), Defendant's trial counsel; (2) Former Camden County Sheriff's Deputy Malcolm Gillette ("Deputy Gillette"); (3) Former Jacksonville Sheriff's Office Detective ("JSO") Dale Gilbreath ("Det. Gilbreath"); and (4) Mr.

Bernie de la Rionda ("Mr. de la Rionda"). The State did not present any witnesses. On February 26, 2018, the State filed its written closing argument. On February 26, 2018, the Defendant filed his written closing argument.

This Court will cite to the record as indicated: the transcript from the January 12, 2018 evidentiary hearing (EH) and the Record of Appeal (ROA).

IV. DISCUSSION

In Defendant's Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Evidentiary Hearing, Defendant raises one ground for relief alleging he was denied adversarial testing at the guilt and penalty phases of his capital trial. In support of the instant claim, Defendant provided Deputy Gillette's affidavit, and contends the affidavit establishes incriminating evidence was planted in the vehicle by someone in law enforcement. As a result, Defendant maintains the State violated Brady and Giglio; in the alternative, trial counsel was ineffective; and Deputy Gillette's affidavit qualifies as newly discovered evidence. Defendant further asserts this Court is required to analyze the cumulative effect of the prior claims to determine whether Defendant is entitled to relief.

Claim One (a) - Brady

In Claim One (a), Defendant contends Deputy Gillette's affidavit gives rise to inferences of evidence tampering, compromising evidence of the crime scene, and the integrity of the investigative process. Further, Defendant claims the bullet casings were placed in the stolen vehicle to implicate Defendant in the State's weak murder case. Defendant asserts the affidavit contains exculpatory evidence and calls into question whether Defendant stole the vehicle and the time line of events leading up to the murder as well as the murder itself. Therefore, Defendant maintains the State violated Brady by failing to divulge that Deputy Gillette did not

see any bullets, casings, root beer cans, or Budweiser cans in the stolen vehicle used in the murder.

A postconviction defendant's burdens to establish a claim pursuant to Brady follows:

> To establish a Brady violation, the defendant has the burden to show (1) that favorable evidence – either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. See Strickler v. Greene, 527 U.S. 263 (1999).
>
> To establish prejudice or materiality under Brady, a defendant must demonstrate "a reasonable probability that the jury verdict would have been different had the suppressed information been used at trial." . . .

Riechmann v. State, 966 So. 2d 298, 307-08 (Fla. 2007). In explaining materiality of evidence, the Florida Supreme Court stated:

> [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Jones v. State, 709 So. 2d 512, 519 (Fla. 1998) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). In other words, a Brady violation is established by "showing that the favorable evidence could reasonably be taken to put the whole case is such a different light as to undermine confidence in the verdict." Jones, 709 So. 2d at 519 (quoting Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Further, the cumulative effect of the suppressed evidence must be considered when determining materiality. See Way, 760 So. 2d at 913 (citing Kyles, 514 U.S. at 436 & n. 10, 115 S.Ct. 1555). "It is the net effect of the evidence that must be assessed." Way, 760 at 913 (quoting Jones, 709 So. 2d at 521); see Kyles, 514 U.S. at 436 & n. 10, 115 S.Ct. 1555.

Lightbourne v. State, 841 So. 2d 431, 437 (Fla. 2003).

The mere possibility that undisclosed items or information may have been helpful to the defense in its own investigation does not establish the materiality of the information. Wright v. State, 857 So. 2d 861, 870 (Fla. 2003). Furthermore, "[t]here is no Brady violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." Freeman v. State, 761 So. 2d 1055, 1062 (Fla. 2000) (quoting Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993)).

Initially, this Court notes of the testimony presented at the evidentiary hearing, that the recollection of all parties has diminished over the twenty-plus years since Defendant's arrest, investigation, pre-trial occurrences, and trial. (EH at 22, 36, 37, 39, 42, 50, 70, 93-94, 97, 101, 105-106, 119, 128, 177-78, 186-89.)

Defendant has failed to establish the evidence was favorable. Defendant was unable to prove law enforcement planted evidence against Defendant as alleged in the instant Motion and Deputy Gillette's affidavit. (Defense Exhibit 5.) Instead, Deputy Gillette's testimony demonstrated the past twenty-plus years has left him unclear on the details. (EH at 73, 97, 99, 101, 104-05.) During the evidentiary hearing, Deputy Gillette, who played a minimal role in Defendant's case and became involved due to his ability to recognize Defendant, his close friend and former wrestling partner, identified Defense Exhibit 3 as the inventory sheet he had filled out and testified he generally filled out inventory sheets while awaiting a tow truck's arrival. (EH at 59-62, 71; Defense Exhibit 3.) Further, Deputy Gillette acknowledged the Camden County Sheriff's Office utilized two separate forms when dealing with a vehicle, one for evidentiary purposes and one for inventory purposes. (EH at 133-34.) The latter was used to document the vehicle's contents in the case of a potential theft while stationed at the tow lot. (EH at 133-34.)

In Defendant's case, Deputy Gillette filled out an inventory sheet and noted nothing visible. (EH at 64-65, 71-72; Defense Exhibit 3.) However, Deputy Gillette testified during his deposition and at Defendant's trial that he, while looking into the vehicle from the exterior, saw casings in the vehicle.[6] (Defense Exhibit 1 at 48-49, ROA Vol. XV at 827-82.) Nevertheless, when Deputy Gillette was pressed on the inconsistencies between what was documented in the inventory sheet verse his deposition and trial testimonies, Deputy Gillette was unable to offer any explanation, and stated he would never knowingly lie on the stand or under oath. (EH at 73, 97, 99, 101, 104-05.) Moreover, he could not conclusively state he did not go back to re-examine the vehicle after it was towed to the Camden County Sheriff's Office impoundment lot, which may have jostled the contents in the vehicle, possibly making the casings visible, but did state that was not normally part of his routine. (EH at 135-36.)

Contrary to Defendant's allegation, Mr. de la Rionda, the lead prosecutor on Defendant's case, who has worked for the Office of the State Attorney for the Fourth Judicial Circuit for thirty-five years, testified there was no time for evidence to be added or taken out of the vehicle. (EH at 199.) Additionally, Det. Gilbreath's evidentiary hearing testimony regarding the discovery of the shell casings was consistent with Florida Department of Law Enforcement ("FDLE") Analyst Steven Leary's ("Analyst Leary") findings.[7] (EH at 162-64, 157-58; ROA Vol. XV at 851-53; Defense Exhibit 2 at 27; Defense Exhibit 12.) Thus, this Court finds Defendant was unable to substantiate the evidence tampering allegation, finding that Deputy Gillette's statement was purely speculative. See Crain v. State, 78 So. 3d 1025, 1038 (Fla. 2011) (finding postconviction relief not warranted based on "mere speculation"); see also Davis v.

[6] Deputy Gillette conceded he had treated the Dodge Monaco differently and only looked inside the vehicle from the exterior, keeping the vehicle sealed, because he was aware it was believed to have been involved in a crime. (EH at 64-65.)

[7] This was also consistent with Deputy Gillette's deposition and trial testimonies. (Defense Exhibit 1 at 48-49, ROA Vol. XV at 827-82.)

State, 736 So. 2d 1156, 1159 (Fla. 1999) (holding defendant cannot prevail in postconviction context on basis of "tenuous speculation").

Deputy Gillette testified that the evidence could have been tainted without his knowledge, he also stated that to his knowledge no one tampered with the evidence or put anything in the car and if he had noticed such, he would have documented it. (EH at 116, 130.) Moreover, Deputy Gillette acknowledged his recollection of events was much better closer to the incident than it is today, yielding statements in the affidavit were based on what he believed to be true from his recollection of events from twenty-plus years ago, rather than the conclusive language used in his affidavit. (EH at 97, 109, 128.) Deputy Gillette's became uneasy with the definitive tone of his statements during his testimony. Specifically, Deputy Gillette acquiesced he must have been shown his inventory report in accordance with what was indicated in his deposition transcripts, despite his conclusive statement that he had never seen the inventory report in number five of his affidavit. (EH at 102, 109-110; Defense Exhibit 5 at 56-58.) Further, despite Deputy Gillette's statement he was very detailed in his reports, the State called into question the detail oriented nature of Deputy Gillette's reports, focusing on areas where Deputy Gillette failed to notate specifics. (EH at 112-15; Defense Exhibits 3, 5.) Thus, Defendant failed to prove favorable evidence. Instead, it was evident that the twenty-plus year lapse has resulted in diminished recollections and that Analyst Leary and Det. Gilbreath, who played more extensive roles in the search of the vehicle, were consistent with one another and contradicted Deputy Gillette's affidavit and evidentiary hearing statements.

Defendant also has failed to meet his postconviction Brady burden of proving that the State willfully or inadvertently suppressed from Defendant that Deputy Gillette did not see any bullets, casings, root beer cans, or Budweiser cans in the Dodge Monaco. Defendant failed to

provide any support that the State actually possessed and failed to provide to defense counsel favorable evidence. Contrary to Defendant's allegation, Mr. de la Rionda testified that while he did not specifically remember Defense Exhibit 3, he remembered tendering all discovery reports and materials to defense counsel; he did not perceive the reports indicating nothing visible verses Deputy Gillette's deposition and trial statements to be inconsistent; Mr. de la Rionda specifically addressed the documents in Deputy Gillette's deposition; and defense counsel requested and was present at Deputy Gillette's deposition. (EH at 184-91, 199; ROA Vol. I at 12-15; Defense Exhibit 1 at 56-58.) Defense counsel's lack of memory does not refute Mr. de la Rionda's recollection. (EH at 18-19, 22; ROA Vol. I at 12-15.)

Moreover, Defendant failed to prove the evidence was material. Despite Defendant's contentions, the bullets, casings, Budweiser, and root beer cans were not the only evidence used to tie Defendant to the murder. During trial, Robert Dexter, a JSO evidence technician, testified that he recovered shell casings on the floor of the crime scene at Lil' Champs. (ROA Vol. XIV at 621-22, 624.) Doctor Faillace testified that he recovered the bullet from Ms. Woods's head and etched an "F" for identification purposes, which was stored in the pathology department and then given to legal authorities. (ROA Vol. XIV at 658-59.) FDLE Firearms Analyst, David Williams ("Analyst Williams"), determined the bullet and casing were fired from the same weapon and were matched to the weapon discovered during a search of Defendant's home. (ROA Vol. XV at 836-44, 847-48, 883-87.) Further, Analyst Leary processed the vehicle and found two .25 cartridge casings in it, which Analyst Williams later determined was also fired from the gun found during the search of Defendant's home, as were the bullet and casing from the Jacksonville and Williams Rule crime scenes.[8] Thus, this Court finds the casings at issue in the

[8] The State introduced Williams Rule evidence for identification purposes. Specifically, the State introduced evidence from the shooting at Bishop's Country Store in Jefferson County and the shooting at Lotus Accents in

instant Motion are not material and Defendant was not prejudiced. The State presented substantial evidence against Defendant and therefore, even if the casings had been suppressed, there was no reasonable probability the jury verdict would have been different.

Furthermore, the evidence at issue was equally accessible by both parties. In addition to Mr. de la Rionda remembering that he provided discovery reports to defense counsel, Mr. de la Rionda testified he complied with the requirements of Brady as well as Giglio, noting the steps he took to correct inconsistencies in Deputy Gillette's deposition and Det. Gilbreath's evidentiary hearing testimonies. (EH at 181-82, 184-91; ROA Vol. I at 13-15; Defense Exhibit 1 at 56-58.) Mr. Cofer had a limited independent recollection of the instant case and testified generally about discovery and the process of reviewing evidence. (EH at 14, 16, 18-22, 25-26, 33, 36-37, 39, 45, 48, 50, 52-53.) The record indicates Mr. Cofer was aware of the inventory sheet where Deputy Gillette indicated nothing was visible. (ROA Vol. I at 13-15; ROA Vol. XV at 827-28; EH at 42-44, 49-50; Defense Exhibit 3.) Accordingly, this Court finds the evidence at issue was equally accessible by both parties.

Therefore, in view of the forgoing, this Court finds the State did not violate Brady as the allegation is purely speculative, Defendant has failed to prove favorable evidence was willfully or inadvertently suppressed by the State, the casings were inconsequential in comparison to the sufficient evidence that was offered against Defendant at trial, and the information was accessible to both parties.

Tallahassee. In regards to Bishop's Country Store, William Rudd, the victim of the shooting, identified Defendant as the individual who shot him and FDLE Analyst, Emery Larson, testified that he matched Defendant's right thumb print to the black tray processed at the crime scene. (ROA Vol. XIV at 719-727, 781.) Larson also testified regarding matching Defendant's right thumb print to a sales receipt regarding the Lotus Accents crime scene and testimony from Steve Gauding was entered into evidence. (ROA Vol. XIV at 756-58, 785.) Further, FDLE Analyst Williams compared all the casings from the Jefferson County, Tallahassee, and Jacksonville crime scene and determined they were fired from the same weapon, matched the bullets recovered from the Tallahassee and Jacksonville victims, and determined the bullets and casings were fired from the same weapon, which was determined to be the weapon recovered during the search of Defendant's home. (ROA Vol. XV at 833-87.)

Claim One (b) - Ineffective Assistance of Counsel

Defendant contends in the alternative to the Brady allegation, trial counsel provided ineffective assistance of counsel. Specifically, Defendant maintains trial counsel was ineffective in failing to locate, speak to, and present evidence from Deputy Gillette or cross-examine him at trial.

To prevail on a claim of ineffective assistance of counsel, the defendant must show: (1) counsel's performance was outside the wide range of reasonable professional assistance, and (2) counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Bolin v. State, 41 So. 3d 151, 155 (Fla. 2010).

Initially, the Court notes that a defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis, particularly where added claims are outside the applicable time limit. Pope v. State, 702 So. 2d 221, 223 (Fla. 1997); Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986). The Florida Supreme Court issued its Mandate affirming Defendant's conviction and sentence on April 9, 1997. The United States Supreme Court denied a petition for certiorari on October 6, 1997. Despite the piecemeal compilation of these claims, this Court considers the claims in an abundance of caution, given that Defendant faces the death penalty.

During the evidentiary hearing, Mr. Cofer testified that he did not have an independent recollection of Defendant's trial and trial preparation, including whether or not he cross-examined Deputy Gillette at trial and if such was part of his strategy. (EH at 24-26.) However, Mr. Cofer did state if a witness testified differently than what a document stated, he would have typically confronted the witness on the inconsistent statement. (EH at 24-25.) Mr. Cofer also stated that he or co-counsel would have reviewed depositions in preparation for trial. (EH at 50.) Thus, assuming *arguendo* Defendant is able to prove Mr. Cofer's performance was deficient in

failing to locate, speak to, and present evidence from Deputy Gillette or cross-examine him at trial, Defendant has failed to establish prejudice because of the overwhelming evidence presented against Defendant at trial.

The State presented substantial evidence against Defendant. Specifically, the casing collected at the Jacksonville crime scene and the bullet recovered from the victim's head matched the firearm discovered in the search of Defendant's home. (ROA Vol. XIV at 621-22, 624, 658-59; ROA Vol. XV at 836-44, 847-48, 883-87.) Thus, there is no reasonable probability the result of the proceeding would have been different had counsel located, spoken to, and presented evidence from Deputy Gillette or cross-examined him at trial. Accordingly, the instant Ground is denied.

Claim One (c) – Giglio

Defendant contends the information contained in Deputy Gillette's affidavit establishes the State knowingly presented false and misleading evidence at trial in violation of Defendant's due process and Giglio.

To succeed on a Giglio claim, the Defendant must establish that (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Marshall v. State, 854 So. 2d 1235, 1251-52 (Fla. 2003). False testimony is material if there is a reasonable likelihood that it could have affected the jury's verdict. Ventura v. State, 794 So. 2d 553, 563 (Fla. 2001). To demonstrate willfully offered perjury, a defendant must show more than mere inconsistencies due to memory lapse, unintentional error, or oversight. Maharaj v. State, 778 So. 2d 944, 956 (Fla. 2001). "In the *Giglio* context, the suggestion that a statement may have been false is simply insufficient; the

defendant must conclusively show that the statement was actually false." Maharaj v. Sec'y for Dep't of Corr., 432 F.3d 1292, 1313 (11th Cir. 2005).

This Court finds Defendant has failed to establish a Giglio violation. Deputy Gillette's conclusive statements became indecisive throughout the evidentiary hearing. While Deputy Gillette noted in his 2016 affidavit, filed twenty-plus years after Defendant's arrest and trial, that he did not see anything, he was unable to explain the inconsistency between the notation and his deposition and trial testimonies, swearing he would never have knowingly lied on the stand. (EH at 97.) Further, when pressed, he was unable to completely disregard the possibility that he may have re-examined the vehicle after it was towed from its recovery location to the Camden County Sheriff's Office impound lot. (EH at 135-36.) Thus, Defendant has failed to prove the witness provided a false statement. Additionally, Mr. de la Rionda testified that he did not perceive the testimony to be inconsistent because Deputy Gillette was just documenting what was on the outside of the vehicle rather than doing a thorough evaluation for evidentiary purposes. (EH at 199.) Lastly, the statement was not material as there is no reasonable likelihood it would have affected the jury's verdict because substantial evidence was presented against Defendant. (ROA Vol. XIV at 621-22, 624, 658-59; ROA Vol. XV at 836-44, 847-48, 883-87.) Thus, the instant Ground is denied.

Claim One (d) – Newly Discovered Evidence

Defendant contends in the alternative to the Brady and Giglio allegations, the information contained in Deputy Gillette's affidavit constitutes newly discovered evidence.

To prevail on a claim of newly discovered evidence a defendant must meet both prongs. First, the "evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by

the use of diligence." Jones v. State, 709 So. 2d 512, 520 (Fla. 1998) (citation omitted). "Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Id. (citation omitted). "If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." Henyard v. State, 992 So. 2d 120, 125 (Fla. 2008). If the basis of the newly discovered evidence claim is recanted testimony, the court must make the following findings: (1) the recanted testimony is true; and (2) a different outcome would have probably resulted based on the recantation. Davis v. State, 26 So. 3d 519, 526 (Fla. 2009).

> Further, when determining the impact of the newly discovered evidence, when a prior evidentiary hearing has been conducted, the trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial.

Melton v. State, 193 So. 3d 881, 885 (Fla. 2016) (citation omitted).

Initially, this Court notes the time line of when Deputy Gillette was asked to write the affidavit and when it was executed is unclear. (EH at 83-87.) Further, despite Deputy Gillette's affidavit, the record reflects defense counsel had access to the inventory sheet and knew of its existence. (ROA Vol. I at 12-15; ROA Vol. XV at 827-28; EH at 42-22, 49-50; Defense Exhibit 1 at 56-58.) Additionally, defense counsel was aware Deputy Gillette testified at both his deposition and at Defendant's trial that he located casings in the vehicle even though he wrote nothing visible in the inventory sheet. (Defense Exhibit 1 at 48-49; ROA Vol. I at 12-15; ROA Vol. XV at 827-28; Defense Exhibit 3.) Therefore, the statement in question was known by both parties. This Court finds that even if defense counsel was not aware of such, he could have become aware of the inconsistency with due diligence during the pre-trial stage of Defendant's case. Moreover, the alleged newly discovered evidence was not of the nature that would

probably produce an acquittal on retrial. The allegation that incriminating evidence was planted by law enforcement remains an unsupported, speculative statement. The State presented substantial incriminating evidence against Defendant well beyond the casings recovered from the vehicle as discussed *supra*. (ROA Vol. XIV at 621-22, 624, 658-59; ROA Vol. XV at 836-44, 847-48, 883-87.) Thus, the instant Ground is denied.

Cumulative Error

Defendant opines that many errors made throughout his trial are sufficient enough to require reversal of both his conviction and sentence. It is well-settled that a claim of cumulative error cannot stand in cases where, following individual evaluation, alleged errors are found to be without merit or procedurally barred. Lukehart v. State, 70 So. 3d 503, 524 (Fla. 2011); see Suggs v. State, 923 So. 2d 419, 442 (Fla. 2005) (holding that when a defendant does not successfully prove any of his individual claims and, consequently, counsel's performance is deemed sufficient, a claim of cumulative error must fail); Parker v. State, 904 So. 2d 370, 380 (Fla. 2005) ("Because the alleged individual errors are without merit, the contention of cumulative error is similarly without merit.").

This Court has found all of the claims of individual errors in the instant motion to be without merit. Because cumulative error claims are not gestalts, and because all of Defendant's grounds for relief have been denied, Defendant's claim of cumulative error must be similarly rejected. See Mansfield v. State, 911 So. 2d 1160, 1168 n.6 (Fla. 2005) ("Because we find that none of Mansfield's other claims have merit, we reject Mansfield's cumulative-error argument."). Accordingly, Defendant is not entitled to relief.

In view of the above, it is:

ORDERED AND ADJUDGED that Defendant's "Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Evidentiary Hearing," filed by postconviction counsel on September 25, 2017, is **DENIED**. This is a final order, and Defendant shall have thirty (30) days from the date this Order is filed to take an appeal by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Jacksonville, Duval County, Florida on March 20, 2018.

ANGELA M. COX
Circuit Court Judge

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to counsel for the State and Defense by United States Mail this 21 day of March, 2018.

Deputy Clerk

Case No.: 16-1992-CF-03178-AXXX
/lmd

CLERK CIRCUIT COURT
DUVAL COUNTY, FLORIDA

Appendix L

Decision, Supreme Court of the United States, No. 18-8409:
Mungin v. Florida, 139 S.Ct. 2024 (May 13, 2019)

1

Randall Scott JONES, petitioner,
v. FLORIDA.
No. 18–8399.
May 13, 2019.

Case below, 259 So.3d 803.

Petition for writ of certiorari to the Supreme Court of Florida denied.

2

Anthony MUNGIN, petitioner,
v. FLORIDA.
No. 18–8409.
May 13, 2019.

Case below, 259 So.3d 716.

Petition for writ of certiorari to the Supreme Court of Florida denied.

3

Lamar PERRYMAN, petitioner,
v. GEORGIA, et al.
No. 18–8412.
May 13, 2019.

Petition for writ of certiorari to the Court of Appeals of Georgia denied.

4

Francisco K. AVOKI, petitioner, v.
CAROLINAS TELCO FEDERAL CREDIT UNION, et al.
No. 18–8413.
May 13, 2019.

Case below, 745 Fed.Appx. 493.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

5

DENNIS E., petitioner, v. Matthew J. D'EMIC, Administrative Judge, Supreme Court of New York, 2nd Judicial District, et al.;

Wai–Kim C., petitioner, v. Wayne M. Ozzi, Acting Justice, Supreme Court of New York, 13th Judicial District, et al.

No. 18–8414.
May 13, 2019.

Petition for writ of certiorari to the Appellate Division, Supreme Court of New York, Second Judicial Department denied.

6

Kevin Anthony BRIGGS, petitioner,
v. MONTANA.
No. 18–8420.
May 13, 2019.

Case below, 429 P.3d 275.

Petition for writ of certiorari to the Supreme Court of Montana denied.

Appendix M

Opinion, Florida Supreme Court, No. SC2017-0815:
Mungin v. State, 259 So. 3d 716 (Fla. Nov. 15, 2018)

Supreme Court of Florida

No. SC17-815

ANTHONY MUNGIN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

November 15, 2018

PER CURIAM.

We have for review Anthony Mungin's appeal of the postconviction court's order denying Mungin's motion filed pursuant to Florida Rule of Criminal Procedure 3.851. This Court has jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we affirm the postconviction court's order.

FACTS AND BACKGROUND

Mungin was convicted of first-degree murder and sentenced to death following a jury's recommendation for death by a vote of seven to five. *Mungin v. State*, 689 So. 2d 1026, 1028 (Fla. 1995). This Court explained the facts underlying his conviction and sentence on direct appeal, stating in part:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin.

Id. This Court affirmed Mungin's conviction and sentence of death on direct appeal. *Id.* His sentence of death became final in 1997. *Mungin v. Florida*, 522 U.S. 833 (1997). In the more than twenty years since, Mungin has engaged in extensive postconviction litigation but has not received any relief from his conviction or death sentence. *See Mungin v. State*, 141 So. 3d 138, 140 (Fla. 2013); *Mungin v. State*, 79 So. 3d 726 (Fla. 2011); *Mungin v. State*, 932 So. 2d 986, 990 (Fla. 2006).

In January 2017, Mungin filed the successive motion for postconviction relief at issue in this case seeking relief pursuant to the United States Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and our decision on remand in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The postconviction court summarily denied Mungin's motion.

This Court stayed Mungin's appeal pending the disposition of *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017). After this Court decided *Hitchcock*, Mungin responded to this Court's order to show cause arguing why it should not be dispositive in this case. After reviewing Mungin's response

to the order to show cause, as well as the State's arguments in reply, we ordered full briefing on Mungin's non-*Hurst* claim.

ANALYSIS

As stated above, Mungin's sentence of death became final in 1997. Based on this Court's precedent, *Hurst* does not apply retroactively to his sentence of death. *Id.* at 217; *see Asay v. State* (*Asay V*), 210 So. 3d 1 (Fla. 2016), *cert. denied*, 138 S. Ct. 41 (2017). Thus, Mungin is not entitled to the relief he claims, which depends upon the retroactive application of *Hurst* to his sentence of death.

CONCLUSION

For the reasons explained above, we affirm the postconviction court's order denying Mungin's claims seeking *Hurst* relief.[1]

It is so ordered.

LEWIS, QUINCE, POLSTON, LABARGA, and LAWSON, JJ., concur.
CANADY, C.J., concurs in result.
PARIENTE, J., concurs in result with an opinion.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED WITHIN SEVEN DAYS. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION. NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

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1. We do not address Mungin's motion to disqualify the judge who issued that order because it was untimely.

PARIENTE, J., concurring in result.

I write separately because I continue to adhere to the views expressed in my dissenting opinion in *Hitchcock*[2] that *Hurst*[3] should apply retroactively to cases like Mungin's. *Hitchcock*, 226 So. 3d at 220-23 (Pariente, J., dissenting).

Applying *Hurst* to Mungin's sentence of death, I would grant a new penalty phase based on the jury's nonunanimous recommendation for death by a vote of seven to five. Per curiam op. at 1. Further, I agree with Justice Anstead's dissenting opinion in Mungin's direct appeal, arguing that Mungin was entitled to a retrial because the evidence was insufficient to sustain a finding of premeditation. *Mungin v. State*, 689 So. 2d 1026, 1032 (Fla. 1995) (Anstead, J., dissenting).

An Appeal from the Circuit Court in and for Duval County,
Linda McCallum, Judge - Case No. 161992CF003178AXXXMA

Todd G. Scher of Law Office of Todd G. Scher, P.L., Hollywood, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Lisa Hopkins, Assistant Attorney General, Tallahassee, Florida,

for Appellee

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2. *Hitchcock v. State*, 226 So. 3d 216 (Fla.), *cert. denied*, 138 S. Ct. 513 (2017).

3. *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017).

Appendix N

Order, Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 28, 2017)

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1992-CF-03178-AXXX

DIVISION: CR-B

STATE OF FLORIDA

v.

ANTHONY MUNGIN,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

This cause is before this Court on Defendant's "Motion for Rehearing," filed by postconviction counsel on March 15, 2017. Defendant asks this Court to reconsider its "Order Denying Defendant's Successive Motion to Vacate Judgments of Conviction and Sentences," which was entered on February 28, 2017. The State filed a Response to Defendant's Motion for Rehearing on March 23, 2017.

To start, Defendant claims he was deprived due process because this Court ruled without conducting a case management conference. In his successive 3.851, Defendant raised purely legal issues that do not require an evidentiary hearing. Moreover, the caselaw is clear and established, as this Court explained, Defendant is not entitled to relief.

Defendant also asks this Court to reconsider its rulings on Defendant's claims in his successive 3.851. A party will prevail on a motion for rehearing when careful analysis shows the court has overlooked or misapprehended a point of law or a fact or where it is essential the court clarify its written opinion. Whipple v. State, 431 So. 2d 1011, 1013 (Fla. 2d DCA 1983). A party

should not use a motion for rehearing "merely to reargue the merits of the court's decision or express displeasure with its judgment." Anderson v. State, 532 So. 2d 4, 6 (Fla. 2d DCA 1988).

> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

State v. Green, 105 So. 2d 817, 818-19 (Fla. 1st DCA 1958). Defendant does not present any points of law or fact this Court overlooked or misapprehended in denying Defendant's Successive 3.851. Moreover, there is no need to clarify this Court's order.

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 insufficient.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's "Motion for Rehearing" is **DENIED**.

DONE in Jacksonville, Duval County, Florida on March 28, 2017.

LINDA MCCALLUM
CIRCUIT JUDGE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to counsel for the State and Defense by United States Mail this 29 day of March, 2017.

Deputy Clerk

Case No.: 16-1992-CF-03178-AXXX
/jd

CLERK CIRCUIT COURT
DUVAL COUNTY, FLORIDA

Appendix O

Decision, Florida Supreme Court, No. SC2012-0877:
Mungin v. State, 141 So.3d 138 (Fla. Aug. 16, 2013)

Mungin v. State

Supreme Court of Florida

June 20, 2013, Decided

No. SC12-877

Reporter

141 So. 3d 138 *; 2013 Fla. LEXIS 1230 **; 38 Fla. L. Weekly S 428; 2013 WL 3064817

ANTHONY MUNGIN, Appellant, vs. STATE OF FLORIDA, Appellee.

Subsequent History: Motion denied by, Judgment entered by *State v. Mungin, 2017 Fla. Cir. LEXIS 894 (Fla. Cir. Ct., Feb. 28, 2017)*

Motion granted by *Mungin v. State, 2018 Fla. LEXIS 1956 (Fla., Sept. 12, 2018)*

Motion granted by, Request denied by *Mungin v. State, 2018 Fla. LEXIS 1998 (Fla., Oct. 18, 2018)*

Prior History: [1]** An Appeal from the Circuit Court in and for Duval County, Honorable Adrian Gentry Soud, Judge — Case No. 16-1992-CF-003178-AXXX-MA.

Mungin v. State, 689 So. 2d 1026, 1995 Fla. LEXIS 2203 (Fla., Sept. 7, 1995)

Core Terms

postconviction, evidentiary hearing, scene, remember, arrive, prong, shot, newly discovered evidence, version of events, false testimony, first person, court erred, disqualification, asserting, impeaches, talk

Case Summary

Procedural Posture

Appellant inmate, who had been convicted of first-degree murder and sentenced to death, filed a successive motion for postconviction relief (PCR) under *Fla. R. Crim. P. 3.851*. Appellee State opposed the motion, which the Duval County Circuit Court (Florida) denied. Appellant sought review.

Overview

There were no eyewitnesses to the fatal shooting of a store clerk, but a State's witness testified that he discovered the body and saw a man, whom he later identified as appellant, hurriedly leaving the store with a paper bag. In support of his PCR motion, appellant presented the affidavit of a man who claimed that he was the first person on the scene after the shooting and that no one else was present until after he called 911. Appellant argued that this newly discovered evidence impeached the testimony of the State's witness and showed that the State violated Brady v. Maryland and Giglio v. United States. The high court held that appellant's Brady claim failed because he did not show that the State or law enforcement willfully or inadvertently suppressed the evidence. As there was no evidence that the prosecutor knew of the newly discovered evidence, appellant did not establish that the prosecutor presented or failed to correct testimony that he knew was false; accordingly, the Gigilo claim also failed. The PCR court did not err in denying appellant's motion for disqualification, because its previous adverse ruling was a facially insufficient reason for disqualification.

Outcome

The high court affirmed the PCR court's denial of relief.

Counsel: Todd G. Scher of the Law Office of Todd G. Scher, P.L., Dania Beach, Florida, for Appellant.

Pamela Jo Bondi, Attorney General and Stephen Richard White, Assistant Attorney General, Tallahassee, Florida, for Appellee.

Judges: POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

Opinion

[*140] PER CURIAM.

This case is before the Court on appeal from an order denying a successive motion to vacate a judgment of conviction for first-degree murder and a sentence of death filed under *Florida Rule of Criminal Procedure 3.851*. Because the order concerns postconviction relief from a capital conviction for which a sentence of death was imposed, this Court has jurisdiction of the appeal under *article V, section 3(b)(1), of the Florida Constitution.*

In his successive motion, the defendant, Anthony Mungin, challenged his conviction on the basis that he recently discovered that a witness's testimony differed significantly from the police report, therefore impeaching the testimony of Ronald Kirkland, the only witness who identified Mungin as leaving the crime scene **[**2]** immediately after the murder. Contrary to Kirkland's testimony at trial, the new witness, George Brown, asserted that he was the first person to arrive and no other person was present until after he found the victim and called 911. Mungin sought relief, asserting that the newly discovered evidence from Brown impeaches Kirkland and demonstrates that the State violated *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, and *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*. We reversed the postconviction court's order that summarily denied all relief and remanded the *Brady* and *Giglio* claims to the postconviction court for an evidentiary hearing, but affirmed the order denying the newly discovered evidence claim. Upon remand, the postconviction court held the necessary evidentiary hearing and subsequently denied relief. For the reasons discussed below, we affirm the denial of relief.

FACTS

The pertinent facts of this case are set forth in this Court's opinion on direct appeal as follows:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer **[**3]** [Kirkland] entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard *Williams*[1] rule evidence of two other crimes. They were instructed to consider this evidence **[*141]** only for the limited purpose of proving Mungin's identity.
> First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell

[1] *Williams v. State, 110 So. 2d 654 (Fla. 1959)*.

> recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping **[**4]** center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

Mungin v. State (Mungin I), 689 So. 2d 1026, 1028 (Fla. 1995) (footnote omitted). On direct appeal, this Court affirmed Mungin's first-degree murder conviction and sentence of death. *Id. at 1032*. Mungin then filed a motion for postconviction relief, asserting that his trial counsel was ineffective based on numerous alleged errors, among other claims, which was denied. This Court affirmed the denial of postconviction relief and denied Mungin's petition for a writ of habeas corpus. *Mungin v. State (Mungin II), 932 So. 2d 986 (Fla. 2006)*.

In the current proceeding, Mungin filed a successive motion for postconviction relief, asserting that the newly discovered evidence from Brown impeaches Kirkland and shows that the State violated *Brady* and *Giglio*. In support of this claim, Mungin presented an affidavit from Brown, in which Brown stated that he was the first person to arrive at the store and was in the store by himself **[**5]** during the entire time it took for him to select his purchases, wait for the cashier, search the store for her until he discovered the victim, and then call 911, at which point another man entered the store. Brown further stated in his affidavit that when he entered the store, another person brushed by him on his way out, and that he told the police this information—information that was contrary to statements in the police report that indicated Kirkland was the first person to arrive.

The postconviction court summarily denied relief, and Mungin appealed. On review, this Court detailed the requirements of establishing a newly discovered evidence claim, a *Brady* claim, and a *Giglio* claim. *Mungin v. State (Mungin III), 79 So. 3d 726, 734, 738 (Fla. 2011)*. While both *Brady* and *Giglio* required materiality in order to grant relief, we recognized that a *Giglio* violation had a more defense-friendly materiality prong than a *Brady* claim. *Mungin III, 79 So. 3d at 738*. Ultimately, we concluded that under either *Brady* or *Giglio*, the record did not conclusively show that the evidence was not material, and thus we remanded those claims to the postconviction court for an evidentiary hearing pertaining **[**6]** to Brown's affidavit and the allegation that the police report was false. *Mungin III, 79 So. 3d at 737-38*. However, we held that the same conclusion did not apply to the newly discovered evidence claim, which required that Mungin demonstrate that the evidence was "of such nature that it would probably produce an acquittal on retrial"—a standard that he could not meet. *See id. at 738* (quoting *Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)*).

After this Court remanded the action, the postconviction court held a hearing where numerous witnesses testified, including Brown and various law enforcement officers. The postconviction court **[*142]** subsequently denied relief. Mungin now seeks review of this order, asserting that the postconviction court erred in denying both the *Brady* claim and the *Giglio* claim. He also asserts that the postconviction court erred in denying a motion for disqualification based on this Court's order remanding the case for an evidentiary hearing. We affirm the denial of relief and hold that the postconviction court did not err in denying the motion for disqualification.

ANALYSIS

Brady

In order to establish a *Brady* violation, "the defendant must demonstrate that (1) favorable **[**7]** evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was

prejudiced." *Mungin III, 79 So. 3d at 734* (citing *Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*; *Way v. State, 760 So. 2d 903, 910 (Fla. 2000)*). To meet the materiality prong, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. (quoting *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. However, in making this determination, a court cannot "simply discount[ ] the inculpatory evidence in light of the undisclosed evidence and determin[e] if the remaining evidence is sufficient." *Franqui v. State, 59 So. 3d 82, 102 (Fla. 2011)*. "It is the net effect of the evidence that must be assessed." *Jones, 709 So. 2d at 521*.

Brady claims present mixed questions of law and fact. Where the postconviction court has conducted an evidentiary hearing, this Court will defer to the factual findings of the postconviction court **[**8]** so long as those findings are "supported by competent, substantial evidence, but will review the application of the law to the facts de novo." *Hurst v. State, 18 So. 3d 975, 988 (Fla. 2009)*.

In this case, the postconviction court denied the *Brady* claim, finding that Mungin failed to establish the second prong of *Brady*:

> Based on the testimony presented during the evidentiary hearing, this Court finds that the Defendant has not established a *Brady* violation. While Mr. Brown testified that he was the first and only person on the scene until he called 911, Mr. Brown testified that he did not provide this information to the police. Mr. Brown specifically stated that he did not relay this information to the officers on the scene, explaining that "the other guy" took over. At one point during the hearing, Mr. Brown testified that he did tell officers that he was nudged by someone when entering the store, however, he later clarified that he was not certain whether or not he told the officers of this and stated that he was so nervous from finding someone shot that he "may not have said it." As Mr. Brown testified, this was a traumatic event for him. Additionally, Officer Conn clearly testified **[**9]** that Mr. Brown never told her that he was the first and only person in the store, nor did he tell her that someone bumped into him when he entered the store.
>
> Mr. Brown's testimony may have impeached Mr. Kirkland's testimony. However, the Defendant has not established that this information was willfully or inadvertently suppressed by law enforcement **[*143]** or the State. To the contrary, the evidence indicates that the police and prosecutor were not aware of Mr. Brown's version of events. Thus, the Defendant's *Brady* claim is denied.

The postconviction court also held that Mungin failed to establish the third prong of *Brady* because he failed to establish a reasonable probability that, had Brown's testimony been disclosed, a different result would have occurred. In particular, the court stated that Kirkland's testimony at trial had already been significantly called into question and that Kirkland's identification of the person leaving the store did not match Mungin; accordingly, Kirkland's testimony may not have even incriminated Mungin. In addition, the court found that other substantial evidence established Mungin's guilt.

We affirm the postconviction court's order because competent, substantial **[**10]** evidence supports the postconviction court's finding that Mungin failed to show that the State willfully or inadvertently suppressed favorable evidence—a prong that Mungin must demonstrate in order to prevail on his Brady claim. The postconviction court made several findings of fact that are pertinent to this claim. First, the court pointed out that Brown himself stated consistently that he did *not* tell the police the same facts that he testified to at the hearing because the "other guy" took over. While the court recognized that Brown did make some statements that he told the officers that somebody leaving the store nudged him, Brown later testified that he was not sure

whether he informed the officers about this person. The record provides ample support for these findings. From the very beginning of the hearing, Brown testified as follows:

> Q: And did there come a point where you spoke with any police officers who arrived at the scene?
> A: Yes, sir.
> Q: And did you tell them what you testified to here today?
>
> A: *No. I really didn't get a chance to. The other guy—you know, there was news people and everything and the other guy was there.*
>
> THE COURT: Just a second now. You said, did you talk **[**11]** to them. That them I don't know what them is.
> BY MR. SCHER [defense counsel]:
> Q: Right.
> Q: Do you remember speaking to any particular police officers?
> A: Yes, sir. But I don't remember his name.
> . . . .
> Q: Were you still in the store when you were speaking with the police or were you outside or can you explain how that happened?
> A: Outside. I was outside.
> Q: Were there a number of other people outside besides just you?
> A: Yeah, by then, there was a bunch of people there.
> Q: Was the other gentleman who had come to the store also there speaking to the police with you?
> A: Yes, sir.
> Q: So were you both essentially talking to the police at the same time?
>
> A: Yes, sir. *He was kind of taking over all the conversation* so I pretty much asked the officer if he needed me for anything and if he didn't need me any more I was going.

(Emphasis added.) The postconviction court requested more clarification regarding the statements that Brown gave to the police:

> THE COURT: You spoke to some police officers at the scene?
> THE WITNESS: Yes, sir.
>
> **[*144]** THE COURT: And as I recall what you said, a male police officer?
> THE WITNESS: Yes, sir. He's—I mean I might have spoke to someone else but I can't remember.
> . . . .
>
> THE COURT: Do you—can **[**12]** you recall specifically what you might have told them at the time? Well, let me ask you this: Do you think what you told them at the time was consistent with what you put in your affidavit previously?
> THE WITNESS: Yes, sir. I was trying to. That's what I was saying. I was trying to and then the other guy was—because he kind of asked me what was going on when he came in the store as I called the 911 but he was kind of like talking over the top of me.

During cross-examination, the prosecutor asked Brown whether he told the police that he observed a person leaving the store as he entered:

> Q: All right. And you did not tell that to the police though, did you?
> A: Yeah.
> Q: You did?
> A: I think I did, yes, sir.
> . . . .
> Q: You're not sure. Thinking means you're not sure, right?
> A: Right. I'm not sure.
> Q: Okay. And the only reason is because that what you just read, that affidavit that you read, the attached report on it, the last line that defense counsel did not ask you about, it states that you stated he stated he did not notice anyone leaving the store as he entered. That's what the detectives put down that you told that detective.
>
> A: Right. I was so nervous finding somebody shot I may not have said **[**13]** it.
> Q: Okay. So it is possible that that's what you told them, that you didn't even mention to the detective that you had noticed anybody leaving the store?

A: It's possible.

Q: Okay.

A: But as I—as I got time to kind of calm down a little bit then I did remember somebody coming out as I was going in.

Q: Okay. And you never contacted the police after that day to tell them that?

A: No, sir.

In addition, the prosecutor elicited more information from Brown as to what Brown heard the other man tell the police:

Q: Okay. And you're saying that the police came up and then he just kind of took over and you just stayed in the background and you knew this guy was lying and you just let him talk and lie?

A: Well, I didn't know he was lying. I was just—he kind of took over because as we were trying to see what they wanted us to do he was asking me what happened to her and everything.

Q: Right.

A: So I told him what I did.

Q: What do you remember the guy saying that you claim came after you and took all this credit? What do you remember him saying to the police?

A: Pretty much what I told him.

Q: Which was what?

A: What I told you already, what I've already testified to.

Q: Well, if you could tell me again what **[**14]** you remember this man telling the police.

A: I remember—I guess he was telling them about, you know, that he saw somebody coming in the store, pretty much the same thing as I did.

[*145] Q: So he described the man to the police, right?

A: I believe so.

Q: Yeah.

A: No, he didn't describe—when I heard him he wasn't describing the man.

Q: So what was this man telling the police?

A: That we found the lady there, pretty much we found the lady there shot and called 911.

After defense counsel rested, the State called Officer Charles Wells, who was the first responding officer to the crime scene. Officer Wells talked to the witnesses, but did not take their full account. He testified that Brown never told him a person brushed up against him on the way into the store, and he had no recollection of Brown claiming to be the first person in the store. On cross-examination, when defense counsel asked Officer Wells about his report that mentioned only Kirkland by name, Officer Wells stated, "Mr. Brown didn't tell me anything. He just agreed with Mr. Kirkland." The judge inquired about that statement further, asking how Brown indicated that he agreed. Officer Wells replied that Brown simply nodded.

Detective Conn **[**15]** arrived at the scene fifty minutes later in plain clothes and identified herself as an officer. She took statements from all the witnesses on a one-on-one basis and took shorthand notes while she was conducting the interviews. She was deposed before Mungin's initial trial where she read her notes as to what Brown told her. Detective Conn testified at the evidentiary hearing that Brown had never told her that he was the only person who was inside the store by himself. She further stated that Brown never told her that somebody leaving the store had bumped into him.

In fully reviewing the record, we conclude that the postconviction court's findings are supported by competent, substantial evidence. While Brown made some statements that he attempted to provide the police with the same information as he stated in his affidavit, he also acknowledged during his testimony that Kirkland was the person who told the police Brown's side of the story. Moreover, Brown never definitively stated what he told the police himself. Instead, the record reflects that the more he was questioned specifically as to what information he told the police, the less sure he was. In fact, at one point, Brown even admitted **[**16]** that he heard Kirkland tell the police that a person bumped into Kirkland on his way out of the store when Kirkland first arrived, thus acknowledging that Brown was aware Kirkland was claiming to be first on the scene.

In summary, the record is devoid of any evidence that the State inadvertently or willfully suppressed favorable evidence. Accordingly, as Mungin failed to present sufficient evidence to support the second prong of *Brady*, we affirm the denial of relief as to this claim.

Giglio

Next, Mungin alleges that the State knowingly presented false testimony in violation of *Giglio*. In order to prove a *Giglio* violation, "a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Tompkins v. State, 994 So. 2d 1072, 1091 (Fla. 2008)* (quoting *Rhodes v. State, 986 So. 2d 501, 508-09 (Fla. 2008))*. If the first two prongs are established, the Court will then consider whether the evidence is material by determining "if there is any reasonable possibility that it could have affected the jury's verdict." *Tompkins, 994 So. 2d at 1091*. At this point, the burden then switches **[**17]** to the State, which must **[*146]** "prove that the false testimony was not material by demonstrating it was harmless beyond a reasonable doubt." *Id*. (quoting *Rhodes, 986 So. 2d at 509*).

The postconviction court denied the *Giglio* claim, finding as follows:

> This Court finds that the Defendant has not established a *Giglio* violation. First, the Defendant has not shown that the prosecutor presented or failed to correct false testimony, in that the Defendant has not shown that Mr. Kirkland's testimony was false. Instead, the Defendant has merely shown that Mr. Brown's version of events is inconsistent with Mr. Kirkland's version. It is not uncommon that two witnesses perceive events differently. Further, assuming *arguendo* that Mr. Kirkland's testimony was false, the Defendant has not shown that the prosecutor knew the testimony was false. The evidence introduced at the hearing showed that neither the police, nor the prosecutor, knew of Mr. Brown's version of events. This Court finds Mr. de la Rionda's testimony [the lead prosecutor] that he never knew of Mr. Brown's version of events to be credible. Additionally, the testimony of Mr. Brown and Officer Conn corroborated Mr. de la Rionda's testimony. **[**18]** Therefore, the Defendant's *Giglio* claim is denied.

Much of the evidence that allegedly supports this claim has already been discussed above, which details the lack of evidence pertaining to whether Brown informed the police that he bumped into a person who was leaving the store as he entered and that Brown was the first person to arrive at the scene and was present by himself for some time before Kirkland arrived. At the evidentiary hearing, however, Bernardo de la Rionda, the lead prosecutor at Mungin's trial, also testified that he had no knowledge that Brown was alone in the store with the victim until the 911 call was made or that Brown encountered a person leaving the store when he entered. In addition, the lead prosecutor testified that while he was in communication with law enforcement during the trial, at no point was he aware of any law enforcement officer who knew of such facts. He affirmatively stated that Brown did not contact his office and he had no knowledge of the allegations until the current postconviction proceedings.

We affirm the circuit court's ruling. Although Brown's testimony does call into question whether Kirkland could have seen Mungin leaving the store shortly **[**19]** after the shooting, because Mungin is bringing this claim as a *Giglio* violation, he must show that the prosecutor presented or failed to correct false testimony *and* that the prosecutor knew the testimony was false. Here, the testimony presented during the postconviction evidentiary hearing fails to establish that the prosecutor, or any person with whom he was in contact, knew Brown's version of the events. In fact, Brown himself acknowledged that he was aware Kirkland was informing the police as to his version of the story and that Kirkland was attempting to be in the spotlight and take credit. Brown did not correct Kirkland's

version of the facts that he had provided to the police. Moreover, while Brown asserted that he tried to tell the police what he saw, he also acknowledged that he may not have told them that he observed somebody leaving the store as he entered. Likewise, the lead prosecutor testified that he did not know this information until the current proceedings and, to his knowledge, nobody in law enforcement was aware of Brown's postconviction version of the facts. In looking to the testimony as a whole, there is no testimony to establish either of the first two prongs **[**20]** of *Giglio*. Accordingly, we affirm the postconviction **[*147]** court's denial of the *Giglio* claim.

Cumulative Error

Mungin contends that the postconviction court erred in failing to conduct a cumulative error analysis by reviewing his *Brady* and *Giglio* claims in conjunction with the other claims he alleged in prior proceedings. However, Mungin is not entitled to relief because the Court does not conduct a cumulative error analysis where all of the claims are found to be meritless. *See, e.g.*, *Walker v. State, 88 So. 3d 128, 137 (Fla. 2012)* ("Because Walker has failed to provide this Court with any basis for relief in any of his postconviction claims, Walker is not entitled to relief based on cumulative error."). Thus, we deny relief on this claim.

Motion to Disqualify

In his final claim, Mungin alleges that the postconviction court erred in denying his motion to disqualify, relying solely upon this Court's order that held that the postconviction court erred in summarily denying the successive postconviction claims without granting an evidentiary hearing as to two of the claims. Mungin is not entitled to relief on this claim. This Court has repeatedly held that generally a previous adverse ruling is **[**21]** a facially insufficient reason for disqualification. *See, e.g.*, *Mendoza v. State, 87 So. 3d 644, 664 (Fla. 2011)* ("[A]dverse rulings by a judge are generally considered legally insufficient to warrant a judge's disqualification."); *Rivera v. State, 717 So. 2d 477, 481 (Fla. 1998)* ("The fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that [the] judge discussed his opinion with others,' are generally considered legally insufficient reasons to warrant the judge's disqualification." (quoting *Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992)))*. Thus, this motion was properly denied.

CONCLUSION

For the reasons addressed above, we affirm the postconviction court's denial of relief.

It is so ordered.

POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

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Appendix P

Order, Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 21, 2012)

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 16-1992-CF-3178

DIVISION: CR-C

ANTHONY MUNGIN,
Defendant,

vs.

STATE OF FLORIDA.
_____/

FILED
MAR 21 2012
CLERK CIRCUIT COURT

ORDER DENYING DEFENDANT'S *BRADY* AND *GIGLIO* CLAIMS

This matter is before this Court pursuant to a Mandate issued November 21, 2011 and Opinion issued October 27, 2011 by the Supreme Court of Florida, reversing and remanding the Defendant's Brady[1] and Giglio[2] claims for an evidentiary hearing. Mungin v. State, No. 09-2018, 2011 WL 5082454 (Fla. October 27, 2011). This Court held an evidentiary hearing on February 3, 2012. The Defendant presented the testimony of George Brown and the Honorable Charles Cofer. The State presented the testimony of Charles Wells, Christie Conn, Dale Gilbreath, and Bernardo de la Rionda.

In the Defendant's successive motion, he provided an affidavit from George Brown and claimed that (1) the State violated Brady in failing to disclose the favorable evidence pertaining to Mr. Brown; (2) the State violated Giglio by knowingly presenting false evidence; and (3) Mr. Brown's affidavit constituted newly discovered evidence. This Court denied all three claims. The Supreme Court of Florida reversed and remanded the first two claims, but upheld the denial of the newly discovered evidence claim. With regard to the newly discovered evidence claim, the court noted that the information provided by Mr. Brown was not of such a nature that it would probably produce an acquittal on retrial. Mungin, 2011 WL 5082454, at *20.

[1] Brady v. Maryland, 373 U.S. 83 (1963).
[2] Giglio v. United States, 405 U.S. 150 (1972).

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Evidentiary Hearing Testimony

As an initial matter, this Court notes that Mr. Kirkland was unavailable to testify at the evidentiary hearing, as he is deceased. (P.C.T. at 148.) During the evidentiary hearing, the testimony of Mr. Brown was presented. Mr. Brown testified that on the morning Betty Jean Woods was shot, he pulled into the convenient store parking lot, which was empty. (P.C.T. at 11, 24.) Mr. Brown entered the store, and in the process somebody "kind of bumped" into him, "but it wasn't hard enough" to make him look. (P.C.T. at 11.) Mr. Brown did not know if the person who bumped into him was male, female, white, or black. (P.C.T. at 12-13, 28-30.) Mr. Brown did not pay attention to the person that bumped into him and could give no details about the person. (P.C.T. at 12-13.)

Once inside, Mr. Brown noticed that the clerk (Ms. Woods) was not at the counter. (P.C.T. at 11.) Mr. Brown stated that he was alone in the store. (P.C.T. at 11, 13, 21.) Mr. Brown checked the bathroom and storeroom, but did not find Ms. Woods. (P.C.T. at 11.) As Mr. Brown turned around from checking the storeroom, he noticed Ms. Woods lying on the floor. (P.C.T. at 11.)

Mr. Brown stated that he then called 911 and a man entered the store. (P.C.T. at 12-13, 36, 49, 51.) He and the man attempted to render aid to Ms. Woods. (P.C.T. at 12.) Mr. Brown stated that he was one-hundred percent certain that no one entered the store until he called 911. (P.C.T. at 13-14, 49.) Mr. Brown had never before seen the man that entered the store and did not know who he was. (P.C.T. at 14-15.) At some point later, the police and rescue personnel arrived at the scene. (P.C.T. at 15.)

When asked if he told the police the same facts that he testified to at the evidentiary hearing, Mr. Brown stated, "No. I didn't really get a chance to." (P.C.T. at 15.) Mr. Brown testified that he remembered talking to a male police officer, but that he did not remember the officer's name. (P.C.T. at 15-16.) Mr. Brown could not remember speaking to a female police officer; Mr. Brown stated that he might have, but he could not say. (P.C.T. at 16, 22, 38.) Nor did Mr. Brown recognize the female police officer (Officer Christie Conn) at the evidentiary hearing. (P.C.T. at 39.)

Mr. Brown further stated that he and the other man (who entered the store after Mr. Brown called 911) spoke to the police at the same time. (P.C.T. at 17.) Mr. Brown stated that the man took over the

conversation, so Mr. Brown asked the officer if he was needed for anything further, and if not he was going to leave. (P.C.T. at 17, 24.) Mr. Brown explained that he tried to tell the police what he witnessed, but that the other man was "talking over the top" of him. (P.C.T. at 22.) After that day, no one ever spoke to Mr. Brown regarding what he witnessed in the store, until he was contacted by employees of the Defendant's collateral counsel. (P.C.T. at 18, 22-23.)

On cross-examination, Mr. Brown reiterated that he remembered speaking to a male police officer, but was not certain if he spoke to a female officer. (P.C.T. at 24.) Mr. Brown again stated that he did not stay long at the scene after the police arrived, noting that "the other guy was kind of taking everything over." (P.C.T. at 24.) Mr. Brown explained what the other man told to the police: "I guess he was telling them about, you know, that he saw someone coming in the store, pretty much the same thing as I did." (P.C.T. at 37.) The other man told the police that they (he and Mr. Brown) found Ms. Woods and called 911. (P.C.T. at 37.)

Mr. Brown also clarified that the person who bumped into him "just barely nudged," "just barely touched," him and that he did not really pay attention to this person. (P.C.T. at 28-29.) Mr. Brown testified that he did tell the officer that someone brushed against him as he entered the store. (P.C.T. at 27.) However, Mr. Brown later stated that he "thought" he told the officer about the person bumping into him. (P.C.T. at 31.) Mr. Brown finally testified that he was not sure whether or not he told the officer about this person. (P.C.T. at 32.) Mr. Brown also stated that he "was so nervous finding somebody shot" that he "may not have said it." (P.C.T. at 32.) Mr. Brown stated that once he learned Ms. Woods had passed away, that he tried not to think about the incident anymore. (P.C.T. at 34.) Upon questioning by this Court, Mr. Brown stated that he had never seen anybody shot before and that the incident was a traumatic event for him at the time. (P.C.T. at 39.)

Mr. Brown discussed his memory with regard to the day Ms. Woods was shot. (P.C.T. at 40.) Mr. Brown stated that his memory regarding contact with a female officer was vague. (P.C.T. at 40.) However, he also stated that "everything that went on from when I went in the store until I called 911 I can remember just like I was standing there now." (P.C.T. at 40.)

Mr. Brown stated that someone prepared his affidavit for him, and that he signed it after reading it and assuring that it was accurate. (P.C.T. at 26, 48.) Later during the hearing, Mr. Brown did not have a complete recollection of whether or not he read the entire affidavit. (P.C.T. at 41.) Mr. Brown did not remember what month or year that he signed the affidavit. (P.C.T. at 44.) Mr. Brown also stated that no one forced him to sign the affidavit. (P.C.T. at 47.)

The State presented the testimony of Officer Christie Conn. Officer Conn testified that when she arrived at the scene, she was in plain clothes, but that she would have had her gun and badge on her belt. (P.C.T. at 101, 108.) Officer Conn identified herself as a police officer to the witnesses. (P.C.T. at 108.) Officer Conn interviewed Mr. Brown at the scene and took notes. (P.C.T. at 102.) Mr. Brown told Officer Conn that he entered the store about the same time or at the same time as Mr. Kirkland. (P.C.T. at 104.) With regard to what Mr. Brown recited to her at the scene, Officer Conn read from her pre-trial deposition:

> He said he pulled into the store behind Kirkland, the other witness. He did not know Kirkland's name. He pointed him out because he was still standing around. Went to the drink box, got some Gatorade. Then he went to the counter and arrived about the same time as Kirkland. He waited, looked around and saw Ms. Woods on the floor. He called 911 from the counter. The victim was having problems, spitting up blood. Kirkland and a white female started administering first aid and he checked the register.

(P.C.T. at 105-106.)

Officer Conn stated that the witness interviews were done one-on-one, as to not taint each other's testimony. (P.C.T. at 108-109.) Officer Conn made very clear that Mr. Brown never told her that someone bumped into him when entered the store, nor did he ever tell her that Mr. Kirkland was not there when he (Mr. Brown) got there. (P.C.T. at 109-10.)

Finally, the State presented the testimony of Bernardo de la Rionda.[3] Mr. de la Rionda was the lead prosecutor in this case. (P.C.T. at 156.) Mr. de la Rionda testified that during pre-trial and trial stages of this proceeding, he was not aware of Mr. Brown's assertions that he was alone in the store with

[3] Mr. de la Rionda and Assistant Attorney General Stephen White represented the State during the February 3, 2012 evidentiary hearing.

Ms. Woods until he called 911. (P.C.T. at 156.) Mr. de la Rionda was also not aware of Mr. Brown's current assertion that someone bumped into him as he entered the store. (P.C.T. at 157.) Mr. de la Rionda knew nothing of Mr. Brown's statements until his affidavit was filed with the post-conviction motion. (P.C.T. at 157.)

Brady claim

In order to establish a Brady violation, the Defendant must show that "(1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." Mungin, 2011 WL 5082454, at *11 (citations omitted). To establish materiality, the Defendant must demonstrate a reasonable probability that had the evidence been disclosed, a different result would have occurred. Id. A reasonable probability is one which undermines the court's confidence in the outcome of the proceeding. Id.

In reversing the Brady claim, the Supreme Court of Florida pointed out that Mr. Brown's affidavit contradicts Mr. Kirkland's testimony on a material detail – whether Mr. Kirkland could have seen the Defendant leave the convenient store right after the murder. Mungin, 2011 WL 5082454, at *17. Mr. Kirkland testified that he was the first person on the scene and identified the Defendant as leaving the store, whereas, Mr. Brown, in his affidavit, asserted that he was the first person on the scene and that no one else was present while he searched for the store clerk. The court stated that if Mr. Brown's assertions were truthful, it would mean that Mr. Kirkland was untruthful during trial – a point that might have been critical to the jury. Id. The court was "troubled by the possibility that a false police report was submitted and then relied on by defense counsel." Id. The court noted that it was "left with mere speculation as to what in fact occurred, what the police knew, what the prosecutor knew, and whether Kirkland, a witness with an extensive criminal history, was lying when he testified at trial." Mungin, 2011 WL 5082454, at *17-18. Thus, the matter was reversed for a hearing pertaining to Mr. Brown and the allegation that the police report was false.

Based on the testimony presented during the evidentiary hearing, this Court finds that the Defendant has not established a Brady violation. While Mr. Brown testified that he was the first and only

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

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

Further, assuming *arguendo* that the police and prosecutor were aware of Mr. Brown's version of events and either willfully or inadvertently suppressed this information, the Defendant could not meet the third prong of Brady. That is, the Defendant could not establish that because the evidence was material, he was prejudiced. To state another way, the Defendant cannot establish a reasonable probability that, had Mr. Brown's testimony been disclosed, a different result would have occurred. As pointed out by Justice Polston, in the dissenting portion of his opinion, Mr. Kirkland's testimony was already significantly called into question, and the inconsistencies in his testimony were stressed during closing arguments. Mungin, 2011 WL 5082454, at *21 (Polston, J., dissenting in part concurring in part). Additionally, defense counsel used Mr. Kirkland's testimony regarding the description of the individual leaving the store in support the defense theory that it could not have been the Defendant leaving the store. Id. (Polston, J., dissenting in part concurring in part). "[I]t is unclear whether the jury put any weight in it [Mr. Kirkland's testimony] or whether it was even incriminating." Id. (Polston, J., dissenting in part concurring in part). Further, as pointed out by both the majority (in reference to the newly discovered

evidence claim) and dissenting opinion, the jury was presented with substantial evidence that the Defendant was in fact the person who committed the murder. Mungin, 2011 WL 5082454, at *20-22.

Giglio claim

To establish a Giglio violation, the Defendant "must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." Mungin, 2011 WL 5082454, at *18 (citations omitted). The court noted that "the materiality prong of Giglio is more defense friendly than in a Brady claim." Id. Specifically, the evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. Mungin, 2011 WL 5082454, at *19 (citation omitted).

This Court finds that the Defendant has not established a Giglio violation. First, the Defendant has not shown that prosecutor presented or failed to correct false testimony, in that the Defendant has not shown that Mr. Kirkland's testimony was false. Instead, the Defendant has merely shown that Mr. Brown's version of events is inconsistent with Mr. Kirkland's version. It is not uncommon that two witnesses perceive events differently. Further, assuming *arguendo* that Mr. Kirkland's testimony was false, the Defendant has not shown that the prosecutor knew the testimony was false. The evidence introduced at the hearing showed that neither the police, nor the prosecutor, knew of Mr. Brown's version of events. This Court finds Mr. de la Rionda's testimony that he never knew of Mr. Brown's version of events to be credible. Additionally, the testimony of Mr. Brown and Officer Conn corroborated Mr. de la Rionda's testimony. Therefore, the Defendant's Giglio claim is denied.

Based on the foregoing, it is:

ORDERED AND ADJUDGED that the Defendant's Brady and Giglio claims are hereby **DENIED**. The Defendant shall have thirty (30) days from the date that this Order is entered to take an appeal, by filing a Notice of Appeal with the Clerk of Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 19th day of March, 2012.

John D. Southwood
Senior Circuit Court Judge

Copies to:

Honorable Thomas D. Hall, Clerk
Florida Supreme Court

Stephen White, Esq.
Assistant Attorney General

Bernardo de la Rionda, Esq.
Assistant State Attorney

Todd Scher, Esq.
Attorney for the Defendant

Case no.: 16-1992-CF-3178

Appendix Q

Decision, Florida Supreme Court, No. SC2009-2018:
Mungin v. State, 79 So. 3d 726 (Fla. Oct. 27, 2011)

Mungin v. State

Supreme Court of Florida

October 27, 2011, Decided

No. SC09-2018

Reporter
79 So. 3d 726 *; 2011 Fla. LEXIS 2563 **; 36 Fla. L. Weekly S 610

ANTHONY MUNGIN, Appellant, vs. STATE OF FLORIDA, Appellee.

Prior History: [1]** An Appeal from the Circuit Court in and for Duval County, John Southwood, Judge - Case No. 92-3179CF.

Mungin v. State, 689 So. 2d 1026, 1995 Fla. LEXIS 2203 (Fla., Sept. 7, 1995)

Core Terms

murder, identification, shooting, impeach, evidentiary hearing, postconviction, alleges, newly discovered evidence, scene, police report, cross-examination, robbery, reasonable probability, arrest, lady, shot, version of events, police officer, contradicts, convenience, ineffective, eyewitness, register, bullet, drawer, hair, gun, post conviction relief, defense counsel, trial counsel

Case Summary

Procedural Posture
Defendant was convicted of the 1990 murder of a convenience store clerk and sentenced to death. He filed a successive motion for postconviction relief in the Circuit Court in and for Duval County (Florida). The trial court held a hearing to determine whether an evidentiary hearing was needed and then denied relief, finding no prejudice. Defendant appealed.

Overview
At trial, the State's witness testified that he saw defendant leaving the convenience store as he entered the store; the witness then found the clerk lying on the floor and called 911. Defendant submitted an affidavit from a new witness, who stated that he, not the other witness, was the first person on the scene, that he saw someone leaving the store but could not identify that person, that the State's witness then arrived and, after police arrived, falsely stated that he had been there the whole time. The new witness stated that he gave his name to police but was never called as a witness. The court found that the new witness's testimony completely contradicted the State's witness on a material detail: whether he could have seen defendant leaving the store. The court found that this evidence was material and might have had an impact on the jury's verdict. The court held, however, that the evidence did not meet the requirement for newly discovered evidence because it would not probably produce an acquittal given the other evidence of defendant's guilt.

Outcome
The court reversed and remanded the Giglio and Brady claims to the postconviction court for an evidentiary hearing, but denied the newly discovered evidence claim.

Counsel: Todd G. Scher, Miami Beach, Florida, for Appellant.

Pamela Jo Bondi, Attorney General, and Thomas D. Winokur, Assistant Attorney General, Tallahassee, Florida, for Appellee.

Judges: PARIENTE, LEWIS, QUINCE,

LABARGA, and PERRY, JJ., concur. POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY, C.J., concurs.

Opinion

[*728] PER CURIAM.

Anthony Mungin was convicted of the 1990 murder of a convenience store clerk, Betty Jean Woods, and sentenced to death. *See* *Mungin v. State (Mungin I), 689 So. 2d 1026 (Fla. 1995)*. Mungin appeals the postconviction court's order summarily denying his successive motion for postconviction relief, filed pursuant to *Florida Rule of Criminal Procedure 3.851*, which **[*729]** challenged his conviction on the basis that a newly discovered witness significantly impeaches the testimony of Ronald Kirkland, the only witness who identified Mungin as leaving the crime scene immediately after the murder.[1] The new witness, George Brown, asserts he was the first person on the scene after the murder and that no other person was present in the store. He states that he told this **[**2]** to police the night of the murder and that the police report is false. In the current proceeding, Mungin alleges that he was denied adequate adversarial testing because the newly discovered evidence from Brown impeaches Kirkland and shows that the State violated *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*, and *Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)*.[2] For the reasons discussed below, we reverse and remand the *Giglio* and *Brady* claims to the postconviction court for an evidentiary hearing, but deny the newly discovered evidence claim.

The pertinent facts of this case are set forth in this Court's opinion on direct appeal as follows:

> Betty Jean Woods, a convenience store clerk in Jacksonville, **[**3]** was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer [Kirkland] entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard *Williams*[3] rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.
>
> First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended **[**4]** shell recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

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[1] We have jurisdiction. *See* *art. V, § 3(b)(1), Fla. Const.*

[2] Mungin also alleges that existing procedures utilized by Florida in carrying out executions by lethal injection violate the *Eighth Amendment*; however, he provides no additional factual allegations that would alter our previous decisions. *See* *Schoenwetter v. State, 46 So. 3d 535, 550 (Fla. 2010)*; *Tompkins v. State, 994 So. 2d 1072, 1081 (Fla. 2008)*; *Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007)*. We deny this claim without further discussion.

[3] *Williams v. State, 110 So. 2d 654 (Fla. 1959)*.

Mungin I, 689 So. 2d at 1028 (footnote omitted).

[*730] In his first motion for postconviction relief, Mungin raised several claims regarding Kirkland, specifically that trial counsel was ineffective for failing to cross-examine Kirkland regarding Kirkland's criminal cases; trial counsel was ineffective for failing to effectively examine Kirkland regarding his identification of Mungin and for failing to elicit testimony from Detective Christie Conn that would have destroyed Kirkland's credibility; and newly discovered evidence cast further doubt on Kirkland's veracity. On appeal from the denial of postconviction relief, Mungin raised as an issue that the circuit court erred in denying his claims of ineffective assistance of trial counsel during the guilt phase **[**5]** after an evidentiary hearing, including his claim that counsel was ineffective in failing to adequately impeach Kirkland's testimony. *Mungin v. State (Mungin II), 932 So. 2d 986, 998 (Fla. 2006)*. This Court affirmed the denial of postconviction relief and denied Mungin's petition for a writ of habeas corpus. *Id. at 1004*. In denying relief, this Court engaged in a significant discussion of the claims involving whether counsel was ineffective in failing to properly impeach Kirkland based on the failure to discover and use Kirkland's probationary status as impeachment and the failure to call Detective Conn regarding statements that Kirkland made that called Kirkland's identification of Mungin into question. *See id. at 998-99*. This Court denied relief, holding that even if counsel was deficient, Mungin did not establish prejudice because counsel had attacked Kirkland's identification of Mungin on cross-examination of Kirkland and during his cross-examination of other witnesses who asserted that, days before the crime, Mungin had short hair. During closing, counsel stressed these inconsistencies. *Id. at 999*.

In the current proceeding, Mungin filed a successive motion for postconviction relief, **[**6]** asserting that the newly discovered evidence from Brown impeaches Kirkland and shows that the State violated *Brady* and *Giglio*. In support of this claim, Mungin presented the following affidavit, which potentially calls Kirkland's testimony into question:

> AFFIDAVIT OF GEORGE BROWN
> 1. My name is George Brown. . . . I hereby state the following and will attest to same in any official proceeding.
> 2. On Sunday, September 16, 1990, at approximately 1355 hours, at the Little Champ Store on the corner of Chaffee Road and Crystal Springs Road, I was an eyewitness to the following events. I remember these event [sic] because I go past this location everyday since that date sixteen years ago.
>
> 3. I went into the store that day because it was hot outside. The lady was usually at the counter and was always there-she always made you feel that you were going to steal something-and she was always there. I went into the store and got a drink and went to the counter and she was not there. So, I waited there for a few minutes and then I thought something was wrong. I went to the bathroom and yelled for her and nothing happened. I went back up front and still she didn't come. At the end of the counter there **[**7]** was a door open, so I hollered in there and nothing happened and she didn't come. So, I looked down and there she was. I called 911.
>
> 4. There was no one in the store during this whole time. I was in there all alone. There was no one in the parking lot. There was no one at the gas pumps. There was no one out there. There was someone who came out of the store, brushed up against me when I was coming in but I could not tell who it was, whether the person was a male or **[*731]** female, white or black. I could never give a description of the person who was coming out of the store.
> 5. After I called 911, someone (a male) came into the store and asked what was happening. I was on the phone with 911 and told him that she was having a seizure and told him to roll her over on her side and then we heard this gurgling

sound and the lady told us to roll her back on her back and we did.

6. The police officer came in at that time and he went over there and looked at her and decided to call the Life Flight. There was a cash drawer open on the register and the police officer told me that it was a Lottery drawer and it was always open. There was a glass of water next to the lady and a pill stuck to her lip-that **[**8]** is why I thought she was having a seizure and fell down.
7. I never noticed that there was any type of struggle in the store.
8. The police officer took over the situation and he asked me who found the lady and I told him that I had. He was really busy getting the Life Flight together. The guy that came in took over and pretended that he had been there the whole time. The man was not there when I got there and he did not find the lady. I told the police officer that I could not describe or ever identify the person that brushed past me, I just did not pay attention. The other guy was so busy talking and acting like he was there. I told the police officer if they didn't need me any more, I was leaving.
9. There has never been any law enforcement officer, state attorney, investigator, defense lawyer, or anyone else come to talk with me since that day. I had no idea that anyone was identified or arrested or convicted for this crime.

10. **[**9]** I have reviewed a police report authored by K.D. Gilbreath, #5182, dated November 5, 1990, which contained statements purportedly made by me at the only time I was ever spoken to by anyone about this case. The version of events as stated in the report is false.
10. [sic] On page 7 of the 14-page report in the last paragraph, Mr. Kirkland did not go into the store first. There was no one in the store when I came in. Mr. Kirkland came into the store after I called 911. Mr. Kirkland did not find the victim-it was me. Mr. Kirkland says in the report that he saw a black guy coming out of the store. This is not true because when I went into the store, someone was coming out and I could not identify anyone and no one was in the store when I was there.

11. On page 8 of the report, in the first paragraph, I remember the detective talking to me, but like I have said, Mr. Kirkland stepped up and tried to take over. I told the detective that I checked all the bathrooms to see where she was, and I checked everywhere because she was always in the front. I went over to where the counter was and there was a door open in the back-a little storage room. I turned around and saw her there and heard gurgling **[**10]** noises and that is when I called 911.
12. I looked over and saw the drawer open but I did not touch anything. The officer is incorrect to report that I checked the drawer of the cash register and then shut the drawer. That never happened.
13. I did not know the victim had been shot because I thought she had had a seizure because of the pill stuck to her lip and the water that was spilled next to her.

14. I told the officer that I was the only one in the store and Mr. Kirkland did not come into the store until after I called 911. There is no way he saw **[*732]** anyone in the store because the person who brushed by me I could not identify, so there is no way that Mr. Kirkland could identify anyone, he was not in the store. I could not tell you what the person looked like and I was standing in the store a long time trying to find the lady.
15. I have always been available to testify at any proceedings and I am willing to testify as to what I observed on that particular day and to the falsehoods stated in the police report.

Mungin also presented the following affidavit from his original trial counsel, Charles Cofer, who discussed why he did not discover this information prior to trial:

AFFIDAVIT OF CHARLES **[**11]** G. COFER

1. My name is Charles G. Cofer, and I am presently a sitting county court judge in the Fourth Judicial Circuit in and for Duval County, Florida. I have previously been subpoenaed to give testimony in post-conviction proceedings in the case of *State of Florida v. Anthony Mungin*, and this affidavit is given in connection with further post-conviction proceedings.

2. Prior to taking the bench, I served as an Assistant Public Defender for the Fourth Judicial Circuit. During that time, I represented Anthony Mungin at the trial court level in the first-degree capital murder prosecution relating to the death of Betty Jean Woods. As lead counsel for Mr. Mungin, I had primary responsibility for all aspects of the case, and was familiar with the pre-trial discovery provided by the State of Florida.

3. I have recently been provided with an affidavit executed by an individual named George Brown, which states Mr. Brown's knowledge concerning the death of Betty Jean Woods. I have also reviewed the homicide investigation report authored by Detective Gilbreath dated November 5, 1990. Detective Gilbreath was the lead law enforcement officer in charge of the investigation into Ms. Woods' murder.

4. **[**12]** Mr. Brown's affidavit contradicts the version of events as testified to at trial by the State's key witness, Ronald Kirkland, in many significant ways. Ronald Kirkland was the primary prosecution witness based upon his assertion that he was the first and only person in the Lil' Champ store, and that he was the one who discovered Ms. Woods after she was shot. Mr. Kirkland testified at trial that he observed a man coming out of the Lil' Champ Store carrying a brown bag as he entered the store. Kirkland later identified this man as Anthony Mungin. Because there were no eyewitnesses to the murder, Kirkland's identification of Mr. Mungin was extremely important evidence. Although I attempted to undermine Kirkland's testimony during cross-examination, any evidence that was available that I could have used to further undermine his credibility (especially his purported identification of Anthony Mungin) would have been useful and would have been presented. I would also expect, under the State's obligation under *Brady v. Maryland*, that the prosecution would disclose to me any favorable evidence which could have been used to impeach Kirkland or otherwise undermine his testimony and identification **[**13]** of Mr. Mungin.

5. Prior to trial, the State provided me with a copy of Detective Gilbreath's homicide report, in which there is brief mention made of George Brown and the information he supposedly told Detective Conn when he was interviewed on the day Ms. Woods was shot. I relied on this police report as being an accurate and truthful account of what Mr. Brown told **[*733]** the police. The version of Mr. Brown's statement contained in the homicide report generally supported the version of facts provided by Mr. Kirkland, and provided no suggestion that Mr. Brown had information that would be useful to impeach Mr. Kirkland's version of the events.

7. [sic] Because the information contained in the police report appeared to be of much less importance than the information provided by Kirkland, and due to the fact that Kirkland became the chief prosecution identification witness, our efforts focused on attempting to undermine Kirkland's testimony at trial. Because I relied on the veracity of the police report, apparently no one from the defense team contacted or spoke with Mr. Brown prior to trial.

8. Mr. Brown's affidavit contradicts Mr. Kirkland's version of events, and demonstrates that the police **[**14]** report was inaccurate in terms of explaining the information that Mr. Brown provided to law enforcement. When handling criminal cases, I expected the State to

> provide me with an accurate recitation of what witnesses told the police, but I was never provided with the information contained in Mr. Brown's affidavit. Had the State provided me with an accurate report containing the true version of events that Mr. Brown witnessed, this would have made a tremendous difference in terms of the presentation of Mr. Mungin's case. Every effort would have been made to interview Mr. Brown and to present his conflicting testimony, given that it contradicts and impeaches Kirkland's version of events and his identification of Anthony Mungin.
>
> 9. It is my understanding that Mr. Brown is an unbiased witness with no prior criminal background, in contrast to Mr. Kirkland, who had an extensive criminal history and whose credibility was already in question. It would have been helpful to have a disinterested witness with no criminal background who would have been able to testify and contradict Kirkland's testimony. However, the State never provided me with an accurate and truthful account of Mr. Brown's involvement **[**15]** in the case.

Based on the affidavits of Brown and Cofer, Mungin asserts that he is entitled to relief under *Brady*, *Giglio*, or newly discovered evidence. The trial court held a *Huff*[4] hearing to determine whether an evidentiary hearing was needed and then denied relief, finding that Mungin failed to demonstrate prejudice. Determining whether the trial court erred in denying an evidentiary hearing on a successive *rule 3.851* motion is a question of law subject to de novo review. *Darling v. State, 45 So. 3d 444, 447 (Fla. 2010)*. Because the circuit court denied Mungin's motion without an evidentiary hearing, this Court must accept all factual allegations in the motion as true to the extent they are not conclusively refuted by the record. *Id*. The Court will affirm the ruling "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." *Id*.; *see also Fla. R. Crim. P. 3.851(f)(5)(B)* (providing that a successive postconviction motion in a capital case may be denied without an evidentiary hearing if "the motion, files, and records in the case conclusively show that the movant is entitled to no relief"). The Court will uphold the postconviction court's **[**16]** summary denial "if the motion is legally insufficient or its allegations are conclusively refuted by the record." *Darling, 45 So. 3d at 447* (quoting *Ventura v. State, 2 So. 3d 194, 198 (Fla. 2009)*).

[*734] Here, Mungin has raised three claims pertaining to the Brown affidavit: (1) the State violated *Brady* in failing to disclose the favorable evidence pertaining to Brown; (2) the State violated *Giglio* by knowingly presenting false evidence; and (3) Brown's affidavit constitutes newly discovered evidence that mandates a new trial. In looking at the three different claims raised regarding Brown's testimony, we review the different legal standards involved, starting with Mungin's *Brady* claim.

The *Fifth* and *Fourteenth Amendments to the United States Constitution* require a prosecutor to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*; *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. In order to establish a *Brady* violation, the defendant must demonstrate that (1) favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed **[**17]** by the State, and (3) because the evidence was material, the defendant was prejudiced. *Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*; *Way v. State, 760 So. 2d 903, 910 (Fla. 2000)*. To meet the materiality prong, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Way, 760 So. 2d at 913* (quoting *Bagley, 473 U.S. at 682*). A reasonable probability is a probability sufficient to undermine this Court's confidence in the outcome.

[4] *Huff v. State, 622 So. 2d 982 (Fla. 1993)*.

Id.; *see also* *Strickler, 527 U.S. at 290*. However, in making this determination, a court cannot "simply discount[] the inculpatory evidence in light of the undisclosed evidence and determin[e] if the remaining evidence is sufficient." *Franqui v. State, 59 So. 3d 82, 102 (Fla. 2011)*. "It is the net effect of the evidence that must be assessed." *Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)*.

In denying relief on the *Brady* claim, the postconviction court concluded that Mungin failed to show that the evidence was material. In its order, the postconviction court noted that there were three differences between what Brown alleged in his affidavit that **[**18]** he told the police officer at the scene of the crime and what was stated in the arrest report, concluding that none of these were material or would undermine confidence in the outcome. Specifically, the court found as follows:

> There appear to be three differences between what Mr. Brown alleges in his affidavit that he *told* the officer on the date of the murder, and what the arrest report indicates Brown told the officer. First, Brown alleges that he told the detective that Kirkland arrived after he, Brown, had discovered Ms. Woods and called 911, whereas the report indicated that Brown and Kirkland "entered the store at the same time." Second, Brown alleges that he did not touch the cash register, whereas the report indicates that he "checked the registers." Third, Brown alleges that someone had come out of the store as he was entering, but that he told the police that he could not describe the person, whereas the report indicates that he did not "notice" anyone leaving the store as he entered. None of Brown's other allegations that conflict with Kirkland's testimony is alleged to have been shared with police.
>
> Even if it were assumed that the State erroneously withheld this information, **[**19]** Defendant suffered no prejudice from the failure to disclose. First, most of the allegedly withheld statements are not particularly material. The second **[*735]** and third discrepancies noted above constitute minor differences in the characterization of events. The only material discrepancy was Mr. Brown's allegation that he told the officer that he was the only person in the store and that Kirkland did not come into the store until after Brown called 911. While this discrepancy might have been used to impeach Kirkland's testimony, it does not create a reasonable probability of a different outcome given the importance of Kirkland's testimony compared to other trial evidence.
>
> It is critical to recognize that the undersigned presided over Defendant's trial, and has a very vivid recollection of the trial evidence, which was overwhelming even without Kirkland's testimony.[5] Uncontroverted ballistics evidence was presented directly tying Defendant to the shooting of Ms. Woods. When Defendant was arrested, police found a .25-caliber semiautomatic pistol, bullets, and Defendant's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired **[**20]** from the pistol found at Defendant's house. Moreover, the robbery/murder in this case was the third in a series of robberies and shootings, all of which were committed with the same gun, the gun found in Defendant's bedroom. Furthermore, Defendant was positively identified as the person who had committed the first two robbery/shootings, and the car he used in the first two robberies had been stolen from near his home and then abandoned not far from the scene of the instant robbery/murder. Another car

[5] We caution that trial courts must decide these postconviction matters on an objective basis. *See, e.g.*, *Guzman v. State, 941 So. 2d 1045, 1051 n.4 (Fla. 2006)* (recognizing that trial courts are to make an objective determination as to the effect of a *Giglio* error; it cannot be a subjective assessment). In this case, because the motion was denied without an evidentiary hearing, we must accept Mungin's allegations as true and determine prejudice by reviewing whether our confidence in the outcome is undermined.

> stolen from that area ended up next to Defendant's home with two expended shells from the murder weapon in it. In short, Defendant used the murder weapon in two robbery/shootings not long before the instant robbery/murder, had possession of the murder weapon following the instant robbery/murder, and was directly connected to the two cars used in the three robbery/shootings.
>
> George Brown's affidavit does not allege that a person other than Defendant robbed and killed Ms. Woods, or that Defendant could not have been the killer. Brown's allegation could only provide[] further impeachment of details of Kirkland's testimony and his identification of Defendant as the person he saw leaving the **[**21]** store. Even if Defendant's motion demonstrated that the State improperly withheld information from the defense, that information does not establish a reasonable probability of a different outcome sufficient to undermine confidence in the outcome of the trial. Evaluation of the [sic] all of the evidence introduced at trial demonstrates that it was overwhelming even if Kirkland's identification could have been called into doubt by Brown's testimony. As such, Defendant's claim of a *Brady* violation is conclusively refuted by the record.

In reviewing this claim, we examine Kirkland's trial testimony in even more detail. At trial, Kirkland testified that he was the first person to arrive **[**22]** at the location of the shooting. On his way to his girlfriend's house, he stopped by the Lil' **[*736]** Champ convenience store to pick up a diet coke and breath savers. As he was going into the store, a man who was carrying a brown paper bag almost knocked him down on his way out of the store. He described the man as being shorter than five feet, six inches and weighing about 130 pounds. Kirkland went into the store, picked up his items, and waited for the clerk, finally noticing that she was lying on the floor. He thought she might have had a seizure so he attempted CPR, and while he was performing CPR, another customer came in and called 911. Kirkland alleged that the other customer looked at the cash register and pulled the drawer open. An officer later came to his home and showed him six or seven pictures. Kirkland identified a picture of Mungin as the man who he saw leaving the store. He further identified Mungin in court as the man who he saw.

On cross-examination, defense counsel confronted Kirkland on a number of inconsistencies. For example, although Kirkland was able to identify Mungin as the person he met, he stated he had only a glimpse of him before they bumped into each other, **[**23]** and since Mungin was then traveling in a different direction away from him, Kirkland saw only the back of his head. However, Kirkland was unable to recall if Mungin wore a hat and could not describe whether he was wearing a light or dark shirt. Further, Kirkland stated that Mungin had long hair that appeared to be in a Jheri-curl style and had a "good bit" of beard growth on him-a description that differed from Mungin's appearance at the time of the crime. When the police first asked Kirkland to identify the person leaving the crime scene, Kirkland stated that he was not sure if he could recognize the person again, but he would try. When he was shown the pictures, Kirkland reviewed the photographs for approximately fifteen minutes before he picked Mungin's photo as the person that he saw.

During closing argument, defense counsel stressed the following inconsistencies: at the time that Kirkland noticed the person rushing out of the convenience store, he did not realize it was a murder scene but was thinking about his upcoming date; Kirkland admitted that he saw only the back of the person's head and not his face; Kirkland admitted he saw only a glimpse as the person rushed away; Kirkland **[**24]** was unable to identify any of the clothing that the person was wearing; and most importantly, Kirkland described the person he saw as having a beard and hair that was "kind of long" even though other eyewitnesses to the Tallahassee shooting (which occurred two days earlier) stated that Mungin's hair was so short that it looked like he

was in the military. Thus, defense counsel asserted that Kirkland's testimony supported that the person he saw leaving the store could *not* have been Mungin because a person would be unable to make hair grow significantly in only two days.

During prior postconviction proceedings, this Court discussed the value of Kirkland's testimony as follows:

> Mungin's first subclaim is that trial counsel was ineffective for failing to sufficiently impeach the testimony of Ronald Kirkland. Specifically, Mungin argues that Cofer should have made the jury aware that Kirkland was on probation at the time of the trial and that warrants had been issued for Kirkland's arrest on violation of probation and subsequently recalled.
>
> Even if Cofer's performance was deficient because he failed to discover and use Kirkland's probationary status as impeachment evidence, Mungin has failed **[**25]** to establish prejudice. Cofer attacked Kirkland's identification of Mungin **[*737]** on cross-examination of Kirkland, and by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, whose descriptions of the perpetrator were different from Kirkland's. In closing argument, Cofer argued extensively that due to these inconsistencies, Kirkland's identification could not be believed beyond a reasonable doubt. Moreover, Kirkland testified that he did not tell anyone from the State Attorney's Office that he was on probation and that he did not have any deals with the State in exchange for his testimony at Mungin's trial. Mungin does not allege that any deals were made. As for trial counsel's failure to inform the jury of the recalled warrants for Kirkland's arrest, because the warrants were not recalled until after the trial it cannot be said that counsel's performance was deficient.
>
> . . . .
>
> Even assuming that counsel's performance was deficient in this regard, we conclude that Mungin has failed to establish prejudice. As noted above, trial counsel attacked Kirkland's identification of Mungin on cross-examination by bringing out the limited time **[**26]** he had to actually view the perpetrator and the fact that it took him fifteen to twenty minutes to pick Mungin out of the photo lineup. Cofer also brought Kirkland's identification into question by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, who gave different descriptions of the perpetrator than did Kirkland.

Mungin II, 932 So. 2d at 998-99 (footnote omitted). We concluded that Mungin was not entitled to relief because our confidence in the outcome of Mungin's trial was not undermined.

However, Brown's testimony completely contradicts Kirkland on a material detail: whether Kirkland could have seen Mungin leaving the convenience store right after the murder. Kirkland, who testified at trial, claimed that he was the first person on the scene and identified Mungin as leaving the murder scene. Brown, in direct contradiction, asserts that he was first on the scene and that no other witnesses were present during the entire time he was searching for the missing clerk. Brown alleges that he found the victim and called 911. In referring to Kirkland, Brown swears in his affidavit that Kirkland came in and "pretended that he had **[**27]** been there the whole time. The man was not there when I got there and he did not find the lady." If, in fact, the trial judge upon remand determines Brown is being truthful, this would clearly mean that Kirkland was untruthful at trial, which might have been critical testimony for the jury. We are troubled by the possibility that a false police report was submitted and then relied on by defense counsel. Without an evidentiary hearing to explore this issue, we are left with mere speculation as to what in fact occurred, what the police knew, what the prosecutor knew, and whether Kirkland, a witness with an extensive criminal history, was lying when he testified at trial. In reviewing the *Brady* claim presented, accepting

all allegations in the motion as true to the extent they are not conclusively refuted by the record, we cannot agree that the record at this point conclusively shows that the evidence was not material (i.e., that there was not "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). *Way, 760 So. 2d at 913* (quoting *Bagley, 473 U.S. at 682*). Accordingly, we reverse and remand this claim to **[**28]** the postconviction court for an evidentiary hearing pertaining to **[*738]** Brown and the allegation that the police report was false.

Mungin also asserts that this evidence establishes a *Giglio* violation. Under *Giglio*, "a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Rhodes v. State, 986 So. 2d 501, 508-09 (Fla. 2008)*. As to the knowledge prong, in *Guzman v. State, 868 So. 2d 498 (Fla. 2003)*, we have clarified that *Giglio* is satisfied where the lead detective testifies falsely at trial because the "knowledge of the detective . . . is imputed to the prosecutor who tried the case." *Id. at 505*.

The materiality prong of *Giglio* is more defense-friendly than in a *Brady* claim. *See Davis v. State, 26 So. 3d 519, 532 (Fla. 2009)* ("[T]he standard applied under the third prong of the *Giglio* test is more defense friendly than the test . . . applied to a violation under *Brady*."), *cert. denied, 130 S. Ct. 3509, 177 L. Ed. 2d 1097 (2010)*. While under *Brady*, evidence is material if a defendant can show "a reasonable *probability* that . . . the *result* . . . would have been different," *Way, 760 So. 2d at 913* **[**29]** (emphasis added), under *Giglio*, the evidence is considered material simply "if there is any reasonable *possibility* that it could have *affected* the jury's verdict." *Rhodes, 986 So. 2d at 509* (emphasis added). Accordingly, for the reasons addressed above, we likewise hold that after reviewing the *Giglio* claim presented and accepting all allegations in the motion as true to the extent they are not conclusively refuted by the record, we cannot agree that the record at this point conclusively shows that the evidence pertaining to Brown would not affect the jury's verdict. Accordingly, an evidentiary hearing is needed on this claim as well.

Our analysis is different, however, in considering Mungin's claim that based on this newly discovered evidence, he is entitled to relief under *Jones v. State, 709 So. 2d 512 (Fla. 1998)*. In order to be considered newly discovered: (1) "the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence"; and (2) the evidence "must be of such nature that it would probably produce an acquittal on retrial." *Jones, 709 So. 2d at 521* **[**30]** (internal quotation marks and citation omitted). In making this determination, a trial court must "consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* (internal quotation marks omitted). 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. The jury heard significant evidence during the trial that established Mungin as the killer, including testimony that Mungin stole a red Escort and was engaged in similar shootings a few days before the murder, the stolen car was later discovered in Jacksonville, and the shell casing and bullet left at the scene of the murder were identified as matching the gun found at Mungin's home.

For the reasons addressed above, we reverse and remand the *Brady* and *Giglio* claims to the postconviction court for an evidentiary hearing pertaining to Brown and the allegation that the police report was false. We express no opinion on the merits of these claims. The parties shall proceed in an expedited manner, and an evidentiary hearing **[**31]** on this claim shall be held and an order entered within 120 days of the remand.

It is so ordered.

[*739] PARIENTE, LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

POLSTON, J., concurs in part and dissents in part with an opinion, in which CANADY, C.J., concurs.

Concur by: POLSTON (In Part)

Dissent by: POLSTON (In Part)

Dissent

POLSTON, J., concurring in part and dissenting in part.

I agree with the majority's decision to affirm the trial court's summary denial of Mungin's newly discovered evidence claim. However, unlike the majority, I would also affirm the summary denial of Mungin's *Brady* and *Giglio* claims because Mungin cannot demonstrate materiality under either *Brady* or *Giglio.*

Although Brown's affidavit calls into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting, Kirkland's testimony was already called into question based on other significant inconsistencies, which were pointed out during the trial and stressed during closing arguments. For example, Kirkland's testimony conflicted with other testimony that Mungin had very short hair at the time of the murder. In fact, defense counsel made a convincing argument that Kirkland's testimony actually supported that Mungin could not be **[**32]** the person leaving the store. Based on a review of Kirkland's testimony and the problems with it, it is unclear whether the jury put any weight in it or whether it was even incriminating.

In contrast to the questionable strength of Kirkland's testimony, the jury was presented with significant evidence that Mungin committed the murder. Specifically, the jury was presented with evidence that the murder weapon was found at Mungin's home days after the murder, that Mungin used this same gun to shoot two other store clerks just days before the murder, and that Mungin was linked to the stolen vehicles involved in the crime spree. Brown's affidavit does not call any of this evidence into question and does not provide any support that Mungin was not involved. Therefore, materiality cannot be established under either *Brady* or *Giglio*. *See* *Way v. State, 760 So. 2d 903, 913 (Fla. 2000)* (explaining that the materiality prong under *Brady* is met if the defendant demonstrates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (quoting *United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)* (plurality opinion)); *Rhodes v. State, 986 So. 2d 501, 509 (Fla. 2008)* **[**33]** (explaining that evidence is material under *Giglio* "if there is any reasonable possibility that it could have affected the jury's verdict").

Accordingly, I respectfully concur in part and dissent in part.

CANADY, C.J., concurs.

End of Document

Appendix R

Order, Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Oct. 8, 2009)

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-1992-CF-3178-AXXX-MA

DIVISION: CR-C

STATE OF FLORIDA,

vs.

ANTHONY MUNGIN,
Defendant.
_____/

FILED
IN COMPUTER
E.O.

FILED
OCT 08 2009
CLERK CIRCUIT COURT

ORDER SUMMARILY DENYING DEFENDANT'S CORRECTED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE PURSUANT TO FLA. R. CRIM. P. 3.851 WITH REQUEST FOR EVIDENTIARY HEARING

This matter comes before this Court on Defendant Anthony Mungin's Corrected Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851 With Request for Evidentiary Hearing filed on April 17, 2008. Defendant, through counsel, having filed postconviction motions in 2007 styled "Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851 With Request for Evidentiary Hearing," followed by the instant motion, the State having responded to these Motions, the Court having conducted a hearing pursuant to Huff[1] on August 12, 2009, this Court having reviewed the Court file, and this Court being otherwise fully advised, **FINDS AND RULES** as follows.

BACKGROUND.[2]

The Florida Supreme Court summarized the facts of this case as follows:

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[1]Huff v. State, 622 So.2d 982 (Fla. 1993).

[2]The Court also takes judicial notice of its files and the direct appeal and postconviction appeal records in this case.

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard *Williams* rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.
>
> First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

Mungin v. State, 689 So.2d 1026, 1028 (Fla.1995)(footnote omitted).

Following a jury trial, Defendant was found guilty as charged and sentenced to death. Defendant's convictions and sentences were affirmed on direct appeal. Mungin v. State, 689 So.2d 1026 (Fla. 1996).

On June October 6, 1997, for postconviction purposes, the judgment and sentence were final through the denial of certiorari by the United States Supreme Court reported at Mungin v. Florida, 522 U.S. 833, 118 S.Ct. 102 (1997). See, e.g., In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed), 626 So.2d 198, 198 (Fla. 1993)("Any rule 3.850

motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within one year after the judgment and sentence become final ... (b) upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed").

After several changes of counsel, Mungin filed a timely consolidated amended motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, in which he raised multiple claims. This Court denied all claims by Order dated March 18, 2003. This Order was affirmed on appeal. Mungin v. State, 932 So.2d 986 (Fla. 2006).

On August 16, 2007, Defendant filed a motion styled "Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851 With Request for Evidentiary Hearing." The motion raised three claims: (1) Brady and Giglio violation; or ineffective assistance of counsel; or newly-discovered impeachment evidence; (2) Eighth Amendment violation based upon the existing procedure the State utilizes for lethal injection; (3) Eighth Amendment violation based upon newly-available information. This Court, upon the State's motion to strike Defendant's 3.851 motion on the ground that it exceeded the page limitations for successive motions, struck Defendant's motion by Order filed March 19, 2008. Defendant filed an amended motion, styled "Corrected Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851 With Request for Evidentiary Hearing" on April 21, 2008, raising only the first two claims noted above. The State filed a response on May 29, 2008.

On August 12, 2009, this Court conducted a Huff hearing on this motion, and after hearing argument of counsel, announced in open court that the motion will be denied without an evidentiary hearing. This Court explained the procedural and substantive grounds for the denial. Through this

Order, that decision is rendered in writing.[3] In response to the State's Proposed Order, defense counsel filed "Defendant's Objections to State's Proposed Order," which states objections that the Proposed Order exceeds this Court's oral statements at a hearing on August 12, 2009. This Court's rulings and statements on August 12, 2009 were never intended to be all inclusive of the final disposition of this matter. Rather, this final Order encompasses all pleadings, arguments, and memorandum of law in this case.

FINDINGS AND RULINGS ON POSTCONVICTION MOTION

Rule 3.851(d)(1) prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final. An exception to the rule permits otherwise untimely motions if the movant alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R.Crim. P. 3.851(d)(2)(A). When such a motion is a successive motion, the movant must include "the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions." Fla. R.Crim. P. 3.851(e)(2)(B). Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief."

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[3]This Court requested that the State draft a proposed Order and provide a copy to opposing counsel for objections. This is a proper procedure. See Dillbeck v. State, 964 So.2d 95, 98 (Fla. 2007) ("Dillbeck's initial claim is that the trial court erred in adopting virtually verbatim the State's proposed findings of fact and conclusions of law"; "trial judge directed both parties to submit proposed orders. Further, he does not claim that he was not served with a copy of the State's proposed order or denied an opportunity to object"), citing Glock v. Moore, 776 So.2d 243, 248-49 (Fla. 2001) (rejecting challenges to a trial court's adoption of the State's proposed order "where the defendant had notice of the request for proposed orders and an opportunity to submit his or her own proposal and/or objections"), citing Patton v. State, 784 So. 2d 380, 388-89 (Fla. 2000); Groover v. State, 640 So. 2d 1077, 1078-79 (Fla. 1994). This Court has carefully considered this Order and finds that it reflects the substance of its ruling orally announced May 11, 2009.

Claim I

Defendant contends that the State withheld material and exculpatory evidence tending to impeach the testimony of State trial witness Ronald Kirkland, in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763 (1972). Defendant alleges that the State withheld statements of George Brown, a customer present at the store after Defendant killed Ms. Woods, which were inconsistent with Kirkland's statements regarding the discovery of Ms. Woods after she was shot, and which discredited Kirkland's identification of Defendant as the person "leaving the store hurriedly with a paper bag." According to Mr. Brown's affidavit, his involvement at the scene was not accurately represented in the police report.

a. Brady claim

"The State is required, under *Brady*, to disclose material information within its possession or control that is favorable to the defense." Walton v. State, 3 So.3d 1000, 1009 (Fla. 2009). "To establish a Brady violation, the defendant has the burden to show (1) that favorable evidence-either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced. Id., citing Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). "Under *Strickler*, the materiality prong of *Brady* requires that the defendant demonstrate that there is a reasonable probability of a different outcome expressed as a probability sufficient to undermine our confidence in the outcome." Id.

There appear to be three differences between what Mr. Brown alleges in his affidavit that he *told* the officer on the date of the murder, and what the arrest report indicates Brown told the officer. First, Brown alleges that he told the detective that Kirkland arrived after he, Brown, had discovered

Ms. Woods and called 911, whereas the report indicated that Brown and Kirkland "entered the store at the same time." Second, Brown alleges that he did not touch the cash register, whereas the report indicates that he "checked the registers." Third, Brown alleges that someone had come out of the store as he was entering, but that he told the police that he could not describe the person, whereas the report indicates that he did not "notice" anyone leaving the store as he entered. None of Brown's other allegations that conflict with Kirkland's testimony is alleged to have been shared with police.

Even if it were assumed that the State erroneously withheld this information, Defendant suffered no prejudice from the failure to disclose. First, most of the allegedly withheld statements are not particularly material. The second and third discrepancies noted above constitute minor differences in the characterization of events. The only material discrepancy was Mr. Brown's allegation that he told the officer that he was the only person in the store and that Kirkland did not come into the store until after Brown called 911. While this discrepancy might have been used to impeach Kirkland's testimony, it does not create a reasonable probability of a different outcome given the importance of Kirkland's testimony compared to other trial evidence.

It is critical to recognize that the undersigned presided over Defendant's trial, and has a very vivid recollection of the trial evidence, which was overwhelming even without Kirkland's testimony. Uncontroverted ballistics evidence was presented directly tying Defendant to the shooting of Ms. Woods. When Defendant was arrested, police found a .25-caliber semiautomatic pistol, bullets, and Defendant's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Defendant's house. Moreover, the robbery/murder in this case was the third in a series of robberies and shootings, all of which were committed with the same gun, the gun found in Defendant's bedroom. Furthermore, Defendant was

positively identified as the person who had committed the first two robbery/shootings, and the car he used in the first two robberies had been stolen from near his home and then abandoned not far from the scene of the instant robbery/murder. Another car stolen from that area ended up next to Defendant's home with two expended shells from the murder weapon in it. In short, Defendant used the murder weapon in two robbery/shootings not long before the instant robbery/murder, had possession of the murder weapon following the instant robbery/murder, and was directly connected to the two cars used in the three robbery/shootings.

George Brown's affidavit does not allege that a person other than Defendant robbed and killed Ms. Woods, or that Defendant could not have been the killer. Brown's allegations could only provided further impeachment of details of Kirkland's testimony and his identification of Defendant as the person he saw leaving the store. Even if Defendant's motion demonstrated that the State improperly withheld information from the defense, that information does not establish a reasonable probability of a different outcome sufficient to undermine confidence in the outcome of the trial. Evaluation of the all of the evidence introduced at trial demonstrates that it was overwhelming even if Kirkland's identification could have been called into doubt by Brown's testimony. As such, Defendant's claim of a Brady violation is conclusively refuted by the record.

b. Giglio claim

Defendant also claims that Mr. Brown's affidavit establishes a Giglio violation. To establish a Giglio violation, it must be shown that: "(1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." Guzman v. State, 868 So.2d 498, 505 (Fla. 2003). This test requires the court to consider whether there is any reasonable possibility that the false evidence could have affected the jury's verdict or sentencing recommendation. See Guzman

v. State, 941 So.2d 1045, 1050 (Fla. 2006). Even assuming that Brown's affidavit demonstrates that Kirkland's testimony was "false," and that the prosecutor knew it to be false, there was no reasonable possibility that such "false evidence" could have affected the jury's verdict, for the same reasons set forth in the Brady analysis above. As such, Defendant's claim of a Giglio violation is conclusively refuted by the record.

c. Newly-discovered evidence

Defendant also claims that the affidavit constitutes "newly-discovered evidence" entitling him to a new trial. The Supreme Court in Jones v. State, 709 So.2d 512 (Fla. 1998), established a two-part test for defendants to obtain a new trial based on newly discovered evidence. First, the evidence must not have been known by the trial court, the party, or counsel, and it must appear that the defendant or defense counsel could not have known of it by the use of due diligence. Id. at 521. Second, the evidence "must be of such nature that it would probably produce an acquittal on retrial." Id. (citing Jones v. State, 591 So.2d 911, 915 (Fla.1991)). Newly discovered evidence satisfies the second prong of the Jones test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." Id. at 526 (quoting Jones v. State, 678 So.2d 309, 315 (Fla.1996)).

Even assuming that Defendant or his counsel could not have learned of Brown's allegations in time to file a timely newly-discovered evidence motion, by the use of due diligence, Brown's allegations are not of such nature that it would probably produce an acquittal on retrial," for the same reasons there was no reasonable possibility that such "false evidence" could have affected the jury's verdict, for the same reasons set forth in the Brady analysis set forth in the Brady analysis above. As such, Defendant's newly-discovered evidence is conclusively refuted by the record.

d. Ineffective assistance of counsel

Mentioned in one of the captions in Claim I of the motion, but not argued in the motion, is an alternative, unelaborated claim that "trial counsel was ineffective." Presumably, Defendant is suggesting that, if this Court ruled that the State did not fail to disclose exculpatory information, or that the claim could have been could have been timely discovered by the exercise of due diligence, then counsel was ineffective for failing to discover Brown's allegations. While Defendant does not elaborate this argument in the motion, the Court will address it in an abundance of caution.

To prevail on an ineffective-assistance claim, Petitioner must demonstrate (1) counsel's performance was objectively deficient and (2) counsel's deficiency prejudiced his defense, depriving him of a fair trial with a reliable result. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Rutherford v. State, 727 So.2d 216, 219 (Fla. 1998).

Again, even assuming that trial counsel was deficient for not investigating Brown, there is no reasonable probability that result of the trial would have been different, for the same reasons set forth in the other claims above. As such, Defendant's ineffective-assistance claim is conclusively refuted by the record.

For the foregoing reasons, Claim I is **DENIED.**

CLAIM II

In this claim, Defendant argues that the State's lethal injection procedure violates the Eighth Amendment's protection against cruel and unusual punishment. In the Corrected Motion, Defendant acknowledges that the United States Supreme Court affirmed the decision of the Kentucky Supreme Court finding the lethal injection protocols there constitutional in Baze v. Rees, ___ U.S. ___, 128

S.Ct. 1520 (2008). Without abandoning the claim, Defendant requested the opportunity to "amend the motion and/or address this issue in more depth at the Case Management Conference" after counsel reviewed the Baze decision. At the case management conference, Defendant's counsel chose not to waive the claim, but indicated that the "motion speaks for itself" and did not present further argument on the claim.

Accordingly, this Court notes that the Florida Supreme Court has repeatedly held that Florida's lethal injection procedures comply with the requirements of Baze. See e.g., Henyard v. State, 992 So.2d 120, 129 (Fla. 2008)(rejecting argument that Baze set a different or higher standard for lethal injection claims than previously set by the Florida Supreme Court in Lightbourne v. McCollum, 969 So.2d 326 (Fla.2007)); Ventura v. State, 2 So.3d 194, 200 (Fla. 2009)("Florida's current lethal-injection protocol passes muster under any of the risk-based standards considered by the *Baze* Court"); Tompkins v. State, 994 So.2d 1072 (Fla. 2008)(affirming order summarily denying claim based upon Baze); Walton v. State, 3 So.3d 1000, 1012 (Fla. 2009)(same); Brown v. State, 2009 WL 1990022 (Fla. July 9, 2009)(same).

For the foregoing reasons, Claim II is **DENIED.**

Based on the above, it is:

ORDERED AND ADJUDGED that Defendant's Corrected Motion to Vacate Judgments of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851 With Request for Evidentiary Hearing is **DENIED** without an evidentiary hearing. The Defendant shall have thirty (30) days from the date this Order is filed in which to take an appeal, by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, this 28th day of September, 2009.

JOHN D. SOUTHWOOD
Senior Circuit Judge, Fourth Judicial Circuit

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Appendix S

Decision, Florida Supreme Court, No. SC2003-0780
Mungin v. State, 932 So. 2d 986 (Fla. June 29, 2006)

Mungin v. State

Supreme Court of Florida

April 6, 2006, Decided

No. SC03-780, No. SC03-1774

Reporter
932 So. 2d 986 *; 2006 Fla. LEXIS 553 **; 31 Fla. L. Weekly S 215

ANTHONY MUNGIN, Appellant, vs. STATE OF FLORIDA, Appellee. ANTHONY MUNGIN, Petitioner, vs. JAMES R. MCDONOUGH, etc., Respondent.

Subsequent History: [1]** Released for Publication June 13, 2006.

Rehearing denied by *Mungin v. State, 2006 Fla. LEXIS 1330 (Fla., June 13, 2006)*

Prior History: An Appeal from the Circuit Court in and for Duval County. John Southwood, Judge. Case No. 92-3178-CF. And an Original Proceeding - Habeas Corpus.

Mungin v. State, 1997 Fla. LEXIS 172 (Fla., Mar. 6, 1997)

Core Terms

trial court, ineffective, trial counsel, evidentiary hearing, murder, penalty phase, shooting, asserts, public record, sentence, post conviction relief, deficient performance, identification, mitigation, ineffective assistance claim, conflicting interest, appellate counsel, alibi defense, direct appeal, postconviction, photographs, records, ineffective assistance, assistance of counsel, investigate, recused, argues, felony, actual conflict, guilt phase

Case Summary

Procedural Posture

The Circuit Court in and for Duval County (Florida) denied appellant inmate's motion for postconviction relief, which he filed under *Fla. R. Crim. P. 3.850*. The inmate appealed from that order, and also petitioned for a writ of habeas corpus. This matter followed.

Overview

In reviewing the postconviction relief motion, the instant court first held that no per se disqualification rule required circuit-wide disqualification necessary to preserve judicial impartiality. Second, the inmate waived or abandoned a claim that the trial court failed to conduct an in-camera review of certain public records from both the county sheriff's and State attorney's office. Third, the trial court properly refused to review a detective's notes of an interview conducted with the inmate, as they were irrelevant to his ineffective assistance of counsel claim and were beyond the scope of direct examination. Fourth, the inmate's numerous ineffective assistance of counsel claims, for the most part, lacked merit, and even if they had merit, the inmate failed to show prejudice. Finally, habeas relief was denied, as: (1) hearsay evidence admitted to discuss a prior crime in the penalty phase was not fundamental error; (2) two photographs related to a Tallahassee shooting were relevant, and even if the were not, their admission was harmless; (3) an error in instructing the jury on both premeditated and felony murder was harmless; and (4) his Ring v. Arizona claim lacked merit.

Outcome

The trial court's denial of the inmate's motion for postconviction relief was affirmed, and his petition for a writ of habeas corpus was denied.

Counsel: Todd G. Scher, Miami Beach, Florida, for Appellant/Petitioner.

Charles J. Crist, Jr., Attorney General, and Curtis M. French, Assistant Attorney General, Tallahassee, Florida, for Appellee/Respondent.

Judges: PARIENTE, C.J., and WELLS, LEWIS, CANTERO, and BELL, JJ., concur. ANSTEAD and QUINCE, JJ., concur in result only.

Opinion

[*990] PER CURIAM.

Anthony Mungin appeals an order of the circuit court denying a motion for postconviction relief under *Florida Rule of Criminal Procedure 3.850* and petitions the Court for a writ of habeas corpus. We have jurisdiction. *See art. V, § 3(b)(1), (9), Fla. Const.* For the reasons explained in this opinion, we affirm the trial court's order and deny the petition for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

Anthony Mungin was convicted of the 1990 murder of convenience store clerk Betty Jean Woods. The pertinent facts of this case are set forth in this Court's opinion **[**2]** on direct appeal as follows:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer [Ronald Kirkland] entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $ 59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An **[*991]** analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard *Williams* [1.] rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.
>
> First, William Rudd testified that Mungin came to the convenience store where he worked [in Monticello] on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the **[**3]** cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

Mungin v. State, 689 So. 2d 1026, 1028 (Fla. 1995) (footnote omitted). The jury, which was instructed on both premeditated murder and felony murder with robbery or attempted robbery as the underlying felony, returned a general verdict of first-degree murder. *See id.*

During the penalty phase, the State presented the testimony of Detective Cecil Towle, who was the lead investigator in the Tallahassee **[**4]** case. Detective Towle testified regarding his interview with the victim, Ms. Tsai, who had returned to China.

In mitigation, Mungin presented the testimony of

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1. *Williams v. State, 110 So. 2d 654 (Fla. 1959)*.

friends and family who had close contact with Mungin as a child and teenager. They collectively testified that he was very respectful of his grandparents, with whom he lived, that he attended church, and that he was not a violent or aggressive person. However, most of these witnesses also testified that they had not had any contact with Mungin in at least several years.

Mungin also presented the testimony of Glenn Young, a corrections and probation officer who supervised Mungin for about six months when Mungin resided at the Cross City Correctional Institution beginning in January 1992. Young testified that Mungin had no disciplinary violations during that time. During questioning by defense counsel, Young also indicated that although Mungin was currently serving a life sentence for the other shootings, it did not necessarily mean that he would be incarcerated for life.

Last, Mungin presented the testimony of Dr. Harry Krop, a clinical psychologist and expert in forensic psychology. Dr. Krop testified that he did not find **[**5]** any evidence that Mungin suffered from any major mental illness or personality disorder. Dr. Krop indicated that Mungin functioned in the average range of intellectual ability and that there was no evidence of any type of neurological impairment. Dr. Krop did state that Mungin suffers from a history of drug and alcohol abuse and that Mungin did fairly well in school until drugs changed his lifestyle. Dr. Krop also made it clear that although shooting someone is an antisocial act, in his opinion, Mungin does not suffer from a personality disorder, shows a number of positive strengths, and would be able to function in open prison society.

At the conclusion of the penalty phase, the jury recommended the death penalty by a vote of seven to five. *See id. at 1028*. **[*992]** After weighing the aggravating and mitigating circumstances, the trial court followed the jury's recommendation and sentenced Mungin to death. [2]

[6]** Mungin raised nine issues on direct appeal. [3] This Court concluded that the trial court erred in denying Mungin's motion for judgment of acquittal on the theory of premeditated murder. *See id. at 1029*. However, the Court did not reverse Mungin's first-degree murder conviction because the Court concluded that the trial court correctly denied Mungin's motion for judgment of acquittal on the alternative theory of felony murder. *See id.* The Court also ruled that although the trial court erred in instructing the jury on premeditated murder, this error was harmless. *See id.* The Court rejected all of Mungin's other arguments as either unpreserved or meritless, and affirmed the first-degree murder conviction and sentence of death. *See id. at 1030-32*.

[7]** After several changes of counsel, Mungin filed a consolidated amended motion for postconviction relief under *Florida Rule of Criminal Procedure 3.850*, in which he raised multiple claims. Following a *Huff* [4] hearing, the circuit court ordered an evidentiary hearing on three of Mungin's claims:

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[2] The trial court found two aggravating circumstances: (1) Mungin had previously been convicted of a felony involving the use or threat of violence to another person; and (2) Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. *See id.* The trial court found no statutory mitigation and gave minimal weight to the nonstatutory mitigation that Mungin was not antisocial and could be rehabilitated. *See id.*

[3] These issues were: (1) whether the trial court erred in overruling a defense objection to the State's peremptory strike of an African-American prospective juror; (2) whether the evidence was insufficient to support a first-degree murder conviction; (3) whether the trial court erred in allowing the State to introduce irrelevant evidence that Mungin shot a collateral crime victim in the spine; (4) whether fundamental error occurred when a defense witness testified in the penalty phase that inmates serving life sentences are eligible for conditional release and could be released in as little as five years; (5) whether the trial court erred in instructing the jury on and in finding the aggravating circumstances of robbery and pecuniary gain; (6) whether the trial court erred in refusing to instruct the jury that Mungin's age could be considered in mitigation; (7) whether the trial court erred in failing to find and give some weight to unrebutted nonstatutory mitigation; (8) whether the death sentence is inappropriate if the Court eliminates the aggravating circumstances of robbery and pecuniary gain and considers mitigation that the trial court failed to find; and (9) whether Mungin's conviction and death sentence are unconstitutional. *See id. at 1029 n.4*

[4] *Huff v. State, 622 So. 2d 982, 983 (Fla. 1993)*.

(1) that trial counsel rendered ineffective assistance during the guilt phase; (2) that there is newly discovered evidence; and (3) that trial counsel rendered ineffective assistance during the penalty phase by failing to present evidence of Mungin's troubled childhood. Prior to the evidentiary hearing, Mungin filed two supplemental claims. The first claim alleged that if the State knew of eyewitness Kirkland's criminal history and did not disclose it to defense counsel, the State violated *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. In his second supplemental claim, Mungin argued that his death sentence should be reversed under *Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)*. The circuit court declined to consider Mungin's supplemental *Brady* claim based on its previous ruling that it would not allow any **[**8]** more filings. The trial court also decided not to address the *Ring* claim until there was further development on the issue from either **[*993]** this Court or the United States Supreme Court.

At the evidentiary hearing, Mungin presented the testimony of several witnesses to support his claims of ineffective assistance of trial counsel. Charles G. Cofer, Mungin's lead trial counsel, testified regarding his recollection of his actions during trial preparation and trial. [5] Edward Kimbrough, Jesse Sanders, Brian Washington, Victoria Jacobs, Philip Levy, and Vernon Longworth testified regarding Mungin's whereabouts on the day of the murder and to other facts supporting Mungin's claim that trial counsel was ineffective for failing to fully investigate Mungin's alibi defense. Eyewitness Ronald Kirkland testified regarding his statement to police in 1990, his identification of Mungin, and his prior criminal history. In rebuttal, the State presented the testimony **[**9]** of Cofer and Detective Dale Gilbreath, the lead detective in the case.

The trial court issued an order denying relief and Mungin appeals, raising seven issues, which include numerous subissues, for this Court's review. [6] **[**10]** Mungin also petitions for a writ of habeas corpus, raising three claims for relief. [7]

ANALYSIS

A. MOTION FOR POSTCONVICTION RELIEF

1. Recusal of Judge Southwood

In his first issue on appeal, Mungin argues that Senior Judge John D. Southwood, as well as all of the judges on the Fourth Judicial Circuit, should have been recused from presiding over Mungin's postconviction proceedings because at the time of these proceedings Mungin's trial counsel, Charles G. Cofer, was a sitting county judge in Duval County. Mungin admits that he did not timely file a motion to disqualify in the trial court but argues that Judge Southwood should have sua sponte recused himself and that his failure to do so was fundamental error. Mungin asks this Court to reverse the denial of his postconviction motion and grant **[**11]** him a new evidentiary hearing in another judicial circuit.

[5] Lewis Buzzel, who assisted Cofer with Mungin's case, did not testify at the hearing.

[6] These issues are: (1) whether the failure of the trial judge and the Fourth Judicial Circuit to recuse themselves from Mungin's postconviction proceedings was fundamental error; (2) whether the trial court erred in failing to conduct an in-camera inspection of exempted public records from the Duval County State Attorney's Office and the Duval County Sheriff's Office; (3) whether the trial court erred in denying Mungin's request to review Detective Gilbreath's notes of the interview with Mungin; (4) whether the trial court erred in summarily denying several of Mungin's claims of ineffective assistance of counsel; (5) whether the trial court erred in denying Mungin's claims of ineffective assistance of trial counsel during the guilt phase after an evidentiary hearing; (6) whether the trial court erred in denying Mungin's claim that the Public Defender's Office had an actual conflict of interest; and (7) whether the trial court erred in denying Mungin's claim of ineffective assistance of trial counsel during the penalty phase after an evidentiary hearing.

[7] These claims are: (1) Mungin received ineffective assistance of appellate counsel; (2) the Court should reconsider its ruling on direct appeal that the trial court's error in failing to grant Mungin's motion for judgment of acquittal on the charge of premeditated murder did not require reversal; and (3) Mungin's death sentence is unconstitutional under *Ring*.

Essentially, he urges a per se rule that any time a judge in a circuit represented the defendant in a criminal trial and testifies as a witness in a postconviction proceeding, all the judges of that circuit must sua sponte recuse themselves. We disagree that any rule, statute or court precedent dictates such a result and consider **[*994]** a rule of circuitwide disqualification unnecessary to preserve judicial impartiality.

In addition, Mungin's argument is procedurally barred because it was raised for the first time on appeal in disregard of the time parameters in which motions to disqualify should be filed. As we stated in a recent case, a claim of judicial bias is procedurally barred on direct appeal if the defendant fails to seek disqualification of the judge after having specific knowledge of the grounds for disqualification. *See* Schwab v. State, 814 So. 2d 402, 407 (Fla. 2002).

In *Schwab*, the Court rejected the defendant's argument that the judge should have recused himself under Canon 3E of the Code of Judicial Conduct. We distinguished Maharaj v. State, 684 So. 2d 726 (Fla. 1996), in which **[**12]** the defendant discovered *after* he commenced his appeal of the denial of his 3.850 motion that the trial judge had previously supervised the attorneys who prosecuted the defendant. *See* Schwab, 814 So. 2d at 408. Canon 3E(1)(b) expressly requires that a judge be disqualified if "the judge served as a lawyer or was the lower court judge in the matter in controversy, or *a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter*, or the judge has been a material witness concerning it." (Emphasis supplied.) Accordingly, under Canon 3E, the trial judge in *Maharaj* should have recused himself regardless of whether a motion to disqualify was filed.

In contrast to *Maharaj* and as in *Schwab*, Mungin had specific knowledge of the alleged grounds for disqualification but failed to file a motion to disqualify. Further, unlike *Maharaj*, there is no specific requirement that a trial judge recuse himself or herself simply because a fellow judge in the circuit is to serve as a witness. Mungin has made no claim of actual, rather than merely presumptive, bias. Thus, his claim is both procedurally barred and **[**13]** without merit.

2. Public Records Request

In his second issue on appeal, Mungin argues that the trial court's failure to conduct an in-camera inspection of documents from the Duval County State Attorney's Office and Duval County Sheriff's Office, claimed to be exempt from his public records request, was error that warrants reversal of the denial of his motion for postconviction relief. In Vining v. State, 827 So. 2d 201, 218 (Fla. 2002), this Court addressed the defendant's claim that he was denied access to public records. In granting the defendant's request for additional public records, the trial court ordered the defendant to submit a demand to each agency with a list of the specific documents requested and ordered the agencies to comply within fifteen days. *See id. at 219*. The defendant took no further action between the date of the order and the evidentiary hearing on his postconviction claims. *See id.* This Court rejected the defendant's public records claim, stating:

> Although Vining now contends that there are many public records outstanding, he made no further complaint on the public records issue during the five-month span **[**14]** between the postconviction court's public records order and the evidentiary hearing. Based on this record, we conclude that the court afforded Vining ample time and opportunity to pursue any public records claim. Through his own actions, Vining either waived or abandoned any claim that he was denied public records.

Id.

This Court rejected a similar claim in Pace v. State, 854 So. 2d 167, 180 (Fla. **[*995]** 2003). In that case, the trial court denied an evidentiary hearing on the defendant's claim that certain state agencies

failed to provide public records. The defendant then filed a similar public records request but "made no complaint and filed no motion to compel with the postconviction court regarding these requests." *Id.* The Court cited to *Vining* and concluded that "due to Pace's inaction during the year and a half between his public records request and the evidentiary hearing, . . . Pace has waived or abandoned any claim that he was denied public records." *Id.*

As in *Vining* and *Pace*, Mungin made a request for public records but subsequently failed to follow up on the request by informing the trial court that the issue had not been resolved. **[**15]** Postconviction counsel, Dale Westling, was well aware of the sealed boxes at the records repository, filing a second request to have those records sent to the court. The trial court subsequently entered an order directing that those records be delivered. Kenneth Malnik, Mungin's privately retained counsel who first appeared in the case on March 1, 2001, was aware that there were records that had not been provided by Westling to Malnik. In fact, due to this discovery, Malnik sought and was granted an extension of time in which to file the consolidated amended motion for postconviction relief. However, Malnik did not pursue an in-camera inspection of any documents that were claimed to be exempt from disclosure. Thus, Mungin had ample opportunity to pursue this issue from the date of the trial court's order to the time of the evidentiary hearing in June 2002. Accordingly, Mungin has waived or abandoned his claim that the trial court failed to conduct an in-camera review of these records and we deny this claim for relief.

3. Detective Gilbreath's Notes

Mungin next asserts that he was denied a full and fair postconviction evidentiary hearing because the trial court refused to **[**16]** review Detective Gilbreath's rough notes of the interview Detective Gilbreath conducted with Mungin during the investigation. The trial court declined to review the notes, finding that they were not relevant to Mungin's ineffective assistance of counsel claim and that the issue was beyond the scope of direct examination. Mungin does not contend that these notes might contain *Brady* material, nor does it appear that these notes were part of the Duval County Sheriff's Office records that were the subject of Mungin's public records request. Under the circumstances of this case, there was no error in the trial court's ruling on this evidentiary matter.

4. Summary Denial of Ineffective Assistance of Counsel Claims

In his next issue on appeal, Mungin argues that the trial court erred in summarily denying several of his claims of ineffective assistance of trial counsel. *Florida Rule of Criminal Procedure 3.850(d)* provides that a claim may be denied without a hearing where "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." [8] Thus, to support summary denial **[*996]** without a hearing, a trial court must **[**17]** either state its rationale or attach to its order those specific parts of the record that refute each claim presented in the motion. *See Anderson v. State, 627 So. 2d 1170, 1171 (Fla. 1993)*. Further, when the trial court denies postconviction relief without conducting an evidentiary hearing, "this Court must accept [the defendant's] factual allegations as true to the extent they are not refuted by the record." *Rose v. State, 774 So. 2d 629, 632 (Fla. 2000)*, *receded from on other grounds by Guzman v. State, 868 So. 2d 498 (Fla. 2003)*. However, the defendant has the burden of

[8] For all death case postconviction motions filed after October 1, 2001, *Florida Rule of Criminal Procedure 3.851* requires an evidentiary hearing "on claims listed by the defendant as requiring a factual determination." *Fla. R. Crim. P. 3.851(f)(5)(A)(i)*; *see also Amendments to Fla. Rules of Criminal Procedure 3.851, 3.852, & 3.993, 802 So. 2d 298, 301 (Fla. 2001)*. However, prior to the 2001 amendments to *rule 3.851*, *rule 3.850(d)* applied to the summary denials of postconviction motions in both death and nondeath cases. *See McLin v. State, 827 So. 2d 948, 954 n.3 (Fla. 2002)*. Because Mungin's motion for postconviction relief was filed in 1998, the summary denial standard set forth in *rule 3.850(d)* applies in this case.

establishing a legally sufficient claim. *See* Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000). If the claim is legally sufficient, this Court must then determine whether the claim is refuted by the record. *See id.*

[18]** To obtain relief on a claim of ineffective assistance of counsel Mungin must establish

> deficient performance and prejudice, as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See* Rutherford v. State, 727 So. 2d 216, 218 (Fla. 1998). As to the first prong, deficient performance, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See* Strickland, 466 U.S. at 688. Second, as to the prejudice prong, the deficient performance must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See* id. at 694; Rutherford, 727 So. 2d at 220.

Gore v. State, 846 So. 2d 461, 467 (Fla. 2003) (parallel citations omitted). "When a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001). Further, as the United States Supreme Court explained **[**19]** in *Strickland*,

> judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689. We address each of Mungin's claims separately below.

(a) Voir Dire

Mungin first contends that the trial court erred in denying without an evidentiary hearing his claim that trial counsel was ineffective for accepting the jury without objection, which thereby failed to preserve for appeal the issue of whether the trial court erred in overruling a defense objection to the State's use of a peremptory challenge to strike juror Galloway, an African-American female. At the *Huff* hearing, the State argued that Mungin was not prejudiced by trial counsel's failure to object because the underlying **[**20]** claim was meritless. After reviewing the record of the voir dire, we conclude that the trial court did not abuse its discretion in granting the State's peremptory challenge **[*997]** of juror Galloway. Therefore, the prejudice prong of *Strickland* is conclusively refuted. *See* Valle v. State, 705 So. 2d 1331, 1335 (Fla. 1997).

(b) Failure to Object During State's Closing Argument

Mungin next asserts that the trial court erred in summarily denying his claim that defense counsel was ineffective for failing to object to three comments made by the prosecutor during guilt and penalty phase closing arguments. After reviewing the comments, we conclude that the record conclusively establishes that none of these isolated arguments was objectionable, and accordingly no ineffective assistance of counsel in failing to object can be demonstrated. Thus, summary denial was appropriate because this claim is without merit.

(c) Failure to Properly Prepare Witness

Mungin next asserts that the trial court erred in summarily denying his claim that trial counsel was ineffective during the penalty phase for failing to properly prepare witness Glenn Young. During direct examination, **[**21]** trial counsel asked Young about the amount of time Mungin was already required to serve in prison because of his prior convictions. Young responded that Mungin was serving a life sentence, but that life does not

always mean life. Mungin asserts that as a result of trial counsel's failure to prepare Young, Young was permitted to give highly damaging testimony about the possibility of early release if Mungin was sentenced to life in this case. The trial court denied this claim as procedurally barred.

In his motion for postconviction relief, Mungin appears to argue both the merits of the underlying claim-that Young's testimony was fundamental error-and that trial counsel was ineffective for allowing this testimony. As to the merits of the underlying claim, the trial court correctly found this issue to be procedurally barred because Mungin raised this issue on direct appeal and it was rejected by the Court. *See* *Mungin, 689 So. 2d at 1030*. However, Mungin's claim that counsel was ineffective for opening the door to this testimony is cognizable in a motion for postconviction relief. *See* *Brown v. State, 846 So. 2d 1114, 1123-24 (Fla. 2003)* (addressing the **[**22]** defendant's claim that counsel was ineffective for opening the door to damaging testimony); *Johnson v. State, 769 So. 2d 990, 1000-01 (Fla. 2000)* (same). Accordingly, the trial court erred in failing to address the merits of this claim.

The trial court was required to hold an evidentiary hearing unless Mungin's allegations failed to state a legally sufficient claim or the claim was refuted by the record. *See* *Freeman, 761 So. 2d at 1061*. To establish prejudice, Mungin's allegations must show that Young's testimony that life does not always mean life "so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Gore, 846 So. 2d at 467*. Specifically, as it pertains to the penalty phase, we must determine whether allowing Young's testimony undermines our confidence in the imposition of the death sentence. We conclude that Mungin has failed to meet this burden.

First, Young's testimony on this subject, although not all favorable to Mungin, allowed defense counsel to argue to the jury that Mungin had already been sentenced to prison for the rest of his natural life. Second, as noted by the **[**23]** Court on direct appeal, the trial court properly instructed the jury that the law at the time for capital sentences was death or life with a minimum mandatory term of twenty-five years. *See* *Mungin, 689 So. 2d at 1031*. Thus, **[*998]** regardless of the specter of early release on Mungin's prior convictions, the jury knew that a life sentence in this case meant Mungin would serve at least twenty-five years in prison. Accordingly, we conclude that Mungin cannot demonstrate prejudice under the *Strickland* standard as to this aspect of trial counsel's performance alone or in combination with other alleged deficiencies. [9]

[24] 5. Ineffective Assistance of Counsel during the Guilt Phase**

In Mungin's fifth issue on appeal, he asserts that the trial court erred in denying three claims of ineffective assistance of counsel during the guilt phase of his trial following an evidentiary hearing. In reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court defers to the factual findings of the trial court to the extent that they are supported by competent, substantial evidence, but reviews de

[9] Mungin admits that he raised the following claims in his postconviction motion solely to preserve them for federal review: Claim VI (failure to object to various comments and arguments by the State which diminished the jurors' sense of responsibility in violation of *Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)*); Claim VIII (Mungin is innocent of first-degree murder and was denied an adversarial testing); Claim IX (Mungin is innocent of the death penalty); Claim X (penalty phase instructions improperly shifted the burden to the defense to prove that death was an inappropriate sentence and trial counsel failed to object); Claim XI (jurors received inadequate guidance as to aggravating factors and Florida's statute is unconstitutionally vague); Claim XII (denial of constitutional rights and right to collateral counsel due to rules prohibiting juror interviews); Claim XIII (death sentence predicated on an automatic aggravating circumstance of commission of murder during the course of a felony); Claim XV (Mungin is insane to be executed); and Claim XVII (electrocution and lethal injection are unconstitutional and violative of principles of international law). We agree that the trial court did not err in summarily denying relief on these claims.

novo the application of the law to those facts. *See Stephens v. State, 748 So. 2d 1028, 1031-32 (Fla. 1999)*.

Mungin's first subclaim is that trial counsel was ineffective for failing to sufficiently impeach the testimony of Ronald Kirkland. Specifically, Mungin argues that Cofer should have made the jury aware that Kirkland was on probation at the time of the trial and that warrants had been issued for Kirkland's arrest on violation of probation and subsequently recalled. [10]

[25]** Even if Cofer's performance was deficient because he failed to discover and use Kirkland's probationary status as impeachment evidence, Mungin has failed to establish prejudice. Cofer attacked Kirkland's identification of Mungin on cross-examination of Kirkland, and by his cross-examination of the victim of the Monticello **[*999]** shooting and the eyewitness to the Tallahassee shooting, whose descriptions of the perpetrator were different from Kirkland's. In closing argument, Cofer argued extensively that due to these inconsistencies, Kirkland's identification could not be believed beyond a reasonable doubt. Moreover, Kirkland testified that he did not tell anyone from the State Attorney's Office that he was on probation and that he did not have any deals with the State in exchange for his testimony at Mungin's trial. Mungin does not allege that any deals were made. As for trial counsel's failure to inform the jury of the recalled warrants for Kirkland's arrest, because the warrants were not recalled until after the trial it cannot be said that counsel's performance was deficient.

Mungin also asserts that trial counsel was ineffective for failing to call Detective Christie Conn to testify **[**26]** regarding Kirkland's identification of Mungin in a photo spread. Specifically, Mungin asserts that according to Detective Conn's deposition testimony, Kirkland stated at the time of the identification that he could not swear in court that the man in the photograph was the same man he saw exiting the store on the day of the murder. After the evidentiary hearing, the trial court denied this claim, finding that Cofer "made a tactical decision, after discussing the possibility with Defendant, not to call Detective Conn as a witness."

Cofer testified at the evidentiary hearing that after discussing the issue with Mungin, he made a tactical decision not to call Detective Conn. Cofer stated that it was their decision that unless they had something "pretty important" to present, they wanted to try to reserve initial and final closing argument, and that on balance Kirkland admitted to most of the things that they would have used Detective Conn to impeach. Mungin argues that Cofer's asserted reason for failing to call Detective Conn is belied by the record, which shows that the defense team waived initial closing argument.

Although trial counsel ultimately waived initial closing argument, **[**27]** that does not demonstrate that at the time the decision was made not to call Detective Conn, trial counsel did not intend to use both the initial and final closing. Further, Cofer stated at the evidentiary hearing that the decision was part of his trial strategy, which he discussed with Mungin and to which Mungin agreed. Mungin did not testify at the hearing and therefore failed to present any evidence to rebut Cofer's testimony that Mungin was consulted about this decision.

Even assuming that counsel's performance was deficient in this regard, we conclude that Mungin has

[10] In the alternative, Mungin asserts that the State violated *Brady* by failing to disclose Kirkland's probation status as well as the recalled warrants. The trial court refused to address this claim because it was raised not in Mungin's consolidated amended motion for postconviction relief, but as a supplemental claim filed on the day of the evidentiary hearing. Despite the trial court's ruling, both Cofer and Kirkland were asked about these events at the evidentiary hearing and there was no evidence presented to support a finding that the State knew about Kirkland's probationary status or warrants. Kirkland testified that he did not disclose his probation to anyone at the State Attorney's Office and was unaware that a warrant for violation of probation had even been issued. Cofer testified that neither the State Attorney's Office nor the Public Defender's Office is involved in obtaining a warrant for violation of probation. Moreover, the warrants were recalled in February 1993, after Mungin's trial. The State could not suppress information that was not available.

failed to establish prejudice. As noted above, trial counsel attacked Kirkland's identification of Mungin on cross-examination by bringing out the limited time he had to actually view the perpetrator and the fact that it took him fifteen to twenty minutes to pick Mungin out of the photo lineup. Cofer also brought Kirkland's identification into question by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, who gave different descriptions of the perpetrator than did Kirkland. Accordingly, our confidence in the outcome of Mungin's trial is not undermined by **[**28]** Cofer's failure to call Detective Conn to testify.

In his final guilt phase ineffective assistance subclaim, Mungin asserts that trial counsel was ineffective for failing to pursue an alibi defense. The trial court denied this claim, finding that Cofer's testimony that the alibi defense was inconsistent with the facts of the case and that such testimony would not have benefited Mungin was credible. The trial court concluded **[*1000]** that Cofer's strategic decision not to pursue this defense did not result in deficient performance or prejudice. We agree. Mungin's claim that a man named "Ice" would have helped to establish his innocence is not supported by any credible evidence.

The Court has rejected ineffective assistance of counsel claims alleging a failure to present an alibi defense when counsel has investigated and made a strategic decision, supported by the record, not to present the defense. *See, e.g.*, *Reed v. State, 875 So. 2d 415, 429-30 (Fla. 2004)* (affirming the trial court's finding that counsel was not ineffective for failing to present an alibi defense when, after an investigation, trial counsel concluded that the available testimony provided, at best, an incomplete **[**29]** alibi).

In this case, it appears that counsel was confused about the details of Mungin's alibi defense. However, Mungin has failed to establish prejudice. Mungin was linked to the crime by the ballistics evidence that identified the gun used in the Tallahassee and Monticello shootings, and found in Mungin's room the night he was arrested, as the same gun that was used to shoot the victim in this case. The State also presented the eyewitness testimony of Ronald Kirkland, who identified Mungin as the man he saw leaving the store. In addition, Mungin presented no evidence at the evidentiary hearing that trial counsel would have been able to locate "Ice" or any evidence connecting "Ice" to the gun. Although Edward Kimbrough and Jesse Sanders testified that they knew an individual who went by the name "Ice," Kimbrough had not seen "Ice" since the early or mid-1990s and Saunders had not seen him since 1987. Neither witness testified that he could have helped Cofer find "Ice" in 1992, and neither witness directly supported Mungin's claim that he gave "Ice" the gun.

Equally important, Mungin's other alibi witnesses do not establish that Mungin could not have committed the murder on the afternoon **[**30]** of September 16, 1990. The testimony of Brian Washington, who was sure that the date he drove Mungin to Jacksonville was September 16, 1990, placed Mungin in Jacksonville on the day of the shooting. Philip Levy and Vernon Longworth remembered seeing Mungin in Jacksonville on a Sunday in September but neither could remember the exact date or time. Therefore, even assuming that the day they saw Mungin was September 16, 1990, their testimony does not provide persuasive evidence that Mungin would have been unable to commit the murder between 1:30 and 2:00 that afternoon.

In light of the strong evidence linking Mungin to the crime and the weaknesses in the testimony of Mungin's alibi witnesses, we conclude that Mungin has failed to establish that he was prejudiced by Cofer's failure to follow up on his alibi defense. *Cf. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1325 (Fla. 1994)* (concluding that although counsel's failure to thoroughly investigate an alibi defense may have been deficient performance under the facts of the case, defendant failed to establish prejudice where four witnesses testified contrary to the alibi testimony offered at the evidentiary hearing and **[**31]** three other witnesses placed the

defendant at the scene of the crime).

6. Public Defender's Conflict of Interest

In his sixth issue on appeal, Mungin asserts that his conviction and sentence should be vacated because the Public Defender's Office for the Fourth Judicial Circuit had an actual conflict of interest that it failed to disclose due to its representation **[*1001]** of a State's witness, Ronald Kirkland, both before and during Mungin's trial. In the alternative, Mungin contends that trial counsel was ineffective for failing to investigate whether a conflict existed. After the evidentiary hearing, the trial court denied this claim, finding that no actual conflict of interest existed.

This Court has recognized that "as a general rule, a public defender's office is the functional equivalent of a law firm" and that "different attorneys in the same public defender's office cannot represent defendants with conflicting interests." *Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990)*. Moreover, "the right to effective assistance of counsel encompasses the right to representation free from actual conflict." *Hunter v. State, 817 So. 2d 786, 791 (Fla. 2002).* **[**32]** However, in order to show a violation of the right to conflict-free counsel or to establish a claim of ineffective assistance premised on an alleged conflict, the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* (quoting *Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)*; *see also Bouie, 559 So. 2d at 1115* (same). In *Hunter*, the Court explained that

> [a] lawyer suffers from an actual conflict of interest when he or she "actively represents conflicting interests." *Cuyler, 446 U.S. at 350*. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. *See Herring v. State, 730 So. 2d 1264, 1267 (Fla. 1998)*. A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction." *Cuyler, 446 U.S. at 350*. "Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* **[**33]** If a defendant successfully demonstrates the existence of an actual conflict, the defendant must also show that this conflict had an adverse effect upon his lawyer's representation. *See Strickland, 466 U.S. at 692*; *Cuyler, 446 U.S. at 350*.

817 So. 2d at 792 (parallel citations omitted) (alterations in original).

Hunter involved an allegation that an actual conflict existed because a State witness was formerly represented by the same public defender's office that represented the defendant. *See id. at 791*. The Court rejected the defendant's argument because trial counsel was unaware of the public defender's previous representation of the witness and did not even know about the witness's criminal background. *See id. at 793*. In reaching this conclusion, the Court found its prior decision in *McCrae v. State, 510 So. 2d 874 (Fla. 1987)*, which involved similar facts, on point. In that case, in addition to noting that trial counsel was unaware of the public defender's representation of the witness, the Court also concluded that counsel was not required "to make inquiry into the matter **[**34]** in order to be considered reasonably effective and within the range of normal, professional competence." *Id. at 877*.

In this case, Cofer was aware of some of Kirkland's prior criminal history. However, there is nothing in the record to support a conclusion that Cofer knew that Kirkland had been represented by the Public Defender's Office for the Fourth Judicial Circuit before or during Mungin's case. Cofer testified that he could not recall whether he checked the public defender's database or whether he knew that Kirkland had been represented by the public defender's office. He also stated that if he had known about the public defender's simultaneous representation of Kirkland in 1992, he would have disclosed **[*1002]** this information to Mungin. Cofer's testimony supports the trial court's finding

that no actual conflict existed.

However, even if an actual conflict did exist, Mungin has failed to demonstrate that the conflict adversely affected Cofer's representation. *See Hunter, 817 So. 2d at 792* (noting that the defendant must satisfy both prongs of *Cuyler* to be entitled to relief). Cofer cross-examined Kirkland extensively about his identification **[**35]** of Mungin, and in light of the fact that Mungin has presented no evidence that Cofer knew of the public defender's representation of Kirkland, Mungin cannot establish that the alleged conflict prevented adequate cross-examination of Kirkland. *See Hunter 817 So. 2d at 793*; *Bouie, 559 So. 2d at 1115*.

Finally, regarding Mungin's claim that Cofer was ineffective for failing to determine that the public defender's office had represented Kirkland, this Court rejected that argument in *McCrae*. Accordingly, we affirm the trial court's denial of relief on this claim.

7. Ineffective Assistance of Counsel During the Penalty Phase

In his final ineffective assistance of trial counsel claim, Mungin asserts that his trial counsel was ineffective during the penalty phase for failing to present mitigation evidence that Mungin attempted suicide at the age of twelve. As with Mungin's claims of ineffective assistance of counsel during the guilt phase, he must establish both deficient performance and prejudice to be entitled to relief. With respect to mitigation this Court has recognized that "the obligation to investigate and prepare for the penalty portion **[**36]** of a capital case cannot be overstated." *State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002)*. "An attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *Ragsdale v. State, 798 So. 2d 713, 716 (Fla. 2001)* (alteration in original) (quoting *State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000)*). Moreover, the United States Supreme Court recently reaffirmed the importance of a thorough investigation by defense counsel into mitigating factors. *See Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. When evaluating claims that counsel was ineffective for failing to present mitigating evidence, the defendant has the burden of showing that counsel's ineffectiveness "deprived the defendant of a reliable penalty phase proceeding." *Asay v. State, 769 So. 2d 974, 985 (Fla. 2000)* (quoting *Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998)*).

With regard to deficient performance, Cofer testified that he was aware of Mungin's attempted suicide at age twelve and generally presented this type of information to the mental health **[**37]** expert to incorporate into his or her testimony. Dr. Krop testified at trial that in conducting his evaluation he reviewed psychiatric records from when Mungin was twelve years old. Thus, this is not a case where counsel did not investigate potential mental health mitigation. Instead, Cofer chose to submit all relevant information to the mental health expert to allow the expert to make a diagnosis. This method of presenting Mungin's mental health mitigation cannot be automatically considered deficient performance, especially given Dr. Krop's conclusion that Mungin did not suffer from any major mental illness or personality disorder. It was an informed strategic decision well within professional norms.

Even if Cofer's decision not to present evidence of Mungin's suicide attempt directly to the jury could be considered deficient performance, Mungin has failed to establish prejudice. The suicide **[*1003]** attempt took place when Mungin was twelve years old, which was twelve years before he committed the murder at issue in this case. Mungin presented no evidence at the hearing that he had any suicidal tendencies at the time of the murder. Nor did he present any evidence to contradict Dr. Krop's **[**38]** testimony at trial that Mungin did not suffer from any major mental illness or personality disorder at the time of the murder. Finally, there are contradictory statements in the hospital report regarding whether Mungin took two Valium tablets to help him sleep or to attempt suicide. Thus,

although the jury recommended death by a close seven-to-five vote, we conclude that Cofer's failure to present evidence of Mungin's suicide attempt to the jury did not "so affect[] the fairness and reliability of the proceedings that confidence in the outcome is undermined." *Gore, 846 So. 2d at 467*.

B. PETITION FOR A WRIT OF HABEAS CORPUS

1. Ineffective Assistance of Appellate Counsel

Mungin raises two claims of ineffective assistance of appellate counsel. "The criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel." *Wilson v. Wainwright, 474 So. 2d 1162, 1163 (Fla. 1985)*. Thus, the Court must consider

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally **[**39]** acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Teffeteller v. Dugger, 734 So. 2d 1009, 1027 (Fla. 1999) (quoting *Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988)*). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000)* (quoting *Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994)*).

Mungin first argues that he received ineffective assistance of appellate counsel because appellate counsel failed to raise on appeal the State's introduction of hearsay testimony during the penalty phase. The State presented the testimony of Tallahassee Police Department Officer Cecil Towle regarding the facts of a prior crime that had been used in the guilt phase as *Williams* rule evidence.

Mungin asserts that this hearsay testimony violated **[**40]** his constitutional right of confrontation. To the extent Mungin relies on *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, we have recently concluded that *Crawford* is not retroactive. *See Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005)*. Moreover, Mungin did not raise a confrontation clause argument in the trial court and therefore that specific argument was not preserved for appeal. "Appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object." *Johnson v. Singletary, 695 So. 2d 263, 266 (Fla.1996)*. In addition, the use of hearsay testimony of a police officer to discuss details of a prior crime in the penalty phase does not constitute error, much less fundamental error. *See generally Dufour v. State, 905 So. 2d 42, 62-63 (Fla. 2005)* (rejecting the defendant's argument that trial counsel was ineffective for **[*1004]** failing to object to the hearsay testimony of the attorney who prosecuted the defendant for an out-of-state murder and who summarized the testimony of the pathologist who testified in the out-of-state trial). Accordingly, counsel **[**41]** cannot be deemed ineffective for failing to raise this issue on appeal.

Mungin also asserts that appellate counsel was ineffective for failing to raise on appeal the State's introduction during the penalty phase of two photographs of the victim of the Tallahassee crime. The same standard for introducing testimony of a prior violent felony conviction during the penalty phase applies to photographs. *See generally Lockhart v. State, 655 So. 2d 69, 72-73 (Fla. 1995)* (applying the same standard to testimony and photographs regarding prior violent felony conviction). Thus, photographs depicting the victim of a prior violent felony committed by the defendant are admissible so long as they are relevant and the prejudicial effect of the photographs does not outweigh their probative value. *See id. at 73*;

Duncan v. State, 619 So. 2d 279, 282 (Fla. 1993).

We conclude that the two photographs of the Tallahassee victim admitted in this case were relevant to show the victim and circumstances of the Tallahassee shooting, and that even if not relevant, the admission of the photographs was harmless beyond a reasonable doubt. *See Dufour, 905 So. 2d at 73-74.* **[**42]** Accordingly, we deny this claim for relief.

2. Court's Prior Ruling

In the second claim raised in his habeas petition Mungin asks this Court to reconsider its ruling on direct appeal that the trial court's error in instructing the jury on both premeditated and felony murder was harmless. Since Mungin's direct appeal, this Court has reaffirmed that "[a] general verdict need not be reversed 'where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient.'" *Teffeteller, 734 So. 2d at 1018* (quoting *Mungin, 689 So. 2d at 1030*). We decline to revisit this issue and deny this claim for relief.

3. *Ring v. Arizona*

Mungin acknowledges that this Court has repeatedly rejected claims for relief under *Ring*, and states that he raises the claim only to preserve it for federal review. Moreover, as the State notes, this Court has now expressly held that *Ring* does not apply retroactively. *See Johnson v. State, 904 So. 2d 400, 412 (Fla. 2005)*. Accordingly, we deny this claim for relief.

[43] CONCLUSION**

For the reasons discussed above, we affirm the trial court's denial of Mungin's motion for postconviction relief and deny Mungin's petition for a writ of habeas corpus.

It is so ordered.

PARIENTE, C.J., and WELLS, LEWIS, CANTERO, and BELL, JJ., concur. ANSTEAD and QUINCE, JJ., concur in result only.

References

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Appendix T
Order, Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 21, 2003)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 92-3178-CF

DIVISION: CR-C

FILED

MAR 2 1 2003

CLERK CIRCUIT COURT

STATE OF FLORIDA,
Petitioner,

v.

ANTHONY MUNGIN,
Defendant.

/

ORDER DENYING DEFENDANT'S CONSOLIDATED AMENDED MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND

This matter comes before this Court on Defendant's Florida Rule of Criminal Procedure 3.851 Consolidated Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend filed on July 3, 2001, and on the State's response to that Motion filed on October 9, 2001.

Defendant was charged by Indictment with the Premeditated First Degree Murder of Betty Jean Woods. Following a jury trial, Defendant was found guilty as charged. Defendant was subsequently sentenced to death. Defendant's convictions and sentences were affirmed on direct appeal by Supreme Court of Florida. Mungin v. State, 689 So. 2d 1026 (Fla. 1996) *cert. denied.* 522 U.S. 833 (1997).

A hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), was held on March 8, 2002. (Ex. "A.") Following argument of counsel for the parties on each ground for relief contained in the Motion, excluding claims one and four which the State conceded an evidentiary hearing was

necessary to resolve, this Court denied claims two, three, five, six, eight, nine, ten, eleven, twelve, thirteen, fifteen, and seventeen for the reasons set forth on that date.[1] This Court need not re-address all of Defendant's denied claims in this Order, but re-incorporates the prior rulings on the claims in to this Order. (Ex. "A.")

Furthermore, pursuant to an agreement at the Huff hearing, this Court reserved ruling upon claims seven and sixteen, claims which were premised upon allegations of cumulative error, until after the conclusion of the evidentiary hearing.

An evidentiary hearing addressing claims one and four in Defendant's instant Motion was conducted on June 25 and 26, 2002. (Ex. "B.") This Court will note, initially, that many of the allegations raised by Defendant are directed at trial counsel's trial tactic decisions. One of the outstanding factors to be considered is experience and expertise of trial counsel from the office of the public defender. There may not be many lawyers with the experience of dealing with homicide cases as exhibited by current county court judge and former assistant public defender Charles G. Cofer's, Defendant's trial attorney whose testimony presented at the evidentiary hearing was both more credible and more persuasive than Defendant's allegations. Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997); Laramore v. State, 699 So. 2d 846 (Fla. 4th DCA 1997). . While trial tactics may always be disputed and argued, there would rarely be total agreement and consensus among the defense bar. Taking the totality of evidence derived at the evidentiary hearing, this Court does not find any sufficient degree of ineffective assistance of counsel which would require the reversal of Defendant's judgment and sentence.

In the instant Motion Defendant's first claim for relief is sub-divided into five (5) separate

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[1] Defense counsel voluntarily withdrew claim fourteen. (Ex. "A," pages 39-40.)

claims consisting of: (A) the Duval County public defender's office, Defendant's trial attorneys, had "an actual conflict of interest" that was not disclosed and which should have required that office to withdraw from Defendant's representation; (B) that Defendant's trial attorney's failure to adequately cross-examine witness Kirkland during the trial amounted to deficient performance which prejudiced Defendant; (C) that "trial counsel was ineffective in cross-examining Kirkland and trial counsel failed to elicit testimony from Detective Conn that would have destroyed Kirkland's credibility"; (D) that trial counsel, Judge Cofer, failed to investigate an alleged alibi defense that Defendant alleges he "related to trial counsel as well as the police"; (E) newly discovered evidence "casts further doubt on Kirkland's veracity."

This Court will address each sub-claim separately. In sub-claim (A), Defendant specifically asserts that it was a violation of "Florida Bar Rules 4-1-7 Conflict of Interest: General Rule, 4-1.9 Conflict of Interest; General Rule, 4-1.9 Conflict of Interest; Former Client and 4-1.10 Imputed Disqualification; General Rule" for Defendant's attorneys to represent him. Defendant maintains that Ronald Kirkland, a state witness at Defendant's trial, was represented by the Duval County public defender's office in cases which "occurred during the investigation and pendency of [Defendant's] homicide case in Duval [County] . . . ." Defendant, further, contends that it is unclear whether or not the office of the public defender represented Mr. Kirkland in a 1986 DUI and careless driving case. According to Defendant; "[i]t is outrageous that the Assistant Public Defender's did not disclose to [Defendant] and the Court of this simultaneous representation . . . ."

This sub-claim was addressed at the evidentiary hearing and based upon the evidence presented this Court concludes that Defendant failed to "demonstrate that an actual conflict of interest existed that adversely affected counsel's representation." Rolling v. State, 825 So. 2d 293,

n3 (Fla. 2002). See Hunter v. State, 817 So. 2d 786 (Fla. 2002)(holding that in order to demonstrate ineffective assistance of counsel premised upon a claim of conflict of interest of defense counsel, Defendant must demonstrate both an actual conflict and that this conflict adversely effected counsel's representation.)

In sub-claim (B), Defendant contends that trial counsel rendered ineffective assistance by failing to properly impeach Mr. Kirkland, a state witness, at trial. According to Defendant, "the failure to damage the credibility of this critical witness by showing that Kirkland had an interest in cooperating with the State prejudiced Mr. Mungin's defense." Defendant is concerned that Kirkland allegedly should have been cross-examined concerning a violation of probation warrant issued prior to Defendant's trial.

After a review of the hearing transcript and post-evidentiary hearing pleadings of the parties, this Court concludes that Defendant has failed to show either that: counsel's performance was outside the wide range of reasonable professional assistance; or that counsel's alleged deficient performance prejudiced the defense. (Ex. "B," pgs 134-142.) Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995); Knight v. State, 394 So. 2d 997 (Fla. 1981). Therefore, this Court finds this claim is meritless.

In sub-claim (C) Defendant contends that counsel rendered ineffective assistance by failing to "elicit testimony from Detective Conn that would have destroyed Kirkland's credibility." It was clear to this Court, based upon the credible testimony presented by Judge Cofer, that this claim is meritless. Strickland; Blanco; Laramore. Judge Cofer made a tactical decision, after discussing the possibility with Defendant, not to call Detective Conn as a witness. (Ex. "B," pg 58.) This Court concludes the decision by defense counsel was a tactical one based upon what he felt the facts of the

case supported. Defense counsel, therefore, was not ineffective for failing to call Detective Conn as a witness at Defendant's trial. See Remeta v. Dugger, 622 So. 2d 452 (Fla. 1993); Gonzales v. State, 691 So. 2d 602, 603 (Fla. 4th DCA 1997) ("Tactical or strategic decisions of counsel do not constitute ineffective assistance of counsel.")

In sub-claim (D), Defendant contends that trial counsel failed to "investigate an alibi that Mr. Mungin related to trial counsel as well as the police." At the evidentiary hearing, post-conviction counsel questioned Judge Cofer regarding the existence of an individual named "Ice" who Defendant asserted actually committed the crimes for which Defendant was convicted.[2] Judge Cofer, during his testimony at the evidentiary hearing, discussed this alleged alibi and his investigation into the alleged alibi. The unequivocal testimony at the evidentiary hearing from Judge Cofer was that the alleged alibi defense was "inconsistent" with the facts of the case and such testimony would not have benefitted Defendant. (Ex. "B," pgs 75-80, 100-114.) This Court concludes that the testimony presented by Judge Cofer was both more credible and more persuasive than Defendant's allegations. Blanco; Laramore. Furthermore, this Court finds that this strategic decision of counsel, which was discussed with Defendant, does not equate to either error on behalf of counsel or prejudice to Defendant's case. Strickland; Remeta; Gonzales.

Exhibit 9

In sub-claim (E), Defendant asserts that "newly discovered evidence casts further doubt on Kirkland's veracity." Defendant maintains that as a result of records production he learned that Mr. Kirkland was charged with filing a false police report, on January 1, 1999. According to Defendant "this strange case resulted in an adjudication and seriously undermines any vestige of credibility that

[2] During his testimony, Judge Cofer indicated that Defendant referred to an individual named "Ice," but in one detective's report the individual was identified as "Snow." (Ex. "B," pg 102.)

could be attached to the State's star eyewitness."

After a review of the hearing transcript and post-evidentiary hearing pleadings of the parties, this Court concludes, as it concluded above at to sub-claim (B), that Defendant has failed to show either that: counsel's performance was outside the wide range of reasonable professional assistance; or that counsel's alleged deficient performance prejudiced the defense. Strickland; Cherry; Knight.

In claim four, Defendant avers that counsel rendered ineffective assistance during the penalty phase by failing to adequately "investigate and prepare mitigating evidence." Defendant maintains that defense counsel should have presented evidence of Defendant's "troubled childhood," and specifically a failed attempt at suicide.

This claim, too, was addressed at the evidentiary hearing. Judge Cofer testified that he was aware regarding his practice regarding the presentation of mental health mitigation evidence. That routine consisted of "my method of handling that, is to send those records to Dr. Krop and he would incorporate them in mental health mitigators." (Ex. "B," pgs 83-5,116.) This Court concludes that Defendant has not established that Judge Cofer's routine practice of presenting mental health mitigation evidence was error. Strickland; Cherry; Knight.

Finally, in claim seven Defendant asserts that his trial was "fraught with procedural and substantive errors which cannot be harmless when viewed as a whole . . . ." In claim sixteen Defendant again asserts a claim based upon cumulative "substantive and procedural" errors when "viewed as a whole" prejudiced Defendant. Consistent with the prior rulings above, this Court finds no merit as to Defendant's claims seven and sixteen.

Based on the above, it is:

ORDERED AND ADJUDGED that Defendant's Motion for Post Conviction Relief is **DENIED.** Defendant shall have thirty (30) days from the date that this Order is filed in which to take an appeal, by filing a Notice of Appeal with the Clerk of the Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 18th day of March, 2003.

J. D. Southwood
SENIOR CIRCUIT COURT JUDGE

Copies to:

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CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to Defendant's attorney by United States mail this 21st day of March, 2003.

G Lapierre
Deputy Clerk.

Case No.: 92-3178-CF

Appendix U

Supreme Court of the United States, No. 96-9161:
Mungin v. Florida, 522 U.S. 833 (Oct. 6, 1997)

1
522 U.S. 833, 139 L.Ed.2d 56

Arnold G. WIEDMER, petitioner, v. UNITED STATES.
No. 96–9154.
Oct. 6, 1997.
Rehearing Denied Nov. 17, 1997.
See 522 U.S. 989, 118 S.Ct. 459.

Case below, 100 F.3d 960.

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied.

2
522 U.S. 833, 139 L.Ed.2d 56

Sammy WILLIAMS, petitioner, v. Robert BORG, Warden, et al.
No. 96–9155.
Oct. 6, 1997.
Rehearing Denied Dec. 1, 1997.
See 522 U.S. 1009, 118 S.Ct. 590.

Case below, 108 F.3d 1387.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

3
522 U.S. 833, 139 L.Ed.2d 56

Anthony BAILEY, petitioner, v. John IGNACIO, Warden.
No. 96–9156.
Oct. 6, 1997.

Case below, 106 F.3d 406.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

4
522 U.S. 833, 139 L.Ed.2d 57

Anthony MUNGIN, petitioner, v. FLORIDA.
No. 96–9161.
Oct. 6, 1997.

Case below, 689 So.2d 1026.

Petition for writ of certiorari to the Supreme Court of Florida denied.

5
522 U.S. 833, 139 L.Ed.2d 57

Earl MATTHEWS, Jr., petitioner, v. Michael W. MOORE, Director, South Carolina Department of Corrections, et al.
No. 96–9163.
Oct. 6, 1997.

Case below, *State v. Matthews*, 291 S.C. 339, 353 S.E.2d 444; 296 S.C. 379, 373 S.E.2d 587; *Matthews v. Evatt*, 105 F.3d 907.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

6
522 U.S. 833, 139 L.Ed.2d 57

Lewis Jerry HARE, Jr., petitioner, v. Joseph SACCHETT, Acting Warden, et al.
No. 96–9166.
Oct. 6, 1997.

Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied.

7
522 U.S. 833, 139 L.Ed.2d 57

Joseph HUGHES, petitioner, v. CITY OF CLEVELAND.
No. 96–9167.
Oct. 6, 1997.
Rehearing Denied Dec. 1, 1997.
See 522 U.S. 1009, 118 S.Ct. 590.

Case below, 77 Ohio St.3d 1469, 673 N.E.2d 135; 77 Ohio St.3d 1549, 674 N.E.2d 1187.

Appendix V

Florida Supreme Court, No. SC60-81358:
Mungin v. State, 689 So. 2d 1026 (Fla. Feb. 8, 1996)

Mungin v. State

Supreme Court of Florida

September 7, 1995, Decided

CASE NO. 81,358

Reporter
689 So. 2d 1026 *; 1995 Fla. LEXIS 2203 **

ANTHONY MUNGIN, Appellant, vs. STATE OF FLORIDA, Appellee.

Subsequent History: [1]** As Revised On Denial of Rehearing February 8, 1996. As Revised On Denial of Rehearing March 6, 1997. Released for Publication March 6, 1997.

Corrected by, 02/07/1996

Post-conviction proceeding at, Remanded by *Mungin v. State, 79 So. 3d 726, 2011 Fla. LEXIS 2563 (Fla., Oct. 27, 2011)*

Post-conviction relief denied at *Mungin v. State, 141 So. 3d 138, 2013 Fla. LEXIS 1230 (Fla., June 20, 2013)*

Post-conviction relief denied at *Mungin v. State, 259 So. 3d 716, 2018 Fla. LEXIS 2211, 2018 WL 5993827 (Fla., Nov. 15, 2018)*

Post-conviction relief denied at *Mungin v. State, 320 So. 3d 624, 2020 Fla. LEXIS 268 (Fla., Feb. 13, 2020)*

Writ of habeas corpus denied, Dismissed by, Certificate of appealability denied *Mungin v. Sec'y, Fla. Dep't of Corr., 2022 U.S. Dist. LEXIS 145618 (M.D. Fla., Aug. 15, 2022)*

Prior History: An Appeal from the Circuit Court in and for Duval County, John D. Southwood, Judge - Case No. 92-3178 CF. Cir. Crt. Case No. 92-3178 CF (Duval County).

Disposition: Motion for Rehearing denied.

Core Terms

premeditation, robbery, murder, felony murder, first-degree, guilt, jurors, trial court, mitigation, trial judge, grounds, cases, general verdict, convicted, felony, instruct a jury, sentencing, rested, death sentence, harmless, murder conviction, degree of murder, district court, jury's verdict, instructions, equipped, serve a life sentence, premeditated murder, special verdict, new trial

Case Summary

Procedural Posture
Defendant challenged his conviction for first-degree murder and the imposition of the death penalty by the Duval County Circuit Court (Florida). Defendant alleged that the trial court erred in denying his motion for acquittal on the first degree murder charge and committed fundamental error by allowing testimony that provided a false impression of a life sentence.

Overview
Defendant challenged his conviction for first degree murder and the imposition of the death penalty. Defendant alleged that the trial court erred by denying his motions for acquittal on both first degree murder and felony murder because insufficient evidence existed to convict on either charge. The court agreed that the trial court erred in denying the motion for a judgment of acquittal on first degree murder. The court did not reverse defendant's

conviction because the trial court correctly denied the motion for acquittal on felony murder. The court held that although the trial court failed to instruct the jury on both charges, the error was harmless. The court reasoned that because the evidence supported a conviction for felony murder, the jury could convict defendant of first-degree murder. The court held no fundamental error occurred when a defense witness testified that inmates who served life sentences could be released. The court found that the trial court did not abuse its discretion in failing to give the instruction that defendant's age could be considered for mitigation. All of defendant's other issues were meritless. Thus, the conviction and penalty were affirmed.

Outcome
The court affirmed defendant's conviction for first degree murder and the imposition of the death penalty, because the evidence was sufficient to warrant the first degree murder conviction and the imposition of the death penalty.

Counsel: Nancy A. Daniels, Public Defender and Steven A. Been, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida, for Appellant.

Robert A. Butterworth, Attorney General and Curtis M. French, Assistant Attorney General, Tallahassee, Florida, for Appellee.

Judges: KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur. ANSTEAD, J., dissents.

Opinion

[*1028] The Motion for Rehearing filed by Appellee, having been considered in light of the revised opinion, is hereby denied.

REVISED OPINION

PER CURIAM.

Anthony Mungin, a prisoner under a sentence of death, appeals his conviction of first-degree murder and the penalty imposed. We have jurisdiction based on *article* ***[**2]*** *V, § 3(b)(1) of the Florida Constitution.*

We affirm both the conviction and the death sentence.

Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $ 59.05 discrepancy in cash at the store.

Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.

Jurors also heard Williams rule [1] evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.

[3]** First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.

Second, Thomas Barlow testified that he saw

[1] *Williams v. State, 110 So. 2d 654, 659, 662* (Fla.), *cert. denied,* ***361 U.S. 847, 80 S. Ct. 102, 4 L. Ed. 2d 86 (1959)***; *see also § 90.404(2), Fla. Stat.* (1991).

Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

The judge instructed the jury on both premeditated murder and felony murder (with robbery or attempted robbery as the underlying felony), and the jury returned a general verdict of first-degree murder.

In the penalty phase, several witnesses who knew Mungin while he was growing up testified that he was trustworthy, not violent, and earned passing grades in school. Mungin lived with his grandmother from the time he was five, but Mungin left when he was eighteen to live with an uncle **[**4]** in Jacksonville. An official from the prison where Mungin was serving a life sentence for the Tallahassee crime testified that Mungin did not have any disciplinary problems during the six months Mungin was under his supervision. Harry Krop, a forensic psychologist, testified that he found no evidence of any major mental illness or personality disorder, although Mungin had a history of drug and alcohol abuse. Krop said he thought Mungin could be rehabilitated because of his normal life before drugs, his average intelligence, and his clean record while in prison.

The jury recommended death by a vote of seven to five. The trial judge followed the jury's recommendation and sentenced Mungin to death. In imposing the death penalty, the trial judge found two aggravating factors: (1) Mungin had previously been convicted of a felony involving the use or threat of violence to another person; [2] **[**5]** and (2) Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. [3] The trial judge found no statutory mitigation and gave minimal weight to the nonstatutory mitigation that Mungin could be rehabilitated and was not antisocial.

[*1029] Mungin raises nine issues on this direct appeal. [4]

[6]** I. GUILT PHASE

We first address Issue 2, where Mungin argues that the evidence was not sufficient to support first-degree murder. The trial judge instructed the jury on both premeditated and felony murder, and the jury returned a general verdict of first-degree murder. We agree with Mungin only that the judge erred in denying his motion for judgment of acquittal as to premeditation.

Premeditation is "a fully formed conscious purpose to kill that may be formed in a moment and need only exist for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act." *Asay v. State, 580 So. 2d 610, 612* (Fla.), *cert. denied, 502 U.S. 895, 112 S. Ct. 265, 116 L. Ed. 2d 218 (1991).*

In a case such as this one involving circumstantial evidence, a conviction cannot be sustained--no matter how strongly the evidence suggests guilt--

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[2] *§ 921.141(5)(b), Fla. Stat.* (1991).

[3] *§ 921.141(5)(d), (f),* Fla. Stat. (1991). The trial judge recognized that these two aggravating factors merged and treated them as one aggravator. He also instructed jurors that if they found these two aggravators, they were to count them as one.

[4] Whether (1) the trial court erred in overruling a defense objection to the State's peremptory strike of a black prospective juror; (2) the evidence was sufficient to support first-degree murder; (3) the trial court erred in allowing the State to introduce irrelevant evidence that Mungin shot a collateral crime victim in the spine; (4) fundamental error occurred when a defense witness testified in the penalty phase that inmates serving life sentences are eligible for conditional release and could be released in as little as five years; (5) the trial court erred in instructing the jury on and in finding the aggravating circumstances of robbery and pecuniary gain; (6) the trial court erred in refusing to instruct the jury that Mungin's age could be considered in mitigation; (7) the trial court erred in failing to find and give some weight to unrebutted nonstatutory mitigation; (8) the death sentence is appropriate if this Court eliminates the aggravating circumstances of robbery and pecuniary gain and considers mitigation that the trial court failed to find; and (9) Mungin's conviction and death sentence are unconstitutional.

unless the evidence is inconsistent with any reasonable hypothesis of innocence. *McArthur v. State, 351 So. 2d 972, 976 (Fla. 1977)*. A defendant's motion for judgment of acquittal should be granted in a circumstantial-evidence case "if the state fails to present evidence from which the jury **[**7]** can exclude every reasonable hypothesis except that of guilt." *State v. Law, 559 So. 2d 187, 188 (Fla. 1989)*.

The State presented evidence that supports premeditation: The victim was shot once in the head at close range; the only injury was the gunshot wound; Mungin procured the murder weapon in advance and had used it before; and the gun required a six-pound pull to fire. But the evidence is also consistent with a killing that occurred on the spur of the moment. There are no statements indicating that Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack that would have suggested premeditation. Although the jury heard evidence of collateral crimes, the jury was instructed that this evidence was admitted for the limited purpose of establishing the shooter's identity.

Although the trial judge erred in denying the motion for judgment of acquittal as to premeditation, we do not reverse Mungin's first-degree murder conviction because the judge correctly denied the motion as to felony murder.

The evidence shows that Mungin entered the store carrying a gun, that $ 59.05 was missing from the store, that money from the cash box **[**8]** was gone, that someone tried to open a cash register without knowing how, and that Mungin left the store carrying a paper bag. We find that this evidence supports robbery or attempted robbery, and there is no *reasonable* hypothesis to the contrary.

Because the evidence does not support premeditation, it was error to instruct the jury on both premeditated and felony murder. *See McKennon v. State, 403 So. 2d 389 (Fla. 1981)* (finding error to instruct on robbery as it relates to felony murder where there was no basis in the evidence for the robbery instruction). However, the error was clearly harmless in this case. The evidence supported conviction for felony murder and the jury properly convicted Mungin of first-degree murder on this theory.

[*1030] While a general guilty verdict must be set aside where the conviction may have rested on an unconstitutional ground [5] or a legally inadequate theory, [6] reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient. *Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. **[**9]** 2d 371 (1991)*. The Supreme Court explained this distinction in *Griffin* as follows:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think **[**10]** that their own intelligence and expertise will save them from that error. Quite, the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence, *see Duncan v. Louisiana, 391 U.S. 145, 157, 88 S. Ct. 1444, 1451, 20 L. Ed. 2d 491 (1968)*.

As the Seventh Circuit has put it:

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[5] *See Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931)* (reversing general guilty verdict under a California statute that prohibited the flying of red flags on three alternative grounds, one of which violated rights guaranteed by the First Amendment).

[6] *See Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)* (reversing general guilty verdict for conspiracy where one of the possible bases for conviction was legally inadequate because of a statutory time bar).

"It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance--remote, it seems to us--that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient." *United States v. Townsend, 924 F.2d 1385, 1414* ([7th Cir.] 1991).

Griffin, 502 U.S. at 59-60.

Based upon the foregoing, we find no reasonable possibility that the erroneous instruction contributed to Mungin's conviction, and thus the error was harmless. *State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986)*. Therefore, Mungin is not entitled to relief on this basis. [7]

[11]** II. PENALTY PHASE

When Mungin was tried for the instant case, he was serving a life sentence as an habitual offender for the Tallahassee crime. As his first penalty phase issue (Issue 4), Mungin argues that fundamental error occurred when a defense witness testified during the penalty phase that inmates serving life sentences are eligible for conditional release and could be freed from prison in as little as five years. Glenn Young, a correction/probation officer at the Cross City Correctional Institution, had supervised Mungin after his arrival at the prison. During questioning by defense counsel, Young said, "Life doesn't really mean life. I mean, it means life, but there are inmates that are released with a life sentence."

Mungin maintains that this testimony presented an erroneous picture of what happens to inmates serving life sentences. He did not, however, make a contemporaneous objection to preserve this issue. Any error that occurred was not fundamental. *See State v. Smith, 240 So. 2d 807, 810 (Fla. 1970)* (defining fundamental error as error that goes to the foundation of the case or to the merits of the cause of action). Young's testimony did not go to the foundation **[**12]** of the case. We also note that Mungin **[*1031]** invited this testimony because Young was his witness. Although the State sought to capitalize on this apparently unexpected testimony, defense counsel elicited on redirect examination that inmates serving life sentences typically are not eligible for early release. Further, the trial court correctly instructed the jury on the law at the time for sentences in capital cases: death or life in prison with a minimum mandatory term of twenty-five years. Thus, we find no merit to this issue.

Mungin argues in Issue 6 that the trial judge should have specifically instructed the jury that Mungin's age at the time of the crime--twenty-four--could be considered in mitigation. *See § 921.141(6)(g), Fla. Stat.* (1991). Instead, the trial court gave the general instruction that jurors could consider "any aspect of the defendant's character or record and any other circumstances of the offense."

This Court has held that, under certain circumstances, the general instruction on mitigation is sufficient to allow a jury to rely on the evidence and assign whatever weight it wishes to a defendant's age. *Cave v. State, 476 So. 2d 180, 187-88 (Fla. 1985), cert.* **[**13]** *denied, 476 U.S. 1178, 106 S. Ct. 2907, 90 L. Ed. 2d 993 (1986); see also Smith v. State, 492 So. 2d 1063, 1067 (Fla. 1986)* ("We do not establish a maximum age below which the instruction must always be given.").

We have observed that "age is simply a fact, every murderer has one." *Echols v. State, 484 So. 2d 568, 575 (Fla. 1985), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986)*. How a defendant's age is viewed may differ from case to case. *Compare*

[7] Mungin raises two other guilt-phase issues. Issue 1 (whether trial court erred in overruling a defense objection to the State's peremptory challenge of a black prospective juror) has not been preserved for our review. Any error in Issue 3 (concerning introduction of evidence that Mungin shot a collateral crime victim in the spine) was harmless. The State did not dwell on or unduly emphasize where that victim was shot.

Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985) (age of twenty-three was mitigating factor) *with Lara v. State, 464 So. 2d 1173, 1179 (Fla. 1985)* (age of twenty-five did not require instruction on age as a mitigating circumstance). The better practice may be to give the specific instruction on age, but, under the circumstances of this case, the judge did not abuse his discretion in failing to give the instruction. Nothing about Mungin's age constitutes mitigation for this crime. The record reflects that Mungin had no neurological impairment, did well in school, and was about one credit short of graduation from high school. He left home at age eighteen to live with an uncle in Jacksonville. Although **[**14]** Mungin had used drugs and alcohol, there was no evidence to suggest that he was under the influence of either substance at the time of the crime. Thus, we find no error on this issue.

In Issue 7, Mungin argues that the trial judge erred in failing to find and give some weight to unrebutted nonstatutory mitigation. We find this issue to be without merit.

Our decision in *Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990)*, requires a sentencing court to expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether the evidence supports it and whether any proposed nonstatutory mitigation is truly mitigating.

Mungin says that the trial judge did not specifically evaluate the substance of the evidence from relatives and others who knew him during high school and that the sentencing order does not mention his good prison record or Dr. Krop's testimony that Mungin had used alcohol and drugs for about four years.

The sentencing order reflects that the trial judge heard the testimony of witnesses who knew Mungin through his high school years, but attached "no significance or value" to this testimony because most of the witnesses **[**15]** had had little or no contact with Mungin since he was eighteen years old. We have reviewed the record and do not believe that the trial judge abused his discretion in dismissing this evidence as irrelevant to his sentencing decision.

Further, the sentencing order's reference to the fact that Mungin was capable of rehabilitation encompasses his prison record and the reference to Dr. Krop's findings on Mungin's mental state encompasses drug and alcohol use.

We find no merit to Issue 5 (jury instructed on and found merged aggravating factor of robbery and pecuniary gain). We also find that Issue 8 is without merit because we uphold the merged aggravating factor of robbery and pecuniary gain and we find that the **[*1032]** trial judge appropriately evaluated the mitigation. Under a proportionality review, the death sentence is warranted.

The points raised in Mungin's final issue (Issue 9)--whether his conviction and death sentence are unconstitutional--are either not preserved or without merit.

Accordingly, although we do not find premeditation, we find sufficient evidence of felony murder and affirm Mungin's conviction of first-degree murder. We also affirm the death sentence.

It is so ordered.

GRIMES, **[**16]** C.J., and OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur.

ANSTEAD, J., dissents with an opinion.

Dissent by: ANSTEAD

Dissent

ANSTEAD, J., dissenting.

I would grant rehearing in this case and reverse and remand for a new trial based upon our conclusion that the evidence was insufficient to sustain a finding of premeditation. Relying on *McKennon v. State, 403 So. 2d 389 (Fla. 1981)*, we concluded that the trial court erred in instructing the jury on both premeditated and felony murder because the evidence presented by the State was insufficient to

support premeditation. Majority op. at 3. Indeed, our decision in *McKennon*--where we found evidence similar to the evidence presented in this case insufficient to support robbery as an underlying predicate to felony murder--supports the further conclusion that the trial court's error here was not harmless.

In *McKennon*, the defendant was indicted for first-degree murder and found guilty after a jury trial. On appeal, he challenged his conviction on grounds that the trial court erred in instructing the jury on robbery as an underlying predicate for felony murder where there was insufficient evidence to support a robbery instruction. **[**17]** *403 So. 2d at 390*. The State contended that a discrepancy in the amount of money shown in bookkeeping records and the amount contained in the cash register of the barbershop after the murder constituted a sufficient basis for the robbery instruction. *Id.* We expressly rejected the State's argument in *McKennon* and found that the trial court had erred in giving the instruction because "the purported bookkeeping discrepancy did not prove beyond a reasonable doubt that any funds were taken from the [victim] and hence was insufficient to prove commission of a robbery." *Id. at 391*.

Likewise, Mungin *was not even charged with robbery or attempted robbery*. And, similar to the paucity of evidence of robbery which we found to be insufficient in *McKennon*, the essence of the State's felony murder theory here--with robbery or attempt as the underlying predicate--is a $ 59.05 bookkeeping discrepancy. Moreover, the prosecutor twice explicitly reminded the jury during closing argument that Mungin was not charged with robbery and told them that they did not have to find Mungin guilty of robbery in order to convict him of first-degree murder. Instead, the State focused on premeditation **[**18]** and treated the alternative "felony murder" theory as nothing more than a weak backup. While it may be that the evidence of robbery against Mungin, unlike McKennon, is enough to meet the threshold standard of sufficiency, the evidence is thin at best and certainly not strong enough to render the trial court's error in instructing the jury on premeditation harmless beyond a reasonable doubt.

Furthermore, I also would grant rehearing in this case because I believe that the United States Supreme Court's decision in *Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)*--upon which the majority relies for finding the error here to be a harmless one--simply makes no sense. Rather, there is a solid body of caselaw which states that where a jury is instructed that it can rely on any of two or more independent grounds to support a single count, and one of those grounds was improper, as the premeditation theory was here, a general verdict of guilt must be set aside because it may have rested exclusively on the improper ground. *See Yates v. United States, 354 U.S. 298, 311-312, 77 S. Ct. 1064, 1072-1073*; *1 L. Ed. 2d 1356 (1957)*; *Stromberg v. California, 283 U.S. 359, 369-70, 51 S. Ct. 532, 536, 75 L. Ed. 1117 **[**19]** (1931)*; *see also Zant v. Stephens, 462 U.S. 862, 881, 103 S. Ct. 2733, 77 **[*1033]** L. Ed. 2d 235 (1983)* ("One rule derived from the *Stromberg* case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is *insufficient*, because the verdict may have rested exclusively on the *insufficient* ground.") (emphasis added).

In *Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988)*, the Supreme Court again reiterated the *Stromberg* rule and emphasized the importance of its application in the context of a jury's verdict in a capital sentencing proceeding:

With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. *See e.g.*, *Yates v. United States, 354 U.S. 298, 312, 1 L. Ed. 2d 1356, 77 S. Ct. 1064*, (1957); *Stromberg v. California, 283 U.S. 359, 367-368, 75 L. Ed. 1117, 51 S. Ct. 532 (1931)*. In reviewing death

sentences, the Court has demanded even greater certainty **[**20]** that the jury's conclusions rested on proper grounds. *See*, *e.g.*, *Lockett v. Ohio, 438 U.S. 586 at 605, 57 L. Ed. 2d 973, 98 S. Ct. 2954*, ("The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is . . . unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Andres v. United States, 333 U.S. 740, 752, 92 L. Ed. 1055, 68 S. Ct. 880*, (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, *Zant v. Stephens, 462 U.S. 862, 884-885, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)*. Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

486 U.S. at 376-77 (footnote omitted). Nevertheless, as noted by the majority, it appears that the Supreme Court has retreated from the *Stromberg* rule in cases where one of the alternative theories of guilt underlying a conviction is improper because it is based on insufficient evidence. *See Griffin v. United States, 502 U.S. 46, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991)*. **[**21]**

In *Griffin*, the defendant was charged with drug-conspiracy offenses and the jury returned a general verdict of guilt. The Seventh Circuit affirmed the defendant's conviction--as did the Supreme Court--rejecting her argument that "the general verdict could not stand because it left in doubt whether the jury had convicted [the defendant] of conspiring to defraud the IRS, for which there was sufficient proof, or of conspiring to defraud the DEA, for which (as the Government concedes) there was not." *Id. at 48*. Without mentioning the court's previous statements in *Zant v. Stephens* or *Mills*, Justice Scalia concluded for the majority in *Griffin* that the *Griffin* case was not subject to the rule set out in *Stromberg* and *Yates* and later cases. Rather, Justice Scalia found the error at issue in *Griffin* to be distinguishable from the errors requiring reversal in *Stromberg* and *Yates* because, unlike those early cases, in *Griffin* "one of the possible bases of conviction was neither unconstitutional as in *Stromberg*, nor even illegal as in *Yates*, but merely unsupported by sufficient evidence." *502 U.S. at 56*. As the majority in this case notes, **[**22]** Justice Scalia explained the distinction as follows:

Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

[*1034] *Id. at 59*. It is with this reasoning that I most respectfully take issue. Certainly, jurors are well equipped to analyze evidence--that's their job as fact finders. Obviously, jurors instructed to determine whether a murder was premeditated will attempt to do so. However, jurors are not well equipped to second guess the trial court. Indeed, jurors are prohibited from doing so. Nevertheless, that is exactly what Justice Scalia and the majority assume the jury must have **[**23]** done here in finding the error harmless.

The rationale of the majority blindly presumes that the jury in this case retired to deliberate as to Mungin's guilt, after being specifically instructed on premeditation and felony murder, and then wholly disregarded the instruction on premeditation, having agreed amongst themselves that the trial court must have been mistaken in instructing them on that theory because the evidence was legally insufficient to support it. Clearly, that is not what the jury did here, or what any reasonable jury would do. In fact, this jury--as are all juries--was instructed that they

must follow the trial court's instructions and that such instructions are not to be disregarded.

In my view, the *Griffin* court's distinction between "legal error" and "insufficiency of proof" is one that has absolutely no practical or meaningful difference. No matter what you call it, the trial court here erroneously submitted this case to the jury on the theory of premeditation--which was the main focus of the State's case against Mungin--and there is simply no way that we can know or conclude that the error did not contribute to the jury's verdict. In fact, given the **[**24]** State's emphasis and strong reliance on the premeditation theory, and disparagement of the robbery theory, it is highly likely that the jurors relied on the improper premeditation theory in finding guilt.

In this case the State, having failed to carry its burden of proving premeditation at trial and barely meeting its burden as to felony murder, not only emphasized in its closing argument to the jury that Mungin was guilty of premeditated murder, but virtually dismissed the felony murder theory from the jury's consideration. The trial court then compounded the error by improperly allowing the jury to consider the insufficient premeditation theory. We have "no reason to think that [the jury's] own intelligence and expertise . . . saved them from that error," *id. at 59*, given that the State's presentation of its case and argument alone raise a strong likelihood that the jury relied on the improper theory of premeditation as the basis for its general verdict of guilt. Nor do we have reason to think that the possibility of the jury relying on the improper premeditation theory of guilt to support its verdict was a "remote" one. *See Griffin, 502 U.S. at 59*. Rather, while there **[**25]** arguably may be sufficient evidence in this case to support Mungin's conviction on the alternative legal ground of felony murder, we have every reason to think that the jurors in this case rejected that evidence and rested their verdict on premeditation, just as the State urged them to do.

Interestingly, our own district courts also find the United States Supreme Court's questionable reasoning in *Griffin* unpersuasive. The district courts continue to recognize the "reversible error" standard of *Mills* and consistently apply it. Several recent decisions illustrate this point. For instance, in *Tape v. State, 661 So. 2d 1287 (Fla. 4th DCA 1995)*, the Fourth District held that it was required to vacate the defendant's conviction for attempted first-degree murder and remand for a new trial:

We sua sponte vacate the conviction for attempted first degree murder based on *State v. Gray, 654 So. 2d 552 (Fla. 1995)*, which applies to all cases pending on direct review or not yet final. While this issue was not raised, no one may be convicted of a nonexistent crime. *See Achin v. State, 436 So. 2d 30, 31 (Fla. 1982)*. In *Gray*, the supreme court held that there is no crime of **[**26]** attempted felony murder. In this case the defendant was convicted of attempted first degree murder, but the state argued both felony murder and premeditated murder to the jury. In *Mills v. Maryland, 486 U.S. 367, 376, 108 S. Ct. 1860, 1866, 100 L. Ed. 2d 384, 395 (1988)*, the United States **[*1035]** Supreme Court articulated the well settled rule that a criminal jury verdict must be set aside if it could be supported on one ground but not on another and the reviewing court is uncertain which of the two grounds was relied upon by the jury in reaching its verdict. It is not possible with the evidence and argument in this case to determine which theory the jury used as its basis for the conviction. Therefore, we are compelled to reverse the conviction.

661 So. 2d at 1288.

Similarly, in *Lamb v. State, 668 So. 2d 666 (Fla. 2d DCA 1996)*, the Second District reversed the defendant's conviction for attempted murder in light of our decision in *State v. Gray, 654 So. 2d 552 (Fla. 1995)*. Relying in part on *United States v. Garcia, 907 F.2d 380, 381 (2d Cir. 1990)* (holding that because "there was *insufficient* evidence for one of the theories, then the verdict is ambiguous and a new **[**27]** trial must be granted"), (emphasis added), the district court explained:

The [trial] court instructed the jury as to Count I on attempted second degree murder (depraved mind) and attempted third degree murder (felony murder) and lesser included offenses. The jury found the appellant guilty as charged. Because both attempted second degree murder and attempted third degree murder were charged in the same count, and the record does not otherwise show that he was convicted of attempted second degree murder, we cannot determine upon which offense the jury convicted him. The State of Florida no longer recognizes the crime of attempted felony murder. *State v. Gray, 654 So. 2d 552 (Fla. 1995)*; *State v. Grinage, 656 So. 2d 457 (Fla. 1995)*. Because *Gray* must be applied to all cases pending on direct review or not yet final at the time it was decided, we must reverse the conviction. However, because it is impossible to determine which of the two theories of attempted murder the jury accepted, remand for retrial on the charge of attempted second degree murder is required. *Humphries v. State, 676 So. 2d 1, 20* Fla. Law Weekly D1419 (Fla. 5th DCA 1995), citing **[**28]** *United States v. Garcia, 938 F.2d 12 (2d Cir. 1991)*.

Lamb, 668 So. 2d at 667.

And most recently, the Fifth District in an en banc decision vacated a defendant's attempted first-degree murder conviction and remanded for a new trial because the jury's guilty verdict may have rested on a nonexistent crime. *Allen v. State, 676 So. 2d 491 (Fla. 5th DCA 1996)*. In so doing, the district court explained that the outcome was controlled by the *Mills* line of cases:

The State argues that Allen's conviction for murder is controlled by *Murray v. State, 491 So. 2d 1120 (Fla. 1986)*. In *Murray*, the defendant was charged with attempted first-degree murder and the jury convicted him of the lesser included offense of attempted manslaughter with a firearm. The defendant sought reversal on appeal, pointing to the fact that the jury had been improperly instructed that attempted manslaughter could be based on culpable negligence as well as on an act or procurement. *See Taylor v. State, 444 So. 2d 931 (Fla. 1983)* (holding that a conviction of attempted manslaughter must be based on a showing of an act or procurement rather than mere culpable negligence). The supreme court **[**29]** affirmed Murray's convictions on two grounds. Not only did it find that the issue of jury instructions had not been properly preserved for appeal, but also the court independently reviewed the record and found that ample and sufficient evidence existed to support a conclusion that the shooting of the victim "was the result of an act of petitioner done with the requisite criminal intent and was not mere culpable negligence." *Murray, 491 So. 2d at 1122*.

We have carefully reviewed *Murray* and hold that to the extent it may be in conflict with our opinion, Murray is implicitly overruled by the supreme court's holding in *Gray* that *Gray* is to be applied to "all cases pending on direct review or not yet final." *Gray, 654 So. 2d at 554* (citing *Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992)*); *see also State v. Grinage, 656 So. 2d 457, 458 (Fla. 1995)* (reiterating that the holding in *Gray* "is applicable to all cases **[*1036]** pending on direct review or not yet final at the time of the *Gray* opinion."). *On appeal, the question for this court is not whether evidence exists which would support conviction upon the valid theory, but rather is whether it is possible that* **[**30]** *the conviction was based upon the invalid theory and nothing in the record establishes otherwise*. We also note that *Murray* appears to be in conflict with the United States Supreme Court's decision in *Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988)* which held that "with respect to findings of guilt on criminal charges . . . the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court [is] uncertain which of the two grounds was relied upon by the jury in reaching the verdict." *486 U.S. at 376, 108 S. Ct. at 1866*. This is so because the jury is the sole arbiter of the facts. Even if there is evidence in the record supporting conviction on the alternative legal ground, we, as an appellate court, cannot determine if the jury accepted

that evidence. Accordingly, we reverse Allen's attempted first-degree murder conviction. Because it is impossible to determine which of the two theories the jury accepted, remand for retrial on the charges of attempted premeditated murder is required. See *United States v. Garcia, 938 F.2d 12 (2d Cir. 1991), cert. denied, 502 U.S. 1030, 112 S. Ct. 868, **[**31]** 116 L. Ed. 2d 774 (1992)*; *see also Lamb v. State, 668 So. 2d 666 (Fla. 2d DCA 1996)*; *Humphries v. State, 676 So. 2d 1 (Fla. 5th DCA 1995)*; *Thompson v. State, 667 So. 2d 470 (Fla. 3d DCA 1996)*; *Tape v. State, 661 So. 2d 1287 (Fla. 4th DCA 1995)*; *Ward v. State, 655 So. 2d 1290 (Fla. 5th DCA 1995)*.

676 So. 2d at 492 (emphasis added). We should pay attention to the well-reasoned opinions of our appellate colleagues.

Perhaps the real solution to the uncertainty and potential injustice created by the "two issue" rule at issue herein is to recede from our holdings in previous cases that capital defendants are not entitled to special verdicts. *See, e.g., Brown v. State, 473 So. 2d 1260, 1265* (Fla.), *cert. denied, 474 U.S. 1038, 106 S. Ct. 607, 88 L. Ed. 2d 585 (1985)* (holding that capital defendant is not entitled to special verdict form indicating whether first-degree murder conviction was based upon premeditated murder or felony murder); *Buford v. State, 492 So. 2d 355, 358 (Fla. 1986)* (same). [8] Instead, we should adopt the procedure we have long since mandated in civil cases allowing a defendant the option of requesting a special verdict form when facing **[**32]** alternative theories of liability. *See Colonial Stores, Inc. v. Scarbrough, 355 So. 2d 1181 (Fla. 1977)*.

In *Scarbrough*, this Court explained that allowing a defendant the opportunity to request a special verdict is an essential element to the "two issue" rule:

This raises an issue with respect to which authorities among different jurisdictions are divided. The question arises where two or more issues are left to the jury, and [sic] of which may be determinative of the case, and a general verdict is returned, making it impossible to ascertain the issue(s) upon which the verdict was founded. One line of authority holds that reversal is improper where no error is found as to one of the issues, as the appellant is unable to establish that he has been prejudiced. *Berger v. Southern Pacific Co., 144 Cal. App. 2d 1, 300 P.2d 170 (Cal. 1st DCA **[**33]** 1956)*; *Altiere v. Peattie Motors, Inc., 121 Conn. 316, 185 A. 75 (1936)*; *Knisely v. Community Traction Co., 125 Ohio St. 131, 180 N.E. 654 (1932)*; *Dwyer v. Christensen, 77 S.D. 381, 92 N.W.2d 199 (1958)*. This is known in jurisprudence as the "two issue" rule. It is a rule of policy, designed to simplify the work of the trial courts and to limit the scope of proceedings on review. *See Harper v. Henry, 110 Ohio App. 233, 169 N.E.2d 20 (Ct. App. 1959)*.

The weight of authority to the contrary mandates a reversal where error has affected one issue unless it is clear that the complaining party has not been injured thereby. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)*; *State* **[*1037]** *of Maryland v. Baldwin*, 112 U.S. 490, *5 S. Ct. 278, 28 L. Ed. 822 (1884)*; *Maccia v. Tynes, 39 N.J. Super. 1, 120 A.2d 263 (N.J. App. 1956)*; *Bredouw v. Jones, 431 P.2d 413 (Okl. 1966)*.

We believe that the "two issue" rule represents the better view. *At first thought, it may seem that injustice might result in some cases from adoption of this rule. It should be remembered, however, that the remedy is always in the hands of* **[**34]** *counsel. Counsel may simply request a special verdict as to each count in the case. See Harper v. Henry, supra. Then, there will be no question with respect to the jury's conclusion as to each*. If the trial court fails to submit such verdicts to the jury, counsel may raise an appropriate objection.

[8] It should be noted that, unlike Mungin, the defendants in these cases did not challenge the sufficiency of evidence as to either theory of guilt on appeal.

Had petitioners in the instant case requested special verdicts and objected to submission of a general verdict form to the jury, it would have been necessary for the district court to determine the sufficiency of the evidence to sustain the false imprisonment count as well as the malicious prosecution count. If there was error as to either count, the district court should then remand the case for a new trial as to both counts. However, petitioners failed to meet these requirements.

355 So. 2d at 1186 (emphasis added).

In capital cases in particular, as emphasized in *Mills*, where a defendant faces the ultimate penalty of death, we should want to have as much knowledge about the jury's verdict as possible--not less--in order to enhance the review process. In essence, our current rule prohibiting special verdicts in capital cases amounts to a Catch-22 for the defendant. First, we **[**35]** prohibit a defendant, like Mungin, who faces a first-degree murder conviction on alternative theories of guilt and possible death sentence, from even having the option of a special verdict form; yet, the trial court submits both theories to the jury. Then, on appeal, this Court will uphold the conviction even if--as is the case here--the theory upon which the State built its case suffers from an insufficiency of evidence and it is utterly impossible to tell which theory the jury utilized in reaching its verdict. In a case such as this one, there simply is no reason why a defendant should not be able to request a special verdict form.

To conclude, I dissent because I believe the majority has made a grave mistake in characterizing the trial court's error as harmless. Given the weakness of the State's felony-murder theory and the prosecutor's cursory dismissal of that theory of guilt in closing argument, we cannot conscientiously conclude that the trial court's error in improperly instructing the jury on premeditation did not contribute to the jury's verdict of guilt in this case. *State v. DiGuilio, 491 So. 2d 1129, 1136 (Fla. 1986)*. We should grant rehearing in this case and remand **[**36]** for a new trial--the outcome of which, unlike this one, we could view with confidence.

End of Document

Appendix W

Judgment, Circuit Court in and for Duval County, Florida:
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Feb. 23, 1993)

☐ PROBATION VIOLATOR
(Check if Applicable)

STATE OF FLORIDA

vs

ANTHONY MUNGIN

Defendant

FILED
FEB 23 1993
Henry C. Cook
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

DIVISION CR-C

CASE NUMBER 92- 3178-CF-A

JUDGMENT

The Defendant, ANTHONY MUNGIN, being personally before this Court represented by PD Charles Cofer, his attorney of record, and having:

(Check Applicable Provision)
- ☒ Been tried and found guilty of the following crime(s)
- ☐ Entered a plea of guilty to the following crime(s)
- ☐ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME	CASE NUMBER
1	Murder In The First Degree	782.04(1)(A)	Capital	Felony

and no cause having been shown why the Defendant should not be adjudicated guilty, IT IS ORDERED THAT the Defendant is hereby ADJUDICATED GUILTY of the crime(s)

The Defendant is hereby ordered to pay the sum of twenty dollars ($20.00) pursuant to F.S.960.20 (Crimes Compensation Trust Fund). The Defendant is further ordered to pay the sum of five dollars ($5.00) as a court cost pursuant to F.S.943.35(4).

☐ The Defendant is ordered to pay an additional sum of five dollars ($5.00) pursuant to F.S.943.25(8).
(This provision is optional; not applicable unless checked).

(Check if Applicable)

☐ The Defendant is further ordered to pay a fine in the sum of $ _____ pursuant to F.S.775.0835.
(This provision refers to the optional fine for the Crimes Compensation Trust Fund, and is not applicable unless checked and completed. Fines imposed as part of a sentence pursuant to F.S.775.083 are to be recorded on the Sentence page(s)).

☐ The Court hereby imposes additional court costs in the sum of $ _____.

Defendant ANTHONY MUNGIN

Case Number 92- 3178-CF-A

Imposition of Sentence Stayed and Withheld *(Check if Applicable)* ☐ The Court hereby stays and withholds the imposition of sentence as to count(s) _____ and places the Defendant on probation for a period of _____ under the supervision of the Department of Corrections (conditions of probation set forth in separate order.)

Sentence Deferred Until Later Date *(Check if Applicable)* ☐ The Court hereby defers imposition of sentence until _____ (date)

The Defendant in Open Court was advised of his right to appeal from this Judgment by filing notice of appeal with the Clerk of Court within thirty days following the date sentence is imposed or probation is ordered pursuant to this adjudication. The Defendant was also advised of his right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

FINGERPRINTS OF DEFENDANT

1. R. Thumb	2. R. Index	3. R. Middle	4. R. Ring	5. R. Little
				
6. L. Thumb	7. L. Index	8. L. Middle	9. L. Ring	10. L. Little
				

Fingerprints taken by:

W E Shuford Bailiff 9273

Name and Title

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida, this 23rd day of February A.D. 19 93. I HEREBY CERTIFY that the above and foregoing fingerprints are the fingerprints of the Defendant, ANTHONY MUNGIN and that they were placed thereon by said Defendant in my presence in Open Court this date.

John D Trotter

JUDGE

Page 2 of 6

SENTENCE

Defendant ANTHONY MUNGIN

Case Number 92- 3178-CF-A

(As to Count 1)

The Defendant, being personally before this Court, accompanied by his attorney, PD Charles Cofer, and having been adjudicated guilty herein, and the Court having given the Defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why he should not be sentenced as provided by law, and no cause being shown.

(Check either provision if Applicable)

☐ and the Court having on _____ (date) deferred imposition of sentence until this date.

☐ and the Court having placed the Defendant on probation and having subsequently revoked the Defendant's probation by separate order entered herein.

☐ The Defendant pay a fine of $ _____, plus $ _____, as the 5% surcharge required by F.S.960.25

☒ The Defendant is hereby committed to the custody of the Department of Corrections

☐ The Defendant is hereby committed to the custody of the Sheriff of Duval County, Florida

To be imprisoned (check one; unmarked sections are inapplicable)

☐ For a term of Natural Life.

☒ For a term of Death By Electrocution

☐ For an indeterminate period of 6 months to _____ years.

If "split" sentence complete either of these two paragraphs

☐ Followed by a period of _____ on probation under the supervision of the Department of Corrections according to the terms and conditions of probation set in a separate order entered herein.

However, after serving a period of _____ imprisonment in _____ the balance of such sentence shall be suspended and the Defendant shall be placed on probation for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation set forth in a separate order entered herein.

SPECIAL PROVISIONS

By appropriate notation, the following provisions apply to the sentence imposed in this section:

Firearm - 3 year mandatory minimum — ☐ It is further ordered that the 3 year minimum provisions of F.S.775.087(2) are hereby imposed for the sentence specified in this count, as the Defendant possessed a firearm.

Drug Trafficking - mandatory minimum — ☐ It is further ordered that the _____ year minimum provisions of F.S.893.135 (1)( )( ) are hereby imposed for the sentence specified in this count.

Retention of Jurisdiction — ☐ The Court pursuant to F.S.947.16(3) retains jurisdiction over the defendant for review of any Parole Commission release order for the period of _____. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Habitual Offender — ☐ The Defendant is adjudged a habitual offender and has been sentenced to an extended term in this sentence in accordance with the provisions of F.S.775.084(4)(a). The requisite findings by the court are set forth in a separate order or stated on the record in open court.

Jail Credit — ☒ It is further ordered that the Defendant shall be allowed a total of 330 days credit for such time as he has been incarcerated prior to imposition of this sentence. Such credit reflects the following periods of incarceration (optional):

Prison Credit — ☐ It is further ordered that the Defendant be allowed credit for all times previously served on this count in the Department of Corrections.

Consecutive/Concurrent — It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ above.

Defendant ANTHONY MUNGIN

Case Number 92- 3178-CF-A

Consecutive/Concurrent (As to other Convictions)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐consecutive to ☐ concurrent with (check one) the following:

☐ An active sentence being served.

☐ Specific sentences: _____

_____

_____

_____

In the event the above sentence is to the Department of Corrections, the Sheriff of Duval County, Florida is hereby ordered and directed to deliver the Defendant to the Department of Corrections together with a copy this Judgment and Sentence.

The Defendant in Open Court was advised of his right to appeal from this Sentence by filing notice of appeal within thirty days from this date with the Clerk of this Court, and the Defendant's right to the assistance of counsel in taking said appeal at the expense of the State upon showing of indigency.

In imposing the above sentence, the Court further recommends _____

_____

_____

_____

_____

DONE AND ORDERED in Open Court at Jacksonville, Duval County, Florida, this 23 day February A.D., 19 93 .

JUDGE

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 92-3178 CF

DIVISION: CR-C

STATE OF FLORIDA

vs

ANTHONY MUNGIN

FILED

FEB 23 1993

Henry W. Cook

CLERK CIRCUIT COURT

SENTENCE

The Defendant, **ANTHONY MUNGIN**, is before the Court this date, having been previously found guilty by a jury of Murder in the First Degree. The Court now, therefore, adjudges you, **ANTHONY MUNGIN**, guilty of Murder in the First Degree.

There having been shown no legal cause to preclude pronouncement of sentence, the jury having recommended the death penalty and the Court, after much deliberation, concurring in the appropriateness of the death penalty, I hereby sentence you to death. It is the judgement of the Court and the sentence of the law that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set.

That on such day, as set, you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

May God have mercy upon your soul.

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DONE AND ORDERED AND SENTENCED in Open Court, at Jacksonville, Duval County, Florida, this 23rd day of February, 1993.

JOHN D. SOUTHWOOD
JUDGE OF THE CIRCUIT COURT

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