IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-780
Lower Tribunal No.: 92-3178-CF

ANTHONY MUNGIN,

Appellant.

V.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's summary of denial of Mr. Mungin's Motion for Postconviction Relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal.

"R" – record on direct appeal to this Court.

"PCR" – Record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Mungin has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Mungin, through counsel, accordingly argues that the Court permit oral argument.

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PROCEDURAL HISTORY

On January 28, 1993, Anthony Mungin was convicted by a Duval County jury for the September 16, 1990 murder of a 51-year-old Betty Jean Woods during a robbery of a convenience store. Following a sentencing hearing, the jury recommended death by a

vote of seven to five. This Court followed that recommendation and sentenced Mr. Mungin to death. Mr. Mungin appealed both his conviction and sentence to the Florida Supreme Court. He raised nine issues, contending: (1) the trial court erred in overruling a defense objection to the state's peremptory strike of black prospective juror Galloway; (2) the evidence was insufficient to prove premeditated or felony murder; (3) the trial court erred in allowing the State to present collateral crime evidence that Mr. Mungin had shot a prior robbery victim in the spine; (4) fundamental error occurred at the penalty phase when a defense witness testified about conditional release; (5) the evidence was insufficient to support the robbery and pecuniary gain aggravators; (6) the trial court erred in failing to instruct the jury as to the age mitigator; (7) the trial court erred in failing to find and give weight to nonstatutory mitigation; (8) Mr. Mungin's death sentence is disproportionate; and (9) various constitutional violations occurred at trial and sentencing. The Florida Supreme Court found the evidence insufficient to support a theory of premeditated murder, but sufficient to support a theory of felony

murder, affirmed Mr. Mungin's first degree murder conviction and affirmed his death sentence. *Mungin v. State*, 689 So. 2d 1026

(Fla. 1995), *cert. denied*, 522 U.S. 833, 118 S. Ct. 102, 139 L.Ed. 2d 57 (1997).

On September 16, 1998, Capital Collateral Counsel, Northern Region, filed a "shell" 3.850 motion on Mr. Mungin's behalf. On September 14, 2000, Mr. Mungin, represented by appointed registry counsel Dale G. Westling, Sr., filed an amended motion for postconviction relief, raising six numbered claims for relief, all alleging ineffective assistance of counsel. The State filed a response to this amended motion on October 27, 2000.

Mr. Mungin thereafter retained undersigned counsel to represent him and Mr. Westling moved to withdraw. This Court granted the motion to withdraw by order dated April 3, 2001. On July 2, 1001, undersigned counsel filed on Mr. Mungin's behalf a "Consolidated" amended motion for postconviction relief containing 17 numbered claims for relief.

A hearing was held on March 8, 2002, pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993) and Florida Rule of Criminal Procedure 3.851(c), at which Defendant and the State were permitted to present this Court with arguments as to which claims in Defendant's instant Motion would require an evidentiary hearing. As this Court found at that hearing, Defendant was granted an evidentiary hearing on the following

claims:

Claim I - that trial counsel rendered ineffective assistance during the guilt phase of the trial and newly discovered evidence.

Claim IV - that trial counsel rendered ineffective assistance during the penalty phase of the trial by failing to present mitigating evidence of Defendant's "troubled childhood."

The evidentiary hearing in the instant case was held on June 25 and 26, 2002, in the Duval County Court.

The lower Court denied Defendant's consolidated Amended Motion to Vacate Judgments of Conviction and Sentence on March 18, 2003. (PC-R 203-209)

A Notice of Appeal of that denial was filed in the Florida Supreme Court on April 11, 2003. (PC-R 210-211)

ARGUMENT I

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ADEQUATELY CHALLENGE THE TESTIMONY OF EYEWITNESS, RONALD KIRKLAND, BY FAILING TO PROPERLY IMPEACH MR. KIRKLAND AND ELICIT TESTIMONY FROM DETECTIVE CONN THAT WOULD HAVE CAST DOUBT ON MR. KIRKLAND'S IDENTIFICATION OF MR. MUNGIN

A. INTRODUCTION:

Numerous errors infected the guilt phase. Singularly and

cumulatively, these errors require a new trial. This Court reviews the errors herein de novo, and defers to any finding of fact that is supported by competent substantial evidence. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

B. DEFICIENT IMPEACHMENT OF RONALD KIRKLAND:

Trial counsel, Charles Cofer, failed to utilize critical impeachment evidence in his files that the State's sole eyewitness, Ronald Kirkland, was on probation at the time of Mr. Mungin's trial. This information could have been obtained through resources readily available to Mr. Cofer and would have revealed that Mr. Kirkland at the time of Mr. Mungin's trial had a probation violation, as well as, an outstanding capias. This information was neither elicited on cross-examination of Mr. Kirkland nor argued in the defense's closing argument.

The lower court summarizes the allegation 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 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 to be meritless." (PC-R 206)

The lower court failed to make any factual findings to support its summary legal conclusions. As demonstrated below, the testimony and exhibits from the evidentiary hearing establish a *Strickland* violation.

1. THE EVIDENCE BELOW

a. Charles Cofer. Mr. Cofer was one of two Assistant Public Defenders in the Fourth Judicial Circuit assigned to Mr. Mungin's case.(PC-R 235) Lewis Buzzell assisted Mr. Cofer. Mr. Cofer was the lead attorney.(PC-R 304)

Mr. Cofer filed a standard notice of discovery under the Florida Rules of Criminal Procedure on or about April 7, 1992.(PC-R 238-239) The State submitted a response that did not specifically indicate that any of their witnesses had a criminal history.(PC-R 240-241)

Mr. Cofer then filed a Motion on or about June 12, 1992

which Mr. Cofer read in the record:

> A Paragraph - this would be paragraph 3, subparagraph H, the names of any witnesses in this cause who have charges pending in this or any other jurisdiction, whether charges had been formally filed or not. And then there are some case – cases cited which support the basis of the request, including *Davis v. Alaska.* (PC-R 243)

This motion was granted on December 21, 1992. (PC-R 243)

However, Mr. Cofer learned in a deposition of Ronald Kirkland on June 18, 1992 about Mr. Kirkland's criminal history.

(PC-R 261)

THE COURT: In other words, you discovered, was he honest with you, in your opinion?

THE WITNESS: Well, Mr. Kirkland admitted to a disorderly intoxication, a DUI case. He refused to answer a question about a matter that had been sealed. Mr. De la Rionda had objected to that. There is a grand theft arrest on his dockets, which I don't think he mentioned, but I would not tell because Mr. Kirkland did not respond whether or not that was a subject matter of the sealing, but the deposition was taken before the September 26, 1992 arrest.

Mr. Cofer's customary practice was to request and be in receipt of a criminal history of a civilian deponent before the taking of their deposition.(PC-R 250-251) In fact, Mr. Cofer requested the criminal history of Mr. Kirkland. (PC-R 252) However, the criminal history was run sometime after Mr. Kirkland's arrest for three worthless check cases on September 26, 1992. (PC-R 253) Cofer's customary practice was to review the criminal histories of witnesses before taking their deposition. (PC-R 255)

Mr. Cofer testified that those three cases were disposed of on October 13, 1992 with a withheld adjudication of guilt.(PC-R 254)

Mr. Cofer testified that it was his customary practice to review the responses to the criminal requests before deposition. (PC-R 255) However, Mr. Cofer admitted in cross-examination by the State the following: (PC-R 345)

> Q But at the time of trial in January of '93, at least based on the records in your file and your acknowledgment as the State's Exhibit — I'm sorry— Defense Exhibit No. 4, this rap regarding Mr. Kirkland or criminal history, you were aware that he was on probation at the time he testified, or right before up to the time he received? If you go 90 days from October 13th, it's potentially —
>
> A I will concede that in my file there was a docket that should have made me

aware of that factor.

Not only did the State suggest that Mr. Cofer was aware of Mr. Kirkland's probation from Mr. Cofer's request, but the prosecutor, Bernardo De la Rionda, implied through his questions, that Mr. De la Rionda provided Mr. Cofer with a document found in Mr. Cofer's file, indicating Mr. Kirkland had a criminal history.(PC-R 343-345) Mr. Cofer did not recall that document being in Mr. Cofer's file.(PC-R 344)

Mr. De la Rionda established on cross-examination what Mr. Cofer had in his file at the time of the motion for *Brady* material in the following exchange: (PC-R 354)

> Q And that was actually heard in December of '92?
>
> A '92.
>
> Q Okay. And at that time, at least — I know you don't have a memory, but at least in your file it's reflected that you had that document that we're talking about that he was on probation?
>
> A It reflects that I had a document, including the September arrest. It would not — I would not and did not have any evidence relating to the warrant that was issued about three weeks later.
>
> Q Yes, sir. But it did have in Defense Exhibit that he was on probation?
>
> A I will have to admit that I had that in my possession at that time.

On re-direct, Mr. Cofer testified what he would have investigated had he known Mr. Kirkland was on probation at the time of trial and had a capias. (PC-R 360)

> A Yeah, what I would have almost certainly done is gone down to the probation department and pulled the capias files and see what's on them. I would have seen that there was a warrant and seen the nature of the allegations.

Screen page printouts from the Clerk's office of the three worthless check cases: 1991-89230-MMA, 1991-89229-MMA and 1991-10326-MMA were admitted into evidence as defense exhibits.(PC-R 262-66) Mr. Cofer's subsequent investigation in preparation for the evidentiary hearing revealed that Mr. Kirkland was put on probation on the three cases with the Salvation Army for ninety days. The probations were to run concurrently. There were certain court costs imposed and a condition of restitution was made.(PC-R 269) On or about January 11th, a notation reflects that there were warrants issued in each of the three cases for violating probation. A cash bond was set of Two Hundred Fifty Dollars.(PC-R 269) Mr. Kirkland was never taken into custody, but inexplicably the capiases were recalled around February 17, 1993.(PC-R 270)

Mr. Cofer testified that his trial strategy was to argue that Mr. Mungin was not guilty based on reasonable doubt, and

that he would not concede guilt to any lessers.(PC-R 270) Mr. Cofer had no recollection of any fingerprints linking Mr. Mungin to the Li'l Champ convenience store where the homicide occurred.(PC-R 272) Mr. Cofer was unequivocal that Mr. Mungin made no inculpatory statement.(PC-R 272) Mr. Cofer testified that his trial strategy was to attack Mr. Kirkland's perception as to the individual he saw exiting the Li'l Champ.(PC-R 272-73) Mr. Cofer recalled that Mr. Kirkland was unable to swear that the individual who he picked out from the photo spread was the robber.(PC-R 273) Mr. Cofer brought out to the jury that Mr. Kirkland had a very brief time to view the alleged robber when the robber basically bumped into him and was going the other way.(PC-R 273) Mr. Cofer testified that had he known that Mr. Kirkland was on probation during the pendency of the case and also knew that a capias was recalled just prior to trial that he would have elicited those facts.(PC-R 273-74) Mr. Cofer gave the following rationale:

> A Well, prior to trial you have the detective, who shows a photo spread, who indicates that the witness at the time of seeing the photo spread said that he couldn't swear that the man he picked out was the person, that he was fairly certain and looked like him. At trial Mr. Kirkland showed very little hesitancy, identified Mr.

> Mungin as being the person, and also denied making the statement to – or indicating he could not recall telling Detective Conn that he wouldn't be able to swear. Having the fact that, one, he was on probation, and, two, that there was some outstanding warrant for him, would have been one area that you would typically inquire of a witness about to cast doubt upon the certainty of his identification at trial. In other words, if you show that there's a shift, in other words, at the time of the identification on a photo spread, he indicated that he could not swear to it, and then much later at trial he does, showing the status of him being on probation and a warrant outstanding would tend to suggest that Mr. Kirkland had strengthened his identification because of concerns for himself.

(PC-R 274)

Finally, Mr. Cofer testified how this information would have been used on Mr. Mungin's behalf.(PC-R 360-361)

> A Yeah, what I would have almost certainly done is gone down to the probation department and pulled the capias files and see what's on them. I would have seen that there was a warrant and seen the nature of the allegations.
>
> Q And would you, having that information, despite the fact that Mr. Kirkland may have denied that he received any help, would you have suggested to the jury the possibility that he received help?

A That certainly is something I would have expected Mr. Buzzell to do during his closing argument.

Q Now, you've tried a number of cases with eyewitness testimony, correct?

A Yes.

Q And you're familiar with the — an eyewitness' effectiveness, a lot of times with the jury, is enhanced with how certain they are, correct?

A Yes.

Q And would you agree with me that Mr. Kirkland came across as being very certain of his identification of Mr. Mungin in court that day?

A Yes.

THE WITNESS: Yes, I think Mr. Kirkland was pretty firm in his identification of Mr. Mungin.

BY MR. MALNIK: (PC-R 361-362)

Q And would it have been an effective attack to suggest that the fact that he was more certain now than he was more certain at the time of trial than he was a year and a half ago, could be attributed to the fact that he had a difficult legal situation, he being Mr. Kirkland?

A That's certainly the general argument that you make.

Q And that's an argument that you would have made, had you known, correct?

A Well, Mr. Buzzell would have made it on

behalf of the team since he was – you know, if you're just talking about closing argument, Mr. – we had tried to keep open and close and we had decided to waive opening, and so really it was going to be a one argument case, whether we preserved the sandwich or not, so it's something – Mr. Buzzell is a very capable and experienced attorney and that's the argument that we would have no doubt have made. It's not a very complex argument to make.

Q And on cross-examination you would have pursued it with Mr. Kirkland, had you had that information?

A You have to lay it out during the evidence to support the argument for closing.

In order to resolve the question of whether Mr. Cofer's cross-examination was deficient and prejudicial, it is first necessary to establish Mr. Kirkland's testimony in this matter.

Mr. Kirkland testified that he picked Mr. Mungin out from a photo line-up.(R-673-674) In addition, Mr. Kirkland identified Mr. Mungin in court as the individual that Mr. Kirkland saw leaving the store. (R-671) Finally, Mr. Kirkland testified that Mr. Mungin left the store carrying a paper bag. (R-671)

The importance of the role of Mr. Kirkland played in this case is understood in the opening paragraph of the Court's rendition of the facts in *Mungin*:

"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 $59.02 discrepancy in cash at the store." *Id.*, at 1028

Two recent Florida Supreme Court cases address deficient cross-examination first, in *Robinson v. State*, 707 So. 2d 688 (Fla. 1998), this Court wrote:

> "To establish a claim of ineffective assistance of counsel, a petitioner must first demonstrate that counsel's performance was deficient, and, second, that there was a reasonable probability that but for counsel's deficient performance, the proceeding's outcome would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). However, the Supreme Court has afforded attorneys wide latitude in conducting the defense of a case, and accordingly, has placed a significant burden on those petitioners alleging ineffective assistance of counsel. To that end, the Court observed that:
>
> > 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....

Id. at 689. Therefore, in order to prevail, Robinson must demonstrate that Pearl's conduct fell outside the "wide range of reasonable professional assistance," and, if it did, establish the resulting prejudice.

Obviously, since Fields' trial testimony "completely contradicted Robinson's version of the crimes," *Robinson*, 574 So. 2d at 110, his credibility was a key issue in the case. Porter's deposition related that Robinson and Fields pulled up behind the victim's parked car and that Robinson got out of his car, walked up to the victim's car, and then pulled out a gun. This tracks Fields' trial testimony, although there was no mention in Porter's deposition that the victim was handcuffed after being brought to Robinson's car at gunpoint. *Robinson*, 574 So. 2d at 110. Porter then stated that they drove to the cemetery and, in Fields' words, Robinson "raped" the victim. Again, this tracks Fields' trial testimony. However, Porter then stated that Fields told him he did not rape the victim, contrary to his testimony at trial where he said that Robinson ordered him to rape the victim and he complied.

Eventually, Porter described what Fields told him about the shooting. He stated:

> "Fields said something to the effect of, somehow or another in the conversation that Robinson had called her a bitch and at that point, she either pushed him or slapped at him or something like that and in turn, he slapped back at her or used his gun to threaten her with and that's when he shot

> her. That's when Robinson shot her."
>
> As the State notes, no mention of an "accident" appears in Porter's deposition. Yet, this rendition is at least somewhat inconsistent with Fields' trial testimony that "Robinson expressed concern that she could identify them. He then walked up to her and put the gun on her cheek. Fields heard a shot, saw St. George fall, and watched Robinson stand over her and fire a second shot." *Robinson*, 574 So. 2d at 110.
>
> Based on these facts, defense counsel Pearl's performance was arguably deficient if he had access to Porter's deposition but chose not to use it in attacking Fields' credibility. Assuming that was the case, Robinson still must prove to the trial court that he was prejudiced by Pearl's deficient performance. Here, the jury knew that Fields was a co-defendant testifying as a State witness and that he had an agreement with the State which was brought out in detail on cross-examination. The prosecutor had also described the agreement in detail during Fields' deposition taken April 24, 1986. Based on those known facts, the trial court could conclude that the jury had "ample information from which to assess [Fields'] credibility and weigh [his] testimony accordingly," *see Chandler v. State*, 702 So. 2d 186, 198 (Fla. 1997), and, accordingly, we find no error in the trial court's conclusion that Robinson has failed to demonstrate sufficient prejudice to merit a new trial.

It is significant that this Court in *Robinson* stated, "Based on these facts, defense counsel Pearl's performance was arguably deficient if he had access to Porter's deposition but chose not

to use it in attacking Fields' credibility."

Similarly, there is competent substantial evidence that Mr. Cofer had in his files from two different sources - Mr. Cofer's request and materials provided by the State, that indicated Mr. Kirkland had been placed on probation for ninety days as of January 13, 1992. (PC-R 343-345, 354) Clearly, it was deficient to not use that information in Mr. Cofer's own files.

Moreover, it would be deficient to fail to investigate whether Mr. Kirkland successfully completed probation at the time of trial when that information was so easily obtainable. (PC-R 360)

Unlike *Robinson*, the jury in Mr. Mungin's case lacked ample information from which to access his credibility and weigh his testimony. It appeared to the jury that Mr. Kirkland was a Good Samaritan as opposed to an individual who might have reason to testify more favorably against Mr. Mungin than in his earlier accounts to the police. Therefore, there is sufficient prejudice to merit a new trial.

This Court wrote in *Brown vs. State*, 28 F.L.W. 355 (April 24,

2003):

> " Brown argues that trial counsel was deficient in his cross-examination of Scott McGuire, and he raises several instances of alleged ineffective performance in that

regard. However, these instances satisfy neither the requirement of deficient performance nor the requirement of prejudice under *Strickland*.

Noting that Brown's own detailed oral and written confessions convicted Brown, the trial court found that the matters raised as examples of insufficient impeachment were relatively insignificant matters. Furthermore, the judge ruled that if counsel's performance was indeed deficient, there was not a reasonable probability that the outcome of the trial would have been affected.

We conclude that collateral counsel's argument that counsel *should* have cross-examined him on certain issues, is essentially a hindsight analysis. "The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was *both* a deficient performance and a reasonable *probability* of a different result." *Cherry v. State*, 659 So. 2d. 1069, 1073 (Fla. 1995). We find no error in the trial court's analysis or conclusion.

Brown also contends that counsel was ineffective for failing to specifically ask each of the witnesses at trial whether Brown confessed to them. The trial court ruled, and we agree, that counsel's failure to engage in this line of questioning was not deficient performance, especially considering that some of the witnesses were never in contact with Brown." ***28 Fla. L. Weekly S356***

"Brown alleges that trial counsel rendered ineffective assistance of counsel for failing to impeach McGuire on the following alleged inconsistencies:

(1) At trial, McGuire testified that after arriving, but before entering Hensley's apartment, Brown said to him: "How would you like to do it?" (Referring to "ripping off" Hensley); in his FBI interview, McGuire stated that Brown said "What I thought, you know, we should do," (referring to the employment opportunities the three men were discussing).

(2) In his deposition, McGuire testified that Brown said that he was "dead set against killing him", in his FBI interview, he stated that Brown said he was "dead set against killing the guy."

(3) At trial, McGuire testified that Brown had a gun behind Hensley's seat while Hensley was driving; in his FBI interview, McGuire stated that Brown never did anything with the gun "but keep it hid."

(4) At trial, McGuire testified that he threw the knife on the ground; in his FBI interview, McGuire stated that he set the knife on the tables.

(5) At trial, McGuire testified that he wiped his prints off of the knife; in his deposition, McGuire initially stated that he did not do anything with the knife, but then after being questioned again, stated that he did wipe the prints off of the knife.

(6) At trial, McGuire testified that he saw Hensley on the floor, bloodied; in his deposition, he stated that he saw Hensley half on the bed, half on the floor.

(7) At trial, McGuire testified that Hensley said that he was a homosexual; in his deposition, McGuire said that he thought Hensley said he was bisexual, then admitted it was possible that Hensley said that he was a homosexual.

(8) At trial, McGuire testified that he sold Brown the ID card which was recovered by the police in Atlanta; in his deposition, McGuire said that he gave Brown the ID card in exchange for crack." ***28 Fla. L. Weekly S359 - S360***

This case differs from *Brown.* The alleged inconsistencies in *Brown* are a minuscule attack on the credibility of the witness compared to failing to elicit testimony that Mr. Kirkland was on probation and had an outstanding capias for a violation of probation. Implicit in the Court's analysis of *Brown* was the fact that there were both oral and written confessions. Not only was there no confession, there were no fingerprints linking Mr. Mungin to the scene of the crime. Therefore, this is a much more compelling case of both deficient performance and prejudice than *Brown*.

Besides the question of identification a divided court ruled in *Mungin* that although it was error to instruct on premeditation that error was harmless in light of the evidence of felony murder. *Id.* at 1029 Mr. Kirkland's testimony supported the State's theory of robbery. Mr. Kirkland was the only individual to testify that he saw Mr. Mungin leave with a paper bag. (R-671)

Not only was Mr. Kirkland a critical witness in terms as identifying Mr. Mungin as the perpetrator, but Mr. Kirkland's testimony was integral to establishing a robbery. Consequently, the failure to impeach Mr. Kirkland's credibility prejudices Mr. Mungin because the underlying felony murder theory could have been reasonably been rejected by the jury resulting in, at most,

a second degree murder conviction.

In a vigorous dissent, Chief Justice Anstead characterized the weak evidence that constituted robbery in the given case:

> "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 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." *Id.*, at 1032.

C: FAILURE TO ELICIT TESTIMONY FROM DETECTIVE CONN:

Detective Conn had critical information that Mr. Cofer did not elicit. She stated in deposition the following:

> A On the 20th of September, I showed a photo spread to a Witness Ronald Kirkland.
>
> Q Okay.
>
> A And the photo spread contained six

photos. I don't remember now whether I made the photo spread or Detective Gilbreath made it. He apparently came back to two photos, No. 1 and No. 3. I don't have the photo spread with me so I'm not sure who those people are.

Q Okay.

A He went to No. 1 and said, Everything looks like the suspect, but it wasn't good enough to swear in court.

When they get to a picture of a suspect and they think this — or a subject and they think it's possibly a suspect, my standard question is, Could you swear in court that this is the person. His reply was he couldn't swear to it in court from the photo.

Q Okay.

A That's all I had

(Page 49, line 7 through 24 - Deposition of Detective Conn)

The lower court addressed this claim when it wrote:

> "In sub-claim(C), Defendant contends that counsel rendered ineffective assistance by failing "to elicit testimony from detective Conn that would have destroyed Mr. 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); *Gonzalez v. State*, 691 So. 2d 602, 603 (Fla. 4th DCA 1997)("Tactical or strategic decisions of counsel do not constitute ineffective assistance of counsel.") (PC-R 206-207)

Mr. Cofer testified that the rationale for not calling Detective Conn was as follows:

> A Yes. We discussed this with Mr. Mungin, that as we got close to trial it was our decision — Mr. De la Rionda is a very capable and very talented arguer, and it was our decision that unless we had something pretty important that we wanted to try to handle our case in a way so that we would reserve open and close. In other words, the sandwich in argument. On balance, Mr. Kirkland admitted during trial to most of the things that we could have utilized Detective Conn to impeach on, but with that on exception about the certainty of his identification. On balance we just felt at that time that it was just not worth losing open and close to recall Detective Conn, who was in adverse witness, to establish that one fact. (PC-R 275)

However, trial counsel chose not to follow his own trial strategy, because trial counsel waived his opening close. (PC-R 362) Therefore, the Court's reasoning is not supported by competent substantial evidence.

In addition, trial counsel acknowledged that the decision

to call Detective Conn could have been different if trial counsel had known that Mr. Kirkland had the probation violation as well as an outstanding capias Mr. Cofer testified.

> Q Had you known that Mr. Kirkland had the probation violation as well as an outstanding capias, would your trial strategy have changed with respect to Detective Conn?
>
> A I don't know. It's something I would discuss with Mr. Mungin, with my co-counsel, and we would have had to explore that and it's not just something that now ten years later I can say I definitely would have or would not have done. But certainly whether or not it changes the decision to call Detective Conn or not, it certainly changes how I would have cross-examined Mr. Kirkland.
> (PC-R 275-276)

Mr. Cofer admitted that his decision could have changed based on discussions with Mr. Mungin and co-counsel. Consequently, the tactical decision that the lower court alluded to cannot be upheld because Mr. Kirkland's probation and capias status was not disclosed to Mr. Mungin at the time of trial.

The next question is whether Detective Conn's testimony could have a reasonable probability of changing the outcome of Mr. Mungin's trial.

Although the State may try to suggest that Mr. Cofer's cross-examination of Mr. Kirkland was effective even without

impeaching Mr. Kirkland with his criminal history, Mr. De la Rionda's own examination revealed deficiencies in Mr. Cofer's impeachment of Mr. Kirkland.

> Q Didn't you bring out inconsistencies regarding what he told Detective Conn as to how sure he was or was not about the I.D.?
>
> A Well, I brought out some and some of the things that he admitted to Detective Conn he admitted on the stand. However, I — he did not admit telling Detective Conn that he could not swear to the identification during the trial, if I remember correctly.
> (PC-R 347)
>
> Q And isn't it true that in the deposition of Detective Conn and I can refer you if you need to refresh your memory, that regarding Mr. Kirkland when asked if — when asked about the I.D., when asked if he could swear in court, said from the photo he couldn't swear in court, do you recall that or do you need to refresh —
>
> A I'll take it for granted that's what she said
> (PC-R 348)
>
> Q Detective Conn was asked about what Mr. Kirkland told her.
>
> A Correct.
>
> Q Did she not state in deposition — and I can refer you to page 54 just to make sure we get the

correct quote there. Take a second to look and make sure we're — I believe it's on page 54 and 57 also.
(Witness reading transcript.)

A On 57, and this is in response to your questions during cross in the depo, you asked him could he swear to it in court. Answer: Right. And he said he couldn't I guess, based on the photograph itself. And her answer was: He said he couldn't based — he couldn't based on the photograph.

Q Okay. I gather that could have been brought but if you called her on your case.

A Yes.

(PC-R 348, 349)

Ironically, Mr. De la Rionda's continued examination of Mr. Cofer accentuated the key point that only Detective Conn could have made based on the following.

Q Isn't it true that prior to his deposition, Mr. Kirkland had given statements to Detective Conn, as you pointed out?

A Yes.

Q Okay. So whatever statements he made in terms of testimony that he could have switched, which would be an argument that you could make in terms of him being on probation, he had already admitted to, had he not?

A Yeah, but he changed at trial.

Q How did he change?

A He said — he denied making the statement to Detective Conn.

Q You could have used Detective Conn to impeach him on that could not have?

A Yes I could have.
(PC-R 350-351)

Mr. De la Rionda tried, through his questioning, to rebut the defense counsel's argument in the evidentiary hearing that Mr. Kirkland changed his testimony to help the State as a result of his legal predicament. Instead, Mr. De la Rionda only highlighted Mr. Cofer's failure to call Detective Conn to impeach Mr. Kirkland's failure to remember that he could not swear at the time of the photo I.D.

The failure to elicit the testimony from Detective Conn is obviously detrimental to Mr. Mungin as evidenced by Mr. De la Rionda's argument.

This seemingly rock solid photo identification became the lynchpin for Mr. De la Rionda's closing:

> "Mr. Kirkland then told you that a few days later on September 20th, four days later, he was shown some photographs. A group of photographs. Six or seven he described it as. And the defense tried to bring out a big thing about well, was it six, was it seven. He said either six or seven. The key thing is he signed his name on the back. This Anthony Mungin, the

> defendant, in this case. And he picked him out of a group of six black males or seven black males. He picked out the defendant's photograph as being the person who he observed come out of that Lil' Champ store. Identify I will submit to you in not an issue in this case..as the Defense, I believe, will attempt to argue. He just didn't pick him out in this courtroom when he saw him again. He picked him out of that photograph spread four days after it happened, or three and a half days after it happened.

(Pages 974 lines 14 through 25, Page 975, lines 1 through 25, Page 976, lines 1 through 25, Page 977, lines 1 through 9.)

ARGUMENT II

TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AN ALIBI THAT MR. MUNGIN RELATED TO TRIAL COUNSEL AS WELL AS THE POLICE AND SUCH TESTIMONY WOULD HAVE BENEFITTED MR. MUNGIN

In order to determine whether competent substantial evidence existed it is necessary to review the lower Court's Order:

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.[1]

[1] During his testimony, Judge Cofer indicated that Defendant referred to an individual named "Ice," but in one

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; Gonzalez*.

1. THE EVIDENCE BELOW:

MR. COFER:

Mr. Mungin disclosed to Mr. Cofer that he was not guilty and had an alibi. (PC-R 289) Mr. Mungin gave two statements to the police that were generally consistent. (PC-R 496) Mr. Cofer relayed to the Court the defense that Mr. Mungin disclosed to Mr. Cofer.

Q And could – to the best of your memory,

---

detective's report the individual was identified as "Snow." (Ex. "B," pg 102.)

can you relay to the Court what he told you about this individual "Ice"?

A Well, I have to preface it in some respect to the fact that because Mr. Mungin had already been convicted and sentenced on the shootings in Monticello and Tallahassee, and had been down in the prison system, the Jacksonville homicide detectives, I think on two occasions, had gone and visited him in prison, and asked him to relate his whereabouts during this period of time. And so the Sheriff's Office had already received two statements from Mr. Mungin outlining his travels during this four to five day period of time where he went from here to — and the like. So, those reports indicated in one version, if I remember correctly, a possible suspect by the name of "Snow", and the other suspect by the name of "Ice". During my interviews, Mr. Mungin related a course of travels and just, without trying to over simplify, Mr. Mungin resided up in southern Georgia and Mr. Mungin had possession of a .20 — this .25 caliber semi-automatic. Mr. Mungin had befriended a younger lady who lived in Pensacola, Florida, and on occasion would go from south Georgia to Pensacola to visit her. On this one occasion, Mr. Mungin left south Georgia to go to Pensacola and en route there the shootings in Monticello and Tallahassee occurred.

Now, if I remember correctly in the time frame, and I do have a note in my file mapping this out, the shootings in Monticello and Tallahassee occurred on the same day, within a time period would be consistent with someone driving on Interstate 10 from Monticello to Tallahassee. At that

point Mr. Mungin's general statement to me and as best as I could draw them to be consistent with the two detectives, was that after the shooting in Tallahassee, which was done in order to obtain a gift for his girlfriend in Pensacola, he back-tracked to Jacksonville and the gun that was utilized in the Monticello and Tallahassee shootings was traded to an individual by the name of — nickname of "Ice" who resided in a neighborhood out on Moncrief Road. The gun was traded together with a car.

I have — I don't recall whether — I have a recollection Mr. Mungin indicated he went from there back up to Georgia and then left Georgia, went back I-10 to visit the girlfriend in Tallahassee, and this is now in the period which the shooting in this case is concerned. I believe the time frame is — and I can't remember what month, but seems like it's the 14th of the month for the Monticello and Tallahassee shootings and then the Jacksonville shooting occurred on the 16th or something like that and then Mr. Mungin was arrested in Georgia on the 18th. Well, back-track. He's in Georgia, gets — goes back to Pensacola, visits the girlfriend in Pensacola, for a day or two, comes back to Jacksonville, reconnects with "Ice", gets the gun back, and then goes up to Georgia where he's subsequently arrested.

So the time frame, like I said, I'd have to look back at the time frame we're talking about from the first two shootings to the arrest in Georgia was either four to six days, with the Jacksonville homicide occurring in the middle. During this period of time

> that "Ice" had the gun. So that's the basic alibi.

(PC-R 293-296)

Mr. Cofer described the investigation of Mr. Mungin's defense. Mr. Cofer testified that the Duval County Public Defender's Office had the resources to assign an investigator to perform a guilt phase investigation. (PC-R 292) Nevertheless, Mr. Cofer's recollection was hazy of the work of investigators in the guilt phase. Mr. Cofer thought he ran it by Investigator Blue if he knew anything about "Ice", and Mr. Blue had no information. (PC-R 297) However, Mr. Cofer later testified that he could not state the above with certainty. (PC-R 505) Mr. Cofer testified that Mr. Cofer had no specific recollection of whether Investigator Blue indicated the guilt phase investigation was going to be fruitful. (PC-R 293)

Mr. Cofer claimed to run a database which linked no one with the name of "Ice". (PC-R 296) However, Mr. Cofer never went to 22nd and Myrtle in Jacksonville to see if he could find "Ice" or find out if "Ice" even existed. (PC-R 296)

Mr. Cofer testified about a trip that he made to Pensacola to meet with Ms. Dawson. Mr. De la Rionda questioned Mr. Cofer about his meeting with Ms. Dawson:

> A We met with Charlette that evening in her home and basically told her why we were there, that we were representing

Anthony Mungin, went into some general discussions about her background, how did they know Anthony, you know, the depth of their friendship. Then we started moving into the critical period of the alibi, asking her if Anthony had come over to Pensacola to visit her during this time frame, and she recalled generally that Anthony was there. I can't remember exactly how she was able to set this down, whether it was a letter from Anthony.

Mr. Malnik, I did look at some of my notes yesterday and it appears it's refreshed my memory. There was something about her having a school or something like that that tied it down to being right in that time period of Anthony's visit.

During the course of our interviews, we started trying to get a little more detail out of her, because if you're developing an alibi witness, you realize that detail is important. One, how they know it was a certain date, various recollection they have, because an alibi witness typically is going to be cross on those matters.

During our interviews we asked her what she and Anthony had been doing during that time period and among the other things that she had talked about, she talked about going target practicing with Anthony. And we said — asked her to describe the gun and she described the gun, which would have matched the type of weapon that Anthony used.

BY MR. De la RIONDA:

Q So —

A At that point we exchanged a few more pleasantries, Mr. Buzzell and I went out to our car and we realized that this was not going to work.

(PC-R 323-8-324-22)

However, Mr. Cofer became less certain about details of his conversation with Ms. Dawson while being questioned by Mr. Mungin's post-conviction counsel.

Mr. Cofer testified concerning his conversations with Ms. Dawson that allegedly invalidated Mr. Mungin's account:

A My general recollection — and I don't know what notes that I took, but it was more of she had a general feeling, she knew it was like a weekend or something like that, and she had it tied or pegged to some other event in her life that's why she knew, but it wasn't like I remember he arrived here at X time on X date and that sort of thing.

Q You would agree with me that if she indicated that he arrived Sunday evening with a gun, after the alleged homicide in Jacksonville, that would not necessarily be indicative of guilt, based on what Mr. Mungin had told you, correct?

A That's correct.

Q You would agree, though, that if she indicated that he was there on Sunday morning with the gun, that would be more indicative of guilt, before the homicide. If he would

have gotten there on Sunday morning and stayed the week or stayed a couple of days?

A Okay. And refresh my memory. The homicide was on —

Q Sunday, September 16th at approximately 2:00 o'clock.

A Well, if he had gotten there on Sunday morning with the gun, I'm not sure I understand the direction of your question.

Q I guess what I'm asking you, Mr. Cofer, is you, to the best of your knowledge, don't remember her giving a specific date and time that he arrived, correct?

A Correct. And I don't think she was able to and if she had been able to, it would have had one of those little lights go off in your head, because my conversations with her occurred like a long time after this had occurred and if she had said, yeah, I remember it was this morning and it was this time, I would have thought something is up here.

Q Nowhere in your notes is it reflected the conversation that you had with Charlette, is there? In the trial attorney file, are there any notes memorializing those conversations?

A Unless you've seen them and can bring them to me, I'll concede I may not have written that down. There are other notes relating to going over there.

Q But are there any specific notes memorializing exactly what she said?

A No.

Q Did you take a transcribed or a taped statement from her?

A No

(PC-R 365-367)

2. VERIFICATION OF "ICE'S" EXISTENCE

KIMBROUGH:

Mr. Kimbrough credibly verified the existence of "Ice". Mr. Kimbrough is a Pastor of the Overcomer's Association. (PC-R 379) Mr. Kimbrough met Mr. Mungin in the mid to late 80's (PC-R 378) Mr. Kimbrough became friends with Mr. Mungin. (PC-R 379) Mr. Kimbrough knew Anthony's associates including Phillip Levy and Tank. (PC-R 379)

Most important, in the 80's, Mr. Kimbrough was familiar with a guy older than them in his 30's who stayed in the Moncrief area of Northwest Jacksonville. (PC-R 380) Mr. Kimbrough testified that "Ice" provided drugs and alcohol, and "Ice" hung around Moncrief. (PC-R 381) Mr. Kimbrough associated with "Ice". (PC-R 381) Mr. Kimbrough believed Mr. Mungin had association with "Ice" because they all were doing drugs. (PC-R 381)

Mr. Kimbrough then provided more specific details concerning

"Ice". "Ice" sold drugs including cocaine. (PC-R 381-382) "Ice" had a different vehicle every time Mr. Kimbrough would see him. (PC-R 382) "Ice" was always seen in same section. (PC-R 382) "Ice" carried a gun. (PC-R 382) "Ice" was a jeri-curl, tall individual between 190-250 pounds. (PC-R 382) Mr. Kimbrough did not know where he was from. (PC-R 382) "Ice" would dress like younger people dressed. (PC-R 382-383) Mr. Kimbrough had not seen "Ice" since the mid 90's. Mr. Kimbrough did not know "Ice's" real name. (PC-R 384) "Ice" carried a pistol sometimes on his side or on his back. (PC-R 385)

No investigator or attorney contacted Mr. Kimbrough back in 1992 or 1993 to investigate "Ice". (PC-R 384) Mr. Kimbrough was living on Lee Street in Jacksonville. (PC-R 384)

SANDERS:

Mr. Sanders gave even more vivid descriptions of "Ice". Mr. Sanders met Mr. Mungin back in 1983, and 1984 on 28th and Stuart in Jacksonville, Florida, just two blocks over from Moncrief. (PC-R 392) Mr. Sanders met "Ice" in the early 1980's at Solomon Johnson Park on 27th Drive 28th and Moncrief. (PC-R 393) Mr. Sanders related that Mr. Mungin, Mr. Kimbrough, Phillip Levy and a few more guys out on the neighborhood were playing basketball when they met "Ice" at the park. (PC-R 393-394)

"Ice" was an African male at least four, five years older than Mr. Sanders. (PC-R 394) "Ice" was a hustler who knew how to make money illegally and Anthony, Sanders and "Ice" would steal cars together. (PC-R 394-395) "Ice" taught Anthony and Sanders how to sell drugs and how to burglarize. (PC-395)

Mr. Sanders related an incident where "Ice", Kimbrough, and possibly Phillip Levy did a burglary at Pick and Save and "Ice" escaped capture by the police by hiding in a refrigerator box overnight. (PC-R 396-397)

Mr. Sanders observed "Ice" dealing drugs from 22nd and Myrtle. (PC-R 397) Mr. Sanders described vividly how "Ice" would exchange cars for money, drugs or guns. (PC-R 397-398) Mr. Sanders even observed Anthony to be in cars that "Ice" was usually in possession. (PC-R 398)

Mr. Sanders last saw "Ice" in the summer of 1987. (PC-R399-400) Mr. Sanders knew that "Ice" was from up state New Jersey or New York, but Mr. Sanders never knew his real name. (PC-R 399)

Mr. Sanders left Jacksonville in the late 80's to begin a prison sentence. (PC-R 399) Mr. Sanders was in prison in 1992 and 1993. No investigator or attorney contacted him about "Ice". (PC-R 399) Mr. Sanders testified that had anyone contacted him, Mr. Sanders would have verified that "Ice" existed. (PC-R 399)

WASHINGTON:

Brian Washington has lived in St. Mary's and Kingsland, Georgia, all his life. (PC-R 406) Mr. Washington is approximately four years older than Mr. Mungin. (PC-R 406) Mr. Washington was close to Mr. Mungin in 1989 and 1990 because Mr. Mungin used to go to Mr. Washington's house to visit Mr. Washington's brother. (PC-R 407)

Mr. Washington recalled that the last day that he saw Mr. Mungin was on September 16, 1990. (PC-R 407) Mr. Washington was pumping gas when he saw Mr. Mungin at Mom and Pop convenience store in Kingsland. (PC-R 407, 408) Mr. Washington relayed a conversation that he had with Mr. Mungin to the Court:

> Q And can you relay to the Court what was said?
>
> A I'm not exactly sure, but I think it went something like, you know, I — because I hadn't seen him in a while. I say, hey, man, what's up, what's going on, and he said that he needed a ride to Jacksonville. I said, well, sure, I can give you a ride, but I had to go back to the house to take my wife, my first wife. I'm married. Take her to church.
>
> Q So, would that have been a Sunday that you would have been taking her to church?
>
> A Yes.

Q What time, approximately, did you see Mr. Mungin?

A At that time it was about 10:30.
Q And did you —

THE COURT: A.m.? P.m.?

MR. MALNIK: P.m.? Good question.

THE WITNESS: A.m.

(PC-R 408)

Mr. Washington indicated that he went back to his house for five to seven minutes and then picked Mr. Mungin up at Mr. Mungin's cousin's house where his cousin, Angie Jacobs, was living with someone. (PC-R 409)

Mr. Washington left Kingsland to go to Jacksonville even though Mr. Washington had no plans to go to Jacksonville because Mr. Mungin was like a brother to Mr. Washington and Mr. Mungin needed a ride. (PC-R 409, 410)

Mr. Washington is unfamiliar with Jacksonville, but Mr. Washington knew that he dropped Mr. Mungin somewhere off Gulfair Boulevard. (PC-R 410) Mr. Washington did not see Mr. Mungin anymore that day. (PC-R 410)

Mr. Washington indicated that Mr. Washington learned from his mother about a week and a half after Mr. Washington dropped Mr. Mungin off that Mr. Mungin had been arrested for murder. (PC-R 410) Mr. Washington told his mother the following:

Q And did you say anything to your mom at the time?

A Yes. I told her, I said, mama, that couldn't have been – there's just no way. That couldn't have happened.

Q Did you tell her why it couldn't have happened?

A Yeah, I – well, I told her, I said, no, that couldn't have happened, I said, because, you know, if the time frame of what they were saying, it couldn't have happened at that time.

(PC-R 410)

Mr. Washington indicated that no attorney or investigator contacted Mr. Washington at the time, and Mr. Washington was living in Kingsland. (PC-R 411) Mr. Washington relayed that he would have told an attorney or investigator if they would have contacted Mr. Washington about his contact with Mr. Mungin. (PC-R 411)

Mr. Washington concluded the direct by telling how he was able to recall it was September 16:

A Because my son was just born in August and my mother had a birthday coming up in – at September the 22nd and my daughter's birthday is September 30th. And that was the day I know, because that was my – my first wife went to church on that day.

(PC-R 412)

JACOBS:

Miss Jacobs is Mr. Mungin's cousin, and she and Anthony were very close in September of 1990. (PC-R 420-421) Anthony was living with Angie in mid September, 1990 on 214 Campote Street. Angie knew that Anthony in mid September, 1990 had a girlfriend named Charlette Dawson in Pensacola. (PC-R 421)

Miss Jacobs related that the last time that she saw Mr. Mungin, he was arrested in her house. (PC-R 422) She recalled that he had been gone for several days because he said that he had to go to Pensacola. (PC-R 423)

LEVY:

Phillip Levy testified that he knew Mr. Mungin since 1986. (PC-R 430) Mr. Levy met Mr. Mungin in Jacksonville and they became close friends seeing each other quite often. (PC-R 430, 431)

Mr. Levy testified that the last time that Mr. Levy saw Mr. Mungin was some time around 1990 at his aunt's house on a weekend maybe a Sunday. (PC-R 431) Mr. Levy believed he saw Mr. Mungin about 11:30 or one o'clock in the afternoon. (PC-R 432) Mr. Levy testified that he had not seen Mr. Mungin for several months and they reminisced about old times at his aunt's house and then they left there and went to the corner of 28th and

Stuart. (PC-R 432)

Mr. Levy testified that Mr. Mungin then went across the street to see if Donnetta Dues, Mr. Mungin's former girlfriend, was home. (PC-R 433) Mr. Levy and Mr. Mungin spoke for about thirty-five minutes and Mr. Mungin returned after going to Ms. Dues'. Then Mr. Mungin left to see Mr. Levy's uncle, Vernon Longworth. (PC-R 433) Mr. Levy saw Mr. Mungin the last time around 4:30 or 5:00. (PC-R 434) Mr. Mungin told Mr. Levy that he wanted to take a bath at Mr. Longworth's house. (PC-R 434) Mr. Levy was pretty sure that Mr. Levy saw Mr. Mungin last in the middle of September. (PC-R 434, 435) The reason Mr. Levy believed it was a Sunday because Ms. Dues was at church. (PC-R 436)

LONGWORTH:

Mr. Longworth testified that he met Anthony twenty years ago in Jacksonville, when Mr. Mungin was a teenager. (PC-R 477) Mr. Mungin was good friends with his nephew Phillip. (PC-R 477, 478) Mr. Longworth saw Mr. Mungin often because Mr. Mungin lived in the neighborhood. (PC-R 478)

Mr. Longworth remembered that the last time that he saw Mr. Mungin was a Sunday, but not the exact date. (PC-R 488) Mr. Longworth knew it was a Sunday because it was real hot and there

was not anything to do but get ready to watch football. (PC-R 478, 479)

Anthony came to Mr. Longworth's house about 1 or 2 o'clock in the afternoon, and he stayed there until about 2:30 or 3:00. (PC-R 479) They talked because it had been a long time since Mr. Longworth had seen Mr. Mungin and Mr. Mungin asked to take a shower. (PC-R 479) Mr. Longworth allowed Mr. Mungin to take a shower about 2:30 in the afternoon. (PC-R 480) Mr. Longworth believed that Anthony had gone to see Donnetta Dues who was the mother of Mr. Mungin's son. (PC-R 480)

No attorney or investigator contacted Mr. Longworth about Mr. Mungin in 1992 or 1993 even though Mr. Longworth resided in Jacksonville. (PC-R 480) Mr. Longworth indicated that if someone would have contacted him back then, he would have testified the same. (PC-R 481)

Mr. Longworth specifically remembered that Mr. Mungin's hair was short. (PC-R 482)

Although the recent United States Supreme Court decision in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) concerned an analysis of the reasonableness of defense counsel's investigation of mitigation evidence, the analysis should be equally applicable to a guilt phase investigation. In *Wiggins*, the Court wrote:

Wiggins v. Smith, 123 S. Ct. 2527 (2003):

"[7-10] In this case, as in *Strickland*, petitioner's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. *Id.* at 673, 104 S. Ct. 2052. Here, as in Strickland, counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternate strategy instead. In rejecting Strickland's claim, we defined the deference owed such strategic judgment in terms of the adequacy of the investigations supporting those judgments:

> "[S]tragetic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation . In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*. at 690-691, 104 S. Ct. 2052.

Our opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams

ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396, 120 S. Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). While *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, *cf. post*, at 2546 (SCALIA, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, *ibid.*, we therefore made no new law in resolving Williams' ineffectiveness claim. *See Williams*, 529 U.S., at 390, 120 S. Ct. 1495 (noting that the merits of Williams' claim "are squarely governed by our holding in *Strickland*"); *see also id.* at 395, 120 S. Ct. 1495 (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland's* performance prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today. Cf. *Strickland,* 466 U.S., at 690-691, 104 S. Ct. 2052 (establishing that "thorough investigation[s]" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); *see also id.*, at 688-689, 104 S. Ct. 2052 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable").

Id., at 2535-2536)

Wiggins v. Smith, 123 S. Ct. 2527 (2003):

"Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. Ap. 488. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. *Id.* at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra*, at 688, 104 S. Ct. 2052; *Williams v. Taylor, supra*, at 396, 120 S. Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)(emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.,* 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences)

> (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .....Investigation is essential to fulfillment of these functions")." *Id.*, at 2536-2537

The threshold question is whether the investigation comported with standards that prevailed in Jacksonville at the time of Mr. Mungin's trial. Mr. Cofer testified that the Fourth Judicial Circuit Public Defender's Office had investigators for both guilt phase as well as penalty phase investigations. (PC-R 292) However, Mr. Cofer could not describe any specific work that was done by the Office's investigators in Mr. Mungin's guilt phase investigation. (PC-R 293, 297, 505) Hence, it would appear that the guilt phase investigation fell below the standards of the Duval County Public Defender's Office.

Nevertheless, the State may argue that Mr. Cofer conducted some guilt investigation of his own by running Ice's name through a data base, and attempting to corroborate aspects of Mr. Mungin's version of events by speaking with Ms. Dawson in Pensacola concerning her recollection of her last visit with Mr. Mungin.

First, postconviction counsel is not suggesting that an adequate investigation would result in "Ice" walking into a

Jacksonville courtroom ten years ago and admitting his involvement in Ms. Woods' homicide. However, an adequate investigation would have involved interviewing individuals in the area of Jacksonville where Mr. Mungin stated in his statements to the police that "Ice" frequented to verify "Ice's" existence. Mr. Cofer did not even take that rudimentary step.

The most disturbing aspect of this investigation is that the decision to forego a defense case was based on Mr. Cofer's flawed analysis of the facts. The State introduced police reports that relayed Mr. Mungin's account of that time period. (State's Exhibit 2 & 3)

According to the police report Mr. Mungin stated in an interview on November 21, 1991 that Mr. Mungin had taken the Burgundy Ford Escort from a motel in Kingsland, Georgia, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, Mr. Mungin went to Monticello where he was involved in a shooting and in Leon County where he also shot someone. Mr. Mungin stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shootings. Later in the statement, Mr. Mungin stated he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus. In that first statement on November 21, 1991, Mr. Mungin stated the person he

was dealing with he would only identify as “Snow”. Mr. Mungin stated he spent several days smoking and selling crack in Georgia. A baser then drove Mr. Mungin back to Jacksonville and Mr. Mungin found the Escort stripped. While in Jacksonville, Mr. Mungin procured another car, a Dodge, and purchased the gun back from “Snow”. Mr. Mungin then went to see a girl on West 28th Street and then went to Pensacola to see another girl, Charlette Dawson. Mr. Mungin stated he was in Pensacola between 7:00 and 8:00 p.m. on the same day he obtained the car in Georgia. Mr. Mungin indicated he returned to Georgia after spending two days in Pensacola. (State’s Exhibit 2 & 3)

In Mr. Mungin’s second statement on March 31, 1992, he indicated the individual that he dealt with was “Ice”. In the second statement on March 31, 1992, Mr. Mungin indicated that he had given the gun, car, and money for rock cocaine to “Ice”, and he would be back. Mr. Mungin indicated that he did that the day of the shooting in Monticello and Tallahassee and his Uncle took him back to Georgia. Most important, on March 31, 1992, he stated “he retrieved his gun which he had loaned/sold to a black male along with the car”. He stated it was daytime, almost evening, when he got the beige car, and he drove straight to Pensacola stopping only for gas in Tallahassee. He arrived in Pensacola in the nighttime. (State’s Exhibit 2 & 3)

A careful reading of Mr. Cofer's testimony reveals Mr. Cofer misconstrued Mr. Mungin's account:

> "I believe the time frame is – and I can't remember what month, but seems like it's the 14th of the month for the Monticello and Tallahassee shootings and then the Jacksonville shooting occurred on the 16th or something like that and then Mr. Mungin was arrested in Georgia on the 18th. Well back-track. He's in Georgia, gets – goes back to Pensacola, visits the girlfriend in Pensacola, for a day or two, comes back to Jacksonville reconnects with "Ice", gets the gun back, and then goes up to Georgia where he's subsequently arrested." (PC-R 295, 296)

Mr. Cofer mistakenly believed that Mr. Mungin did not retrieve the gun from "Ice" in Jacksonville until Mr. Mungin returned from visiting his girlfriend in Pensacola on Mr. Mungin's way back to Georgia where he was arrested at a relative's home where the gun was in his room.

As a result of his misunderstanding, Mr. Cofer believed Mr. Mungin's explanation was not plausible based on his interview with Charlette. Mr. Cofer's erroneous advice to Mr. Mungin became apparent when Mr. Cofer testified as to the following:

Since Mr. Cofer believed that Mr. Mungin did not regain possession of the gun until Mr. Mungin stopped in Jacksonville on his trip from Pensacola back to Georgia where Mr. Mungin was arrested, then Ms. Dawson's account of seeing the murder weapon seemed to invalidate Mr. Mungin's account. It can hardly be

said that terminating the investigation of Mr. Mungin's guilt phase theory was reasonable if it was based on a flawed understanding of the facts. Therefore, Mr. Cofer's investigation of Mr. Mungin's defense was deficient and prejudiced Mr. Mungin.

The jury was deprived of testimony that was consistent and buttressed Mr. Cofer's defense that Mr. Mungin did not commit the homicide and Mr. Kirkland erred in his identification of Mr. Mungin as being the individual leaving the store as Mr. Kirkland approached the store.

Assuming this Court finds that the lower Court erred by concluding that the alleged alibi defense was "inconsistent with the facts of the case, because Mr. Cofer mistakenly believed that Mr. Mungin left Pensacola then retrieved the gun in Jacksonville and traveled to Georgia where Mr. Mungin was arrested. Nevertheless, in order to show prejudice, the defense will have to establish that the testimony of the witnesses would have benefitted Mr. Mungin at trial.

First, there was no finding made by the lower Court that any of the witnesses were unavailable. Second, there was no finding that their testimony was incredible or unworthy of belief.

Specifically, the lower Court never made a finding that "Ice" did not exist. Competent substantial evidence was

presented that Mr. Mungin associated with a drug dealer named "Ice" in a Jacksonville neighborhood, and "Ice" traded drugs and money for guns and cars. (PC-R 394-398)

Second, the alibi was consistent with Mr. Mungin's account of his whereabouts as well as facts of the homicide.

First, Mr. Mungin indicated that Mr. Mungin was driven by a baser who picked him up at his aunt's house in Kingsland and drove him to Jacksonville where he was dropped off. (State's Exhibit @ & 3) Brian Washington testified that Washington picked Mr. Mungin up from his cousin's house in the morning in Kingsland, and dropped Mr. Mungin off in Jacksonville. (PC-R 409, 410) Mr. Mungin indicated in his statement that he was looking for a young lady on 28th and Stuart. (State's Exhibit 2 & 3) Mr. Levy testified that he saw Mr. Mungin about 11:30 or 1:00 o'clock in the afternoon and Mr. Mungin went across the street from the corner of 28th and Stuart to see if Ms. Dues, his former girlfriend, was home. (PC-R 432, 433) Mr. Levy saw Mr. Mungin around 4:30 or 5:00 o'clock. (PC-R 434) That time would be consistent with Mr. Mungin telling the police that he left Jacksonville late in the daytime, almost nighttime. (State's Exhibit 2 & 3) Mr. Longworth confirmed the chronology by stating that Anthony came to Mr. Longworth's house around 1 or 2 o'clock in the afternoon and stayed until about 2:30 or 3:00

o'clock. Mr. Longworth allowed Mr. Mungin to take a bath. (PC-R 479-480) Mr. Levy had testified that Mr. Mungin stated he was going to Mr. Longworth's to take a bath. (PC-R 434) Mr. Longworth also confirmed that Mr. Longworth believed Mr. Mungin went to see Ms. Dues. (PC-R 480)

Most significantly, the owner of the Dodge Monaco testified at trial that her vehicle was taken between 10:00 a.m. on September 15th and 1:00 p.m., September 16th. (R-805-806) None of the witnesses saw Mr. Mungin with a vehicle. Mr. Mungin indicated in his statement that he did not leave until late in the day or at 1:00 or 2:00 p.m. in another statement. (State Exhibit 2 & 3) Therefore, the testimony of individuals supports Mr. Mungin's account as well as being consistent with an alibi. Furthermore, their recollection would have been obviously fresher had investigators contacted them shortly after the homicide. Therefore, this testimony would have benefitted Mr. Mungin.

ARGUMENT III

THE DUVAL COUNTY PUBLIC DEFENDER'S OFFICE HAD AN ACTUAL CONFLICT OF INTEREST BASED ON IT'S PRIOR AMD SIMULTANEOUS REPRESENTATION OF STATE WITNESS, RONALD KIRKLAND, THAT HAD AN ADVERSE EFFECT ON MR. MUNGIN'S CASE

1. THE EVIDENCE BELOW

Mr. Kirkland had an extensive criminal history and a history

of being represented by the Duval County Public Defender's Office. In Circuit Court Case No.: 1988-8190-CFE, Mr. Kirkland received a withhold of adjudication and was placed on probation for eighteen months, and Mr. Kirkland was represented by Assistant Public Defender, Michael Tyde, of the Fourth Judicial Circuit. (PC-R 278-81)

Mr. Kirkland was charged with a DUI and a civil infraction of speeding in 1991-21565-MMA. (PC-R 282) Mr. Kirkland received six months probation, 50 hours of community service and six months probation which was terminated on October 8, 1991. (PC-R 283) Danny Delves was appointed to represent Mr. Kirkland on September 10, 1991 on a violation of probation. (PC-R 282-84)

Finally, Mr. Kirkland was represented by the Duval County Public Defender's Office in Case No.: 1991-53947-MMA which began as a felony case and was transferred to County Court for the offense of disorderly intoxication. (PC-R 286) Mr. Kirkland was adjudicated and given thirty-eight days time served by Judge Arnold.

Most significantly, screen page printouts from the Clerk's office of the three worthless check cases, 1991-89230, 1991-89229-MMA and 1991-1036-MMA were entered into evidence. (PC-R 262-66) An examination of the criminal history revealed that all three worthless check charges were filed in 1991. (PC-R 254)

However, Mr. Kirkland was arrested on September 26, 1992, and a notation on the file reveals that the Duval County Public Defender's Office was appointed and that the cases were disposed of on October 13, 1992 with a plea of guilty and the Court withheld adjudication of guilt. (PC-R 254) Mr. Cofer verified that the Duval County Public Defender's Office represented Mr. Kirkland by running the history on the Jax-2K which is the data base provided by the Clerk's office. (PC-R 259)

Mr. Cofer clearly was aware of some of Mr. Kirkland's criminal history because Mr. Cofer deposed Mr. Kirkland and asked Mr. Kirkland about his criminal history. (PC-R 261) More important, Mr. Cofer conceded that Mr. Cofer may have been aware from his own record checks that the Public Defender's Office may have represented Mr. Kirkland for arrests for disorderly intoxication or possibly a DUI during a period of time prior to Mr. Mungin's arrest. (PC-R 247) Clearly, Mr. Cofer had the ability to investigate whether the Duval County Public Defender's Office had represented Mr. Kirkland. Mr. Cofer testified that the Duval County Public Defender's Office had a computer that would have been able to check whether Mr. Kirkland had been previously represented by the Public Defender's Office of the Fourth Judicial Circuit. (PC-R 287) Not only was Mr. Cofer computer literate, but Mr. Cofer developed the case

tracking program that the Public Defender's Office used and the data base went back to 1986, 1987. (PC-R 287)

Mr. Cofer claimed not to have been aware of Mr. Kirkland being represented by the Public Defender's Office during the pendency of Mr. Mungin's case. (PC-R 246) Mr. Cofer claimed that had he known the information concerning the three worthless check cases that occurred simultaneously with his representation of Mr. Mungin that Mr. Cofer would have shared that information with Mr. Mungin. (PC-R 255) Mr. Cofer testified that Mr. Mungin would play a large part in whether to file a Motion to Withdraw based on a conflict. (PC-R 255-57) However, Mr. Cofer did not recall disclosing to Mr. Mungin that Mr. Kirkland had been represented by the Fourth Judicial Circuit. (PC-R 248)

The Florida Rules of Professional Responsibility Rule 4-1.7. Conflict of Interest; general rule:

> **Rule 4-1.7. Conflict of Interest; general rule**
>
> **(a) Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client and
> > (2) each client consents after consultation.
>
> **(b) Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent

> a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) the client consents after consultation.

This Court in *Bouie v. State,* 559 So. 2d 1113 (Fla. 1990) addressed a potential conflict of interest when it wrote:

> **Bouie v. State, 559 So.2d 1113 (Fla. 1990)**
>
> > [3] The sixth amendment right to counsel assures fairness in adversarial criminal proceedings, *United States v. Morrison*, 449 U.S. 361, 101 S. Ct., 665, 66 L. Ed. 2d 564 (1981), but a lawyer representing clients with conflicting interests cannot provide the adequate assistance required by that amendment. *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). As a general rule, a public defender's office is the functional equivalent of a law firm. Different attorneys in the same public defender's office cannot represent defendants with conflicting interests. *Turner v. State,* 340 So. 2d 132 (Fla. 2d DCA 1976). To show a violation of the right to conflict-free counsel, however, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). Bouie cannot meet this burden.

Since a Public Defender's Office is the functional equivalent of a law office, then the prior and simultaneous

representation of Mr. Kirkland constitutes a potential conflict of interest.

A recent case in *Hunter v. State*, 817 So. 2d 786 (Fla. 2002) at first glance appears adverse to Mr. Mungin's claim of a conflict of interest.

In *Hunter*, this Court was confronted with a factual situation similar to Mr. Mungin:

> "Hunter alleges that trial counsel was ineffective due to an actual conflict of interest. Specifically, Hunter argues that an actual conflict of interest existed because Taurus Cooley, a State witness and one of the surviving victims, was formerly represented in several unrelated cases by the same public defender's office that represented Hunter. Hunter contends that the conflict of interest prevented adequate cross-examination and impeachment of Cooley regarding recent and pending criminal charges. The trial court conducted an evidentiary hearing on this claim, and subsequently denied the claim. *Id*. at 791.

This Court gave a lengthy rationale of why relief was being denied to Hunter:

> "Although this Court stated in McCrae that it need not decide whether there was a conflict, we nevertheless noted that there was no actual conflict of interest violation since counsel was unaware of the public defender's representation of the State's witness. *See id.* We find McCrae equally applicable to the instant case. As in McCrae, trial counsel in this case testified at the postconviction evidentiary hearing that he was completely unaware of the public defender office's previous representation of

Cooley. In fact, trial counsel, when asked by collateral counsel about Cooley's criminal background during the postconviction hearing, indicated that he did not know of Cooley's criminal charges. Hence, the trial court was entitled to conclude that since trial counsel was not even aware of the public defender's prior representation of Cooley, such prior representation could not have affected his representation of Hunter. Thus, while Hunter has articulated a potential conflict of interest, see, *e.g. Porter v. Singletary*, 14 F. 3d 554, 561 (11th Cir. 1994), we hold that the trial court did not err in concluding that he has failed to demonstrate that an actual conflict of interest existed that affected his lawyer's performance under the circumstances in this case.

Moreover, even if an actual conflict of interest existed within the public defender's office, we conclude that Hunter has failed to demonstrate that such conflict adversely affected his counsel's representation. *See Herring*, 730 So. 2d at 1268 ("Although a court's inquiry into 'actual conflict' and 'adverse effect' may overlap, the Cuyler decision is clear on its face that the defendant must satisfy both prongs of the claim to prove ineffective assistance of counsel."). Although Hunter contends the conflict prevented adequate cross examination of Cooley regarding his recent and pending criminal charges in an attempt to impeach his credibility, this contention is refuted by trial counsel's testimony that he was not even aware of Cooley's criminal background or the public defender's prior representation of Cooley.

Accordingly, based on the record in this case, Hunter has failed to establish any factual correlation between trial counsel's alleged failure to impeach Cooley on cross-examination and the public defender's

> office's prior representation of Cooley. Consequently, we conclude that the trial court did not err in rejecting Hunter's conflict of interest claim. *Id.* at 793

Mr. Mungin's case can be distinguished. Unlike *Hunter*, Mr. Cofer testified that he was aware of Mr. Kirkland's criminal background as evidenced by the deposition of Mr. Kirkland.(PC-R 261) In addition, Mr. Cofer testified as being aware that he had been represented by the Public Defender's Office. (PC-R 247). It can be argued that Mr Cofer had to know what was in his own files which included two separate documents describing the three worthless check cases where Mr. Kirkland was represented by the Public Defender's Office and received probation which Mr. Kirkland was still on at the time of trial.

Mr. Cofer testified that had he been aware of Mr. Kirkland's probation status and outstanding capias that Mr. Cofer would still have vigorously cross-examined Mr. Kirkland to elicit that information. However, if Mr. Cofer possessed this information, the most beneficial use of the information would have been to have Mr. Kirkland taken into custody on the outstanding capias as Mr. Kirkland approached the witness stand. However, Mr. Cofer, as a representative of the very same office that just represented Mr. Kirkland, could not ethically have taken an adverse position against a former client. The failure to elicit this information had an adverse effect for Mr. Mungin as

detailed in the analysis of prejudice within Argument I.

The adverse effect to Mr. Mungin was that the jury never learned that Mr. Kirkland had a reason to testify favorably to the State.

ARGUMENT IV

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE BY FAILING TO INTRODUCE EVIDENCE OF DEFENDANT'S HOSPITALIZATION RESULTING FROM A SUICIDE ATTEMPT.

Mr. Cofer offered the only testimony as to this issue. Mr. Cofer was asked by post-conviction counsel the following:

> Q You utilized the services of Dr. Harry Krop, correct?
>
> A Yes. Yes, I did.
>
> Q And to the best of your memory, the purpose that you used Harry Krop was to show the testimony that he elicited — that you elicited was to show that Mr. Mungin was capable of being rehabilitated, correct?
>
> A Yes.
>
> Q And another purpose was to show that he wasn't an anti-social personality?
>
> A That would have been my hope, yes.
>
> Q And, in fact, that's what Dr. Krop testified to?
>
> A Correct.
>
> Q And also Dr. Krop testified that Mr. Mungin had serious substance abuse

problems at the time of the incident, correct?

A The specifics of what Dr. Krop testified to I'm sure will be on the record. For me to say it was or wasn't at this point, I don't have specific recollections.

Q Would it have been consistent with your defense to show that essentially Anthony was a good person that went bad, I think as you argued in a very short — did some very bad things in a very short period of time. Would it have been consistent with your defense to let the jury know that maybe his upbringing was less than stellar?

A Oh, I think.

(PC-R 302-303)

The hospital records reflect a lengthy stay for a suicide attempt. (Defense Exhibit 13) Equally significant, the records reveal Mr. Mungin to be a very depressed youth in a troubled home environment. (Defense Exhibit 13)

As this Court noted in its opinion, Mr. Mungin's jury recommendation for death was seven to five. *Id.* at 1028 Had Mr. Cofer conveyed the information contained in the hospital records to the jury, at least one jury could have changed their vote from death to life.

CONCLUSION:

As a result of numerous errors by the lower Court, Mr.

Mungin asserts that the lower Court erred in denying claims seven and sixteen dealing with cumulative error. As a result, Mr. Mungin should be accorded a new trial and/or a new sentencing.