No. _____

OCTOBER TERM 2021

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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November 19, 2021

CAPITAL CASE

QUESTION PRESENTED

1. Can Florida, consistent with Due Process and *Brady v. Maryland*, condone the prosecution's withholding of material exculpatory evidence beyond the time for a defendant to file his first postconviction motion, and then later hold that the defendant found the evidence "too late" such that the merits of the constitutional claim cannot be heard?

PARTIES TO THE PROCEEDING

Petitioner Anthony Mungin was the Movant in the trial court and the Appellant in the Florida Supreme Court.

Respondent State of Florida was the Respondent in the trial court and the Appellee in the Florida Supreme Court.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:

Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX

Direct Appeal:

Florida Supreme Court: *Mungin v. State,* 689 So.2d 1026 (Fla. 1995)
Supreme Court of the United States: *Mungin v. Florida*, 522 U.S. 833 (1997)

First Postconviction Proceeding:

Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
Florida Supreme Court: *Mungin v. State,* 932 So.2d 986 (Fla. 2006)

Second Postconviction Proceeding:

Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
Florida Supreme Court; *Mungin v. State,* 79 So.3d 726 (Fla. 2011); *Mungin v. State*, 141 So.3d 138 (Fla. 2013)

Third Postconviction Proceeding:

Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
Florida Supreme Court: *Mungin v. State,* 259 So.3d 716 (Fla. 2018)

Fourth Postconviction Proceeding:

Circuit Court in and for Duval County, Florida
State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
Florida Supreme Court: *Mungin v. State*, 320 So.3d 624 (Fla. 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Mungin prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court in this cause, reported as *Mungin v. State*, 320 So.3d 624 (2020), is attached as to this Petition as "Attachment A." The order from the Florida Supreme Court denying rehearing is attached to this Petition as "Attachment B." The order denying the successive motion for postconviction relief in the circuit court is non-published and attached as "Attachment C."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a) and 2101 (d). The Florida Supreme Court issued its decision on February 13, 2020. Petitioner thereafter sought rehearing, which was denied on June 22, 2021 ("Attachment C"). This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROCEDURAL HISTORY

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

Mr. Mungin, with the assistance of counsel, filed a Rule 3.850 motion for postconviction relief, a motion later amended (Supp. 1PCR3-44; 1 PCR 76). The State filed a response to this motion (1PCR 79-105), and a limited evidentiary hearing was

conducted by the lower court on June 25 and 26, 2002. Post-hearing memoranda were submitted by the parties (1PCR 116-151; 152-73; 175-79). Relief was denied (1PCR 203-09), and a timely notice of appeal was filed (1PCR 210-11).

The Florida Supreme Court affirmed the denial of Rule 3.850 relief, and also denied Mr. Mungin's petition for state habeas corpus relief. *Mungin v. State*, 932 So. 2d 986 (Fla. 2006).

Mr. Mungin thereafter timely filed a federal habeas corpus petition pursuant to 28 U.S.C. §2254. While that petition was pending, Mr. Mungin filed a new Rule 3.851 motion for postconviction relief raising, *inter alia*, a claim that he was denied an adversarial testing at the guilt and sentencing phases of his capital trial in light of newly discovered constitutional violations (2PCR 1-75). The motion contained supporting documentation in the form of two affidavits, one from witness George Brown and the other from Mr. Mungin's trial counsel, Judge Charles C. Cofer. *See* 2PCR70-72 (Brown affidavit); 74-75 (Cofer affidavit), and a police report relevant to the issues presented in the new Rule 3.851 motion (2PCR 73). The state trial court summarily denied the motion with a State-prepared proposed order (2PCR 130-140). Mr. Mungin timely appealed to the Florida Supreme Court, which subsequently reversed and remanded for an evidentiary hearing. *Mungin v. State*, 79 So. 3d 726 (Fla. 2011).

On remand, the evidentiary hearing took place on February 3, 2012 (3PCR 94-256). At the hearing, Mr. Mungin presented the testimony of two witnesses: George Brown and Charles Cofer (Mr. Mungin's counsel at trial). In its case, the State

presented three law enforcement officers – Charles Wells, Christie Conn, and Dale Gilbreath – as well as the trial prosecutor, Assistant State Attorney Bernardo de la Rionda. Following the hearing, the parties filed post-hearing memoranda (3PCR 50-65)(State's memorandum); (3PCR 66-81) (Defense Memorandum). On March 21, 2012, the lower court entered its order denying relief to Mr. Mungin (3PCR 82-89).

Mr. Mungin timely filed a notice of appeal (3PCR 90-91). The Florida Supreme Court affirmed the denial of relief. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013). Subsequently, Mr. Mungin returned to federal court, where he amended his habeas corpus petition with the new claims arising out of state court. However, the federal proceedings were again abated when, on or about January 12, 2017, Mr. Mungin filed a new Rule 3.851 motion (his third) in light of *Hurst v. Florida,* 136 S.Ct. 616 (2016), and subsequent Florida developments in light of *Hurst*. While the appeal from the denial of the *Hurst*-based postconviction motion was pending in the Florida Supreme Court, Mr. Mungin filed another Rule 3.851 motion on September 25, 2017, that is subject of the instant proceedings (4PC-R 1-26).

In this Rule 3.851 motion, Mr. Mungin alleged that violations of due process under *Brady*[1] and *Giglio*[2] had been discovered in light of information contained in an affidavit executed by a prosecution witness at trial, Malcom Gillette; in the alternative, Mr. Mungin alleged that his trial counsel was ineffective in unreasonably failing to discover the information contained in Mr. Gillette's affidavit. He also

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

[2] *Giglio v. United States,* 405 U.S. 150 (1972).

alleged that the information contained in Mr. Gillette's affidavit constituted newly discovered evidence.

Following the filing of the State's written response (4PC-R. 32-44), the lower court conducted a case management hearing (Supp. 4PC-R. 377-86). The court subsequently entered an order granting Mr. Mungin an evidentiary hearing (4PC-R. 45-48). That hearing was conducted on January 12, 2018 (4PC-R. 164-369). Following the submission of post-hearing memoranda by the parties (4PC-R. 49-76; 77-136), the lower court entered an order denying relief on the merits (4PC-R. 137-55) (Attachment C).

Mr. Mungin timely appealed to the Florida Supreme Court, which denied relief on procedural grounds. *Mungin v. State*, 320 So.3d 624 (Fla. 2020) (Attachment A). A timely rehearing motion was denied on June 22, 2021 (Attachment B).

STATEMENT OF RELEVANT FACTS

1. THE GUILT PHASE OF TRIAL

On Sunday, September 16, 1990, between 1:30 and 2:00 PM, Ronald Kirkland stopped at the Lil' Champ store on Chaffee Road near Interstate 10, in Jacksonville (T663-64). There was a tan or cream-colored compact car parked in the lot (T676). As Kirkland went in, a black man coming out of the store carrying a brown bag almost knocked him over (T664, 671). Kirkland got a brief glimpse at the man as they passed; then, because he was angry at being bumped, Kirkland turned and saw the back of the man's head (T677-78). The man coming out of the store had longish-hair done up in a "jeri curl," and had a growth of beard (T680-81). The beard could have

been a couple of weeks old, but Kirkland could not give any estimate as to how old the growth appeared (T681).

Kirkland did not see anyone in the store; he got a diet coke and waited for the clerk to return (T664). A few minutes later, Kirkland noticed a woman lying on the floor behind the counter, near an open cash register (T664-65, 667). He removed two undissolved aspirins from the woman's mouth and attempted CPR; the woman started to cough blood, and Kirkland turner her on her side and noticed a wound on her head (T665). Another customer came in and called 911 (T665). The other customer also looked at the open cash register (T681). Kirkland did not know if the other customer checked both cash registers in the store (T681-82). The woman, Betty Jean Woods, a store employee, was taken to a hospital (T652, 659, 689). She died four (4) days later of a gunshot wound to her head (T639, 661).

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

An evidence technician lifted twenty-nine (29) latent fingerprints from the crime scene (T628-29). Most were from the door, but he also looked for fingerprints

on the cash registers, the safe, and the counter-top (T628-29, 631). No prints were lifted from the safe (T629). No evidence was presented of any comparison of the latent prints obtained with Mr. Mungin's fingerprints. The evidence technician also observed a purse behind the counter in the Lil' Champ store (T630). He saw no indication that the purse had been gone through (T630-31). The technician testified that the scene had been contaminated before he arrived, and that various people had walked behind the counter (T625). A shell casing was found on the floor of the store (T621-22).

Dennis Elder, a Lil' Champ supervisor, arrived at the store at 2:15 or 2:30 PM the day of the shooting (T688-89). Police were there and Ms. Woods was being taken away by a Life Flight helicopter (T694). During a walk through the store with the police, Elder did not notice anything missing or out of place (T694). He ultimately determined, however, that the store's cash register had $59.05 less than the register reading indicated should have been there (T694).

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

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

The State also presented the testimony of Deputy Malcom Gillette, who was a deputy sheriff in Camden County, Georgia, on September 18 and 19, 1990, and was involved in Mr. Mungin's arrest on September 18 (T824). After Mr. Mungin was arrested, Gillette testified that he as on patrol and came across a 1978 white and beige Dodge Monaco at a closed-down gas station just north of Kingsland (T826). When he found the car, Gillette testified that he called for a wrecker to get the car: but he testified "I didn't unseal the car. I didn't open the car" (T827). The following testimony ensued:

Q [by ASA de la Rionda] Did you see anything in the car?

A [by Mr. Gillette] Yes, sir. I saw some cartridges, some pistol cartridges.

Q How many did you see?

A *If memory serves me correct I saw two.*

Q Where were they located?

A They were located in the back behind the driver's seat.

(T827-28) (emphasis added).

There was no cross-examination by Mr. Mungin's defense counsel, and immediately following Gillette's testimony, the State called a number of witnesses who were referred to by both parties as *Williams*-rule witnesses.[3] Before the first *Williams*-rule witness, the defense requested a *Williams*-rule instruction (T707). The trial judge told the prosecutor he did not know what the witnesses would testify to (T708), and asked which of the purposes of the *Williams*-rule he should instruct on (T709). The judge pointed out he could instruct on more than one purpose (*Id.*). The prosecutor told the court to instruct on the issue of identity, and the judge asked the prosecutor if that was all he wanted (*Id.*). Before the first *Williams*-rule witness testified, the court instructed the jury that as to the next several witnesses, the evidence they received was to be considered only for the purpose of proving the identity of the defendant (T712-13). The *Williams*-rule evidence was as follows:

On September 14, 1990, two (2) days before the Jacksonville shooting, at approximately 10:30 AM, Mr. Mungin drove up in a dark Ford Escort to Bishop's County Store in Monticello, Florida, near Interstate 10, came in, and asked for some cigarettes (T714, 719). William Rudd, the clerk on duty, noticed that Mr. Mungin was a clean-shaven, clean-cut young man; he thought Mr. Mungin might have been in the Navy (T725). Mr. Mungin was wearing a cap, but Rudd could see that there were no curls hanging from underneath the cap (T726). When Rudd turned to get the cigarettes, Mr. Mungin shot him in the back (T719, 721). Rudd saw Mr. Mungin then get money from the cash box that was kept under the counter (T722). When Rudd

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

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

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

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

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

In Jacksonville, about a mile from where the Escort was recovered, a four-door Dodge Monaco Royal, a big car, white with a tan vinyl roof, was stolen on September 15 or 16, 1990 (T799, 802-03, 806). The Dodge was recovered in September 18 near Kingsland, Georgia, about 100 yards from the house where Mr. Mungin was arrested (T826, 828). Two (2) expended shells found in the Dodge were determined to have been used in the gun that shot Ms. Woods (T828, 853, 884-85).

At the conclusion of the *Williams*-rule witnesses, the trial court instructed the jurors again that such evidence was to be considered only as proof of the identity of the defendant (T829).[4]

At the close of the State's case, the defense moved for judgment of acquittal as to premeditated murder based on insufficiency of evidence of premeditation, and for judgment of acquittal as to felony murder based on insufficiency of evidence of the underlying felony of robbery (T901-05). Both motions were denied (T907). The judge

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

instructed the jury on both premeditated murder (T1033-34), and felony murder, with robbery or attempted robbery as the underlying felony (T1034-37). The jury returned a general verdict of guilty of first-degree murder (R324; T1057).

2. Evidence Adduced at Postconviction Evidentiary Hearing

Mr. Mungin presented several witnesses at the evidentiary hearing in support of his allegations in his postconviction motion that is the subject of the instant petition: trial counsel Charles Cofer; Deputy Malcom ("Tony") Gillette; Dale Gilbreath; and Assistant State Attorney Bernardo de la Rionda. He also presented a number of documents which were admitted as evidence. *See* 4PC-R. 167 (listing defense exhibits). The State presented no witnesses or other evidence.

Charles G. Cofer. Mr. Cofer represented Mr. Mungin at his capital trial as "lead counsel" (4PC-R. 174). He recalled Tony Gillette as being a law enforcement officer on the Georgia end of the investigation into the Florida murder of Betty Jean Woods (4PC-R. 177). Dale Gilbreath was the lead investigating officer from Florida with respect to Ms. Woods's murder (4PC-R. 179). One of the factual issues about Mr. Mungin's case that was being investigated was a number of cars, including a car found in Georgia (4PC-R. 180).[5]

Mr. Cofer recalled receiving pretrial discovery from the State and would expect to receive from the State any information—regardless of form—that it was obligated to disclose pursuant to *Brady* (4PC-R. 182). Outside of what the transcripts would

[5] A blown-up photograph of this car—a tan or beige Dodge Monaco—was introduced at trial (4PC-R. 181; State Trial Ex. 12).

reflect, Mr. Cofer had no independent recollection of what Gillette said in his deposition or at trial regarding the discovery of two shell casings in the Dodge Monaco (4PC-R. 183).

Mr. Cofer was shown Defense Exhibit 3, a document from the Camden County, Georgia, Sheriff's Department entitled Inventory and Vehicle Storage receipt (4PC-R. 184). The document bears the date September 19, 1990, at 0027 hours, and appeared to be signed by Tony Gillette (*Id.*). In the lower section of the document, there was a handwritten entry "Nothing visible, trunk not searched" (*Id.*). The car referenced in the receipt was a 1978 Dodge Monaco, registered to a Sharon Gannon from Jacksonville, Florida (4PC-R. 185). Although Mr. Cofer had no independent recollection whether he had been provided this document at the time of Mr. Mungin's trial, he acknowledged it would be "one of the normal documents" that one would expect to be disclosed by the State during discovery (*Id.*). Mr. Cofer twice acknowledged that if Gillette had testified at trial that he observed shell casings or bullets in a vehicle and he had a document suggesting that nothing was visible, he would have utilized the document to cross examine him and confront him with what would be an inconsistent statement (4PC-R. 187-88). Mr. Cofer had no independent recollection whether he conducted any cross-examination at trial of Gillette (EHT 26).[6]

[6] Although he testified that he was "pretty diligent in preparing cross examinations" (4PC-R. 189), Mr. Cofer did not ask Gillette any questions on cross-examination.

Mr. Cofer also identified a handwritten note, introduced as Defense Exhibit 4, containing, at the top, his own handwriting (4PC-R. 189-90). The lower part of the note contains the handwriting of his co-counsel, Lewis Buzzell (4PC-R. 190). The portion of the letter written by Mr. Cofer states: "Lewis, FYI, we are supposed to see the evidence on Mungin in de la Rionda's office today at 2:00 PM. Be nice to have you there, Charlie C." (4PC-R. 191).[7]

The casings that were found in the Dodge Monaco were introduced at trial by the State as substantive evidence (4PC-R. 196-97; State Trial Exhibits 21, 22).

On cross-examination, the State—despite its earlier and successful hearsay objection to any questions about the substance of the note written by Mr. Buzzell—questioned Mr. Cofer about that part of the note. Mr. Cofer was asked if he would be speculating about what Mr. Buzzell put there or not; Mr. Cofer responded "Well, I can see what he said, what he noted, and normally he would note things of significance" (4PC-R. 201). Mr. Cofer also rejected the State's attempt to press him about whether he would have personally viewed the State's evidence before trial; according to Mr. Cofer "there were cases where I may or may not have seen every piece of evidence before trial" (4PC-R. 202). But as to Mr. Mungin's case, Mr. Cofer

[7] The part of the note in Mr. Buzzell's handwriting states "Met with Bernie and went through evidence or EV, *casings from car missing*. Still need to see, viewed video from Tally (4PC-R. 191) (emphasis added). The State objected to this portion of the note on relevance grounds, but the trial court overruled the objection (4PC-R. 191-93). The State next objected to this portion of the note on hearsay grounds, an objection that the trial court sustained (4PC-R. 194-95). The trial court ordered Mr. Mungin's counsel to redact the note that had been introduced into evidence but allowed a non-redacted version to be proffered for the appellate record (4PC-R. 195-96).

had no independent recollection but "I assume that I did because there was a note by me to Lewis that we were scheduled to go up and do that" (*Id.*).

The State's cross-examination further emphasized the importance of the shell casings from the Dodge Monaco to its prosecution of Mr. Mungin:

> Q . . . Regarding the evidence or the proof in this case, would you acknowledge that the state had evidence that showed the defendant was involved in actually shooting somebody in Tallahassee and also in Jefferson County?
>
> A Yes.
>
> Q Okay. And that evidence in terms of the casings or bullets or whatever that was recovered that were matched up to the gun that was found in the defendant's home and you stated correctly between two towels in Georgia? Do you recall that?
>
> A I don't know if it was the defendant's home but I know that firearm was tied in some fashion to both the Monticello and the Tallahassee shootings.
>
> Q And in fact it also was tied into the murder here in Jacksonville, too, correct, in terms –
>
> A That is my understanding.
>
> Q All right. ***And then there was evidence that was recovered from the vehicle, the Dodge that was recovered in Georgia that showed, also, casings recovered from that, also, matching the gun. Do you recall that?***
>
> A I don't recall whether they matched the gun or not.

(4PC-R. 203-04) (emphasis added).[8]

Mr. Cofer was also questioned about the pretrial deposition taken of Tony Gillette, specifically about a question from Mr. de la Rionda to Gillette during that

[8] The casings from the Dodge Monaco ***did*** match the gun and were introduced into evidence by the State at Mr. Mungin's trial.

deposition wherein Mr. de la Rionda referenced "a ***report*** regarding the car that was recovered" (4PC-R. 205) (emphasis added). Mr. Cofer agreed that the referenced "report" contained entries for the date (9/19) and the time (0027, or 12:27 AM) (4PC-R. 206). Mr. de la Rionda then asked Mr. Cofer about the "report," making an (unsupported) factual statement that the "report" he referenced in the deposition was "the actual document, that is defense exhibit – the inventory" that was introduced as Defense Exhibit 3 (*Id*). However, Mr. Cofer had no recollection "of whether or not I had that document" (4PC-R. 207). Mr. Cofer also acknowledged that, in his deposition, Gillette testified that "he saw ***one casing*** inside that Dodge car from outside the car but did not go into the car to search the car" (4PC-R. 213) (emphasis added).

Malcom Anthony Gillette. Mr. Gillette joined the Camden County, Georgia, Sheriff's Department in 1988 and was employed there as a deputy sheriff until 1993 (4PC-R. 222). He had a "limited" role in the case, principally regarding Mr. Mungin's apprehension and execution of a search warrant in September 1990 (4PC-R. 225-26). A superior officer, Rob Mastriani, asked Gillette to search for a car because it was believed that Mr. Mungin came to Georgia in a vehicle (4PC-R. 226).

Gillette located a 1978 Dodge Monaco in an area near the house where Mr. Mungin was arrested (*Id*). Part of his normal routine in such circumstances was to fill out a property and inventory sheet, which he did in this case; Defense Exhibit 3, the property and inventory sheet, is a document he filled out "[w]ithout a doubt" (4PC-

R. 227). He put his name on the document and the handwriting was his (*Id*).[9] Based on what the inventory sheet says, Gillette wrote there was "nothing visible in the car" after conducted a standard search of the vehicle (*Id.*). He also noted that he did not unseal the car and that he did not open or search the trunk (4PC-R. 228).

Gillette also recalled being deposed in Mr. Mungin's case (4PC-R. 229). He identified an affidavit he wrote, typed, and signed on September 24, 2016; the affidavit was introduced into evidence as Defense Exhibit 5 (4PC-R. 229). The affidavit came about as the result of a visit by investigator Rosalie Bolin, who asked him questions about his involvement in the case and, after which he agreed to write out and then sign the affidavit (4PC-R. 231). Gillette acknowledged that, in his pretrial deposition and at Mr. Mungin's trial, he testified that he looked through the window of the car and observed a casing or a bullet (4PC-R. 233). He did not recall anyone ever showing him the inventory sheet (Defense Exhibit 3) at any time prior to his deposition or his trial testimony (4PC-R. 233). The testimony he gave in his deposition about having observed a casing or a bullet in the Dodge Monaco is not consistent with the entry he wrote in the inventory report (4PC-R. 235). Nor is his trial testimony consistent with the entry he wrote in the inventory report (4PC-R. 235-36). Gillette had no explanation for the inconsistencies (4PC-R. 236). If he had looked inside the car and observed something such as a bullet or a casing, Gillette explained that he would have alerted his superior officers about his discovery and

[9] Once he filled out the inventory sheet, Gillette explained he would give a copy to the towing company and put the other copy in the police file (4PC-R. 237).

would have shown his superior officers what he had located to make sure they were aware of it; in other words, "I would not have dismissed it" (4PC-R. 237). Other than the visible search of the car, Gillette did not conduct any further inventory but simply escorted the vehicle to the impound lot (4PC-R. 239). He did not note the presence of a root beer can or a Budweiser beer can in the car (4PC-R. 239).

On cross-examination, Gillette emphasized that, as a result of questioning by defense investigator Bolin, he himself wrote the contents of, typed, and signed his affidavit (4PC-R. 243). He wrote and typed the affidavit the same day he signed it – September 24, 2016 (*Id*). He had had previous contacts with Ms. Bolin, who acknowledged always that she was working on Mr. Mungin's case and was "just trying to get to the truth" (4PC-R. 245). Gillette could not say exactly when he was asked questions about the inventory receipt he filled out in 1990 except that he wrote, typed, and signed an affidavit after meeting with Ms. Bolin (4PC-R. 246).[10] Ms. Bolin was not present when he wrote, typed, and signed the affidavit (*Id.*). He speculated that it may have been some months after talking with Ms. Bolin that he decided to write out an affidavit but emphasized that the content and timing of the affidavit were his decisions alone: "And I said I will fill it out. I will write it. I didn't want anyone to be a part of it. All I wanted to do was to make sure that this affidavit had what I knew to be true" (4PC-R. 247). Gillette even refused to accept the offer that

[10] Gillette later acknowledged that he himself obtained the inventory receipt from the Camden County Sherriff's Department after a visit from Ms. Bolin but prior to writing and signing the affidavit (4PC-R. 271). *See also* 4PC-R. 272 ("Ms. Bolin has never sent me anything like that").

someone from Mr. Mungin's defense team would send him a draft affidavit to review because "I wanted to make sure that there was no influence to anything that was not of my own accord" (4PC-R. 254).

Gillette was also questioned about a "report" about his work in this case (4PC-R. 257). Gillette, who did not immediately recall the "report," testified-after his recollection was refreshed—that it was a document he also wrote (*Id.*). Gillette, however, differentiated between the two documents; one was an incident report and one was an inventory receipt (4PC-R. 259). Both documents refer to the fact that he found the car and transported it to the Sheriff's Office (*Id.*). His trial testimony in Mr. Mungin's case was the truth "[a]s I knew it at the time" (4PC-R. 260). When he was asked by Mr. de la Rionda during his deposition about a "report" he had done, Gillette explained that he did not believe he was referring to the "inventory sheet" (4PC-R. 264, 266).[11] It was the inventory sheet, and not the incident report, that made reference to the fact that there was "nothing visible" in the Dodge Monaco, a fact which Gillette, to this day, remembers "very clearly. I do not recall seeing bullets in the car. I wrote on here [the inventory receipt] there was nothing visible. I stated in here [deposition and trial testimony] that I saw bullets. I have absolutely, unequivocally no understanding of why these two things are not consistent. I wish I had an answer for you but I don't" (4PC-R. 268). He also included in his affidavit the

[11] The State was clearly attempting to inject confusion into this issue. As Gillette explained, the "report" and the "inventory receipt" are different documents (4PC-R. 266-67).

statement that "evidence could have been tainted without my knowledge" because "that was my belief" (4PC-R. 293).

On redirect examination, Gillette reinforced the fact that everything about the affidavit—its content and the timing of its execution—were his decisions and his alone:

> Q Did you write the affidavit?
>
> A Yes, sir.
>
> Q Did you type the affidavit?
>
> A Yes, sir.
>
> Q Did you choose the language that was used in the affidavit?
>
> A Yes, sir.
>
> Q Anybody force you to write the affidavit?
>
> A No, sir.
>
> Q Anybody force you or coerce you to use certain words in the affidavit?
>
> A No, sir.
>
> Q Where you telling the truth to the best of your knowledge when you wrote and executed this affidavit?
>
> A Yes, sir.
>
> Q The timing of when this affidavit was executed was in your hands, correct? You wrote it, correct?
>
> A Correct.
>
> Q I think you also indicated that you had or may have contacted the Sheriff's Office to get some information to use in the affidavit, is that correct?
>
> A That's correct. That's the only place I know I could have retrieved that information.
>
> Q Okay. That was something you would have done on your own, correct?

A Yes, sir.

* * *

Q Was there anything in the conversations you had with Ms. Bolin or anybody in the sheriff's office that you may have spoken with to influence you one way or the other about what you put in the affidavit or when you wrote it?

A No, sir.

(4PC-R. 285-86).

Gillette also cleared up the confusion about the "inventory receipt" and the "report" referenced by the State during its cross-examination. The "report" does reference some of the same information contained in the "inventory receipt" such as the date, time, type of car, etc., but there is nothing in the report's narrative section that in any way mentions casings or bullets (4PC-R. 289). As Gillette explained, there is a difference between an incident "report" and an "inventory receipt," the main difference being a "report" is called a "report" (4PC-R. 290). The "report" referenced in his deposition (which mentioned nothing about bullets or casings) could well have been the "report" he completed, not the inventory receipt (*Id.*).

Dale Gilbreath. Gilbreath had been employed at the Jacksonville Sheriff's Office for 33 years before beginning his present employment as an investigator with the State Attorney's Office (4PC-R. 304). One of the cases he worked on was Mr. Mungin's case (4PC-R. 305). Gilbreath was questioned about a Towing and Notice of Impoundment document he filled out and signed in reference to the Dodge Monaco (4PC-R. 308; Defense Exhibit 9). The report had a number of categories of items, such as "radio," which Gilbreath checked off because the car had a radio (4PC-R. 309). Aside from the radio, he observed a number of items not in the car after it had been

towed to the Sheriff's Department impound lot, such as tape deck and tapes, CB radio, keys in lock (*Id.*).

Gilbreath went to Kingsland, Georgia, on September 19, 1990, arriving at the police station around 9 AM (4PC-R. 312). He had previously been advised that Mr. Mungin had been taken into custody overnight (4PC-R. 313). One of the tasks he undertook after arriving at the sheriff's office was to call for a tow truck to have the Monaco taken back to Jacksonville (4PC-R. 314). In his deposition, Gilbreath testified that after the car was brought to the impound lot at the Camden County Sheriff's facility, he looked through the windows of the Monaco and there was a single shell casing on the back floorboard (*Id.*). He accompanied the Monaco as it was towed from Georgia back to Jacksonville (4PC-R. 316).

On September 20, Gilbreath took a shell casing found at the crime scene where Ms. Woods was shot to the FDLE offices in Tallahassee (4PC-R. 318). He did not take the casings found in the Dodge Monaco (*Id.*). Four latent lifts had also been taken from the Monaco and later submitted to FDLE for comparison (4PC-R. 321). A box of .25 caliber rounds had impounded from the search of the house in Georgia, along with the Raven handgun (*Id.*). Gilbreath indicated in his report that he had looked through the window of the Monaco and noted on the back floorboard an aluminum .25 caliber shell casing, but he could not recall if he could tell exactly what caliber the casing was or whether it was a statement reflective of the fact that it was already known that a .25 caliber bullet was used in the Florida shooting (4PC-R. 321-22). All

he could say at this time was that it "looked like a .25 caliber aluminum shell casing" (4PC-R. 322).

On cross-examination, Gilbreath explained that FDLE analysis Steve Leary had prepared a report on October 22, 1990, documenting the discovery of two shell casings from the Monaco (4PC-R. 327). The evidence was later analyzed by Dave Williams from FDLE (4PC-R. 328). Gilbreath also summarized the following events: on September 14, 1990, a shooting took place in Jefferson County, Florida, where a .25 caliber shell casing was recovered at that crime scene; fingerprints established that Mr. Mungin was the shooter (4PC-R. 329). That same day, another shooting took place in Tallahassee, where a .25 caliber shell casing was also recovered from the crime scene; Mr. Mungin was also responsible for that crime (*Id*). There was a .25 caliber shell casing and bullet removed from Ms. Woods as a result of the incident on September 16, 1990, resulting in her death (4PC-R. 330). At Mr. Mungin's trial, there was testimony from Mr. Williams that there was a forensic match between the shell casings from all three crime scenes (Monticello, Tallahassee, and Jacksonville), the weapon seized in Georgia, and the two shell casings found in the Dodge Monaco (4PC-R. 331). In the report authored by FDLE analyst Leary, there is also reference to a root beer can and a Budweiser can found under the front passenger seat of the Dodge Monaco that were processed for latent prints (4PC-R. 332).

Bernardo de la Rionda. Mr. de la Rionda was the lead prosecutor in Mr. Mungin's case (4PC-R. 344-45). He is aware of the *Brady v. Maryland* case and the fact that the State is obliged to disclose to the defense in a criminal case any

exculpatory information, including impeachment evidence that might help in cross-examination (4PC-R. 346). He is also aware of the State's ongoing obligation to correct false or misleading testimony (*Id.*).

Mr. de la Rionda had no specific recollection of the existence of the inventory receipt document that had been filled out by Gillette, although he did provide discovery to the defense (4PC-R. 347). There was no paper trial regarding documentation provided in discovery because, at the time, there was no formalized process as there is now (4PC-R. 348-49). He did acknowledge that the inventory receipt in question should have been provided in discovery and "[t]o my – best of my recollection" it was (4PC-R. 350).

As Mr. de la Rionda explained, his "recollection," was based on two factors. First, it was his "normal procedure" to provide discovery and he remembered going to Georgia at some point "and got documents from Georgia" (*Id.*). Second, when reading Gillette's deposition in preparing for the evidentiary hearing, it references a "report" by Gillette (4PC-R. 351-52). Mr. de la Rionda did acknowledge that the "report" and the "inventory receipt" bore some of the same general information about the Dodge Monaco and the dates involved, but there is nothing in the "report" that contains any reference to Gillette's observations as he detailed in the "inventory receipt" (4PC-R. 190).

On cross-examination, Mr. de la Rionda was questioned about whether, prior to trial, he was aware of the inconsistencies between Gillette's inventory receipt ("nothing visible") versus his trial and deposition testimony where he indicated he

did see the casings (4PC-R. 361). Mr. de la Rionda, however, refused to even acknowledge that there was any inconsistency (4PC-R. 362).

3. The Florida Supreme Court's Decision

The focus of the briefing in the Florida Supreme Court was on the merits of the issues raised by Mr. Mungin because the lower court rejected the procedural bar urged by the State. After recounting the procedural history of Mr. Mungin's case, the lower court first addressed its understanding of the legal bases on which Mr. Mungin's Ruled 3.851 was based:

> 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.

(4PC-R. 142).

Most of the lower court's order is devoted to addressing (and later rejecting) the *Brady* claim. In rejecting the claim, the court initially framed the legal questions by observing that "[t]he mere possibility that undisclosed items of information may have been helpful to the defense in its own investigation does not establish the materiality of the information" (4PC-R. 144) (citation omitted). The court also expressed its (mis) understanding that a *Brady* claim has a diligence requirement (4PC-R. 144) (citations omitted).[12] The lower court ultimately rejected Mr. Mungin's

[12] There is, of course, no "diligence" requirement on part of the defense to ferret out exculpatory evidence in the possession of the prosecution. or law enforcement is

motion because he did not "prove" that the police "planted" evidence—something which he never alleged (4PC-R. 144-45). Because the lower court did not attempt to undertake a proper *Brady* materiality analysis because it (wrongly) understood the standard to require Mr. Mungin to "prove" that evidence was "planted," it avoided any discussion of the myriad of ways that the withheld information undermined confidence in the outcome of Mr. Mungin's trial and penalty phase. At trial, Gillette testified that he saw two pistol cartridges in the back behind the driver's seat of the 1978 Dodge Monaco. However, Mr. Gillette has now recanted that portion of his testimony; **he now swears that he did not see any bullets or casings in the Dodge Monaco. Nor did he see any root beer or Budweiser cans in the vehicle. If he had seen any of these items, he would have noted such in his written incident report or in the inventory receipt. But neither document says anything about him locating these critical items of evidence. Rather, he noted "nothing visible" in the inventory receipt, information never disclosed to the defense at trial. The information provided by Gillette's gives rise to inferences of evidence tampering, compromising the evidence of a crime scene, and the integrity of the investigation process as a whole.** Mr.

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flatly contrary to the actual state of the law. "A rule [] declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process. 'Ordinarily, we presume that public officials have properly discharged their official duties.'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004). *See also Archer v. State*, 934 So. 2d 1187, 1203 (Fla. 2006) ("[W]e point out that there is no 'due diligence' requirement in the *Brady* test and that the prosecutor is charged with possession of what the State possesses...."). The law "lend[s] no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks*, 540 U.S. at 695.

Mungin's jury should unquestionably have been given the true picture of the realities of the case.

The Florida Supreme Court eschewed any attempt to address the *Brady* violation, choosing instead to impose a procedural bar the lower court never found. Because Deputy Gillette had testified at trial as a prosecution witness and as a character witness on Mr. Mungin's behalf at the penalty phase of his original trial, the Florida Supreme Court concluded that Gillette was a "known witness who was available to the defense since Mungin's 1997 trial." *Mungin v. State*, 320 So.3d 624, 626 (Fla. 2020). Thus, irrespective of what information was withheld from Mr. Mungin by the State at the time of trial, the Florida Supreme Court refused to entertain the merits of Mr. Mungin's claim, forgiving the State for its misconduct and for violating Mr. Mungin's right to due process: "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." *Id.*

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S REFUSAL TO CONSIDER THE MERITS OF A CLAIM THAT THE STATE WITHHELD MATERIAL EXCUPLATORY EVIDENCE IN VIOLATION OF DUE PROCESS BECAUSE IT WAS DISCOVERED "TOO LATE" ITSELF VIOLATES DUE PROCESS AND THE *BRADY* RULE

1. Introduction

The central issue presented at the state court evidentiary hearing regarded the exculpatory information discovered by Mr. Mungin's collateral counsel from Malcom "Tony" Gillette, a prosecution witness at trial who testified to the discovery of physical evidence that the State argued tied Mr. Mungin to the murder of Ms. Woods. The State's case at trial for guilt was thin at best, relying substantially on the testimony of Ronald Kirkland. Kirkland was the linchpin of the State's case against Mr. Mungin. Without a confession or physical evidence linking Mr. Mungin to the crime scene, Kirkland's identification of Mr. Mungin at the scene was unquestionably a critical piece of evidence for the prosecution; he was the only witness to testify that he saw Mr. Mungin leave the scene of the crime with a paper bag (R671).

To the extent that there was any "physical evidence" presented by the State to tie Mr. Mungin to the Jacksonville crime, the State presented two shell casings found in a car (a Dodge Monaco) that was impounded following Mr. Mungin's arrest in Kingsland, Georgia. According to the State, these shell casings located in the Dodge Monaco were later tied to Mr. Mungin.

At trial, Mr. Gillette was a prosecution witness. He testified that he had been a deputy sheriff in Camden County, Georgia, on September 18 and 19, 1990, and he

was involved in Mr. Mungin's arrest on September 18, 1990 (T824). After Mr. Mungin was arrested, Gillette testified that he was on patrol and came across a 1978 white and beige Dodge Monaco at a closed-down gas station just north of Kingsland (T826). When he found the car, Mr. Gillette testified that he called for a wrecker and had a wrecker come and get it: "I didn't unseal the car. I didn't open the car" (T827). The following then ensued:

Q [by ASA de la Rionda] *Did you see anything inside the car*?

A [by Mr. Gillettte] *Yes, sir. I saw some cartridges, some pistol cartridges.*

Q How many did you see?

A *If memory serves me correct I saw two*.

Q Where were they located?

A They were located in the back behind the driver's seat.

(T827-28) (emphasis added). There was no cross-examination conducted by trial counsel Cofer. Immediately following Mr. Gillette's testimony, the State began its presentation of the *Williams*-rule evidence in an attempt to tie Mr. Mungin to the Jacksonville crime scene.

As noted above, Mr. Gillette at trial testified that he saw two pistol cartridges in the back behind the driver's seat of the 1978 Dodge Monaco. However, Mr. Gillette recanted that portion of his testimony in both an affidavit that was the basis of the Rule 3.851 motion and, more importantly, at the evidentiary hearing. Mr. Gillette swore that he did not see any bullets or casings in the Dodge Monaco. Nor did he see any root beer or Budweiser cans in the vehicle. If he had seen any of these items, he

would have noted such in the inventory storage receipt he filled out upon discovering the Monaco. In fact, in the inventory receipt, Gillette noted there was "nothing visible" upon his inspection of the Monaco. This information (including the inventory receipt) was never disclosed to the defense prior to trial. Mr. Gillette's affidavit and subsequent evidentiary hearing testimony gave rise to inferences of evidence tampering, compromising the evidence of a crime scene, and the integrity of the investigation process as a whole. Mr. Mungin's jury should unquestionably have been given the true picture of the realities of the case.

2. Florida's Requirement that Defendant's Must "Seek" Exculpatory Evidence that the State Can Forever "Hide" Warrants Review by this Court

Mr. Mungin acknowledges that the postconviction motion whose allegations are subject to the instant proceeding was filed after his initial round of state collateral litigation. It was also filed after his second and third motions as well. But what was never addressed by the Florida Supreme Court was the simple fact that throughout the litigation of no less than three motions for postconviction relief (including three evidentiary hearings), **the State of Florida sat on its hands and withheld material exculpatory evidence from Mr. Mungin and his collateral counsel**. At the same time, the State of Florida complains that when Mr. Mungin finally discovers the information it had successfully hidden for decades, it is "too late" for him to have his constitutional claims heard. Rather than condemning this behavior, the Florida Supreme Court condoned it by refusing to entertain the actual merits of the *Brady* claim raised by Mr. Mungin, thus placing its stamp of approval on the State hiding evidence for years. If a Florida defendant happens to find that evidence after the first

postconviction litigation has concluded, too bad.

But this is not the law, nor is it consistent with basic notions of fairness, justice, and due process. This Court has long held that the State has a constitutional duty to disclose exculpatory and impeachment evidence to a criminal defendant in advance of trial. *See Brady v. Maryland*, 373 U.S. 83 (1963). As the Florida Supreme Court has explained, "[u]nder *Brady*, the government's suppression of favorable evidence violates a defendant's due process rights under the Fourteenth Amendment." *Rogers v. State*, 783 So. 2d 980 (Fla. 2001) (citing *Brady*, 373 U.S. at 86)). This Court also made clear in *Kyles v. Whitley*, 514 U.S. 419 (1995), that due process requires the prosecutor to fulfill her obligation of knowing what material, favorable, and exculpatory evidence is in the State's possession and disclosing that evidence to defense counsel:

> Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Id. at 439. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf." *Id.* at 437. *See also Strickler v. Greene*, 527 U.S. 263, 281 (1999) (noting "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"). The *Strickler* Court reiterated that a prosecutor has a duty to disclose exculpatory evidence even though there has been no request by the defendant, and that the prosecutor has a duty to learn of any favorable evidence known to individuals acting

on the government's behalf (such as law enforcement). *Id.* at 280-81.

In *Banks v. Dretke*,124 S. Ct. 1256 (2004), the Court, in addressing a *Brady* claim, held that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Thus, in the words of this Court, a rule "declaring `prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 1275. Under *Banks*, the burden is on the State to "set the record straight," not upon the defense, at the time of trial or during the collateral proceedings, to intuit that the State is holding information back from the defense. *See also Strickler v. Greene*, 527 U.S. 263 (1999). In Mr. Mungin's case, despite having numerous opportunities to do so over the course of years and three postconviction evidentiary hearings, the State failed to "set the record straight" at any time in the pretrial, trial, or prior collateral proceedings.

Under the authority of both *Banks* and *Strickler*, the fact that the *Brady* claim raised by Mr. Mungin concerning the information from Deputy Gillette was not presented in his earlier Rule 3.851 motions is not dispositive; indeed it is irrelevant. As this Court explained in both *Banks* and *Strickler*, it is the *prosecution* that has the burden of disclosure of exculpatory evidence, including impeachment evidence, and the defendant does not have the obligation to assume that the State failed to comply with its constitutional obligations or to scavenge for hints along the way that the State acted improperly. Indeed, the *Brady* claim that was found meritorious in *Banks* was presented in the defendant's *third* state postconviction petition, the Court

having concluded that the defendant did not need to establish his failure to present the issue in his prior collateral challenges due to the overarching principle that it is the State that has the duty to disclose.

The Florida Supreme Court has frequently been presented with *Brady* claims where the name of a particular witness had been listed by the State in pre-trial discovery but nevertheless found that a *Brady* violation occurred because information regarding statements made by that witness or about that witness had not been disclosed to the defense. In *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004), the Florida Supreme Court vacated a capital murder conviction and ordered a new trial in a case where the defense not only had the name of a witness (Gail Milligan) but had deposed the witness and cross-examined her on the witness stand at trial. The Florida Supreme Court did not find that because trial counsel had the witness's name, his failure to learn of the undisclosed favorable evidence, to investigate it, and present it, meant that the defendant was barred due to a want of diligence from presenting his *Brady* claim once he learned of the existence of the withheld evidence.[13]

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[13] While the Florida Court did correctly note in Mr. Mungin's that Gillette testified that he had been in contact with Mr. Mungin's defense team and had discussed a potential affidavit with the defense investigator on several occasions, the Court failed to put them in the proper context. The most important part of Gillette's testimony, overlooked by the Florida SupremeCourt, was that **the decision about what to put into the affidavit and when to sign it was entirely Gillette's**; in fact, Gillette explained that investigator Bolin "offered that they could send me something and I said, no, I don't want – I am going to write it in my – my language . . . " (4PC-R. 254). He emphasized that the content and timing of the affidavit was his and his alone: "And I said I will fill it out. I will write it. I didn't want anyone to be a part of it. All I wanted to do was to make sure that this affidavit had what I knew to be true" (4PC-R. 247). It was not until Gillette *signed the affidavit* that Mr. Mungin had a claim to bring to court; Gillette could have been sitting in defense counsel's office

Similarly, in *Cardona v. State*, 826 So. 2d 968 (Fla. 2002), the Florida Supreme Court vacated a capital murder conviction and ordered a new trial in a case where the defendant not only had the name of a witness (Olivia Gonzalez-Mendoza, who was the co-defendant), but had deposed the witness and cross-examined her at trial. As in *Mordenti*, the *Cardona* Court did not find that the defendant could not prevail on her *Brady* claim simply because trial counsel knew of the witness and had deposed and cross-examined her.

Likewise, in *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001), the Florida Supreme Court ordered a new trial in a capital murder conviction. There, the defense, in postconviction, learned that hair found in the victim's hand did not originate from the defendant. In granting a new trial, the Florida Supreme Court wrote:

> The State's additional argument is that defense counsel Harris elicited information at trial from a serologist about the hairs. The information solicited, however, was merely the fact that hairs were gathered at the scene. The State asserts this testimony sufficiently apprised the defense of the existence of this evidence. This argument is flawed in light of *Strickler* and *Kyles*, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory. In failing to do so, the State committed a *Brady* violation when it did not disclose the results of the hair analysis pertaining to the defendant.

Hoffman, 800 So. 2d at 179.

In sum, the Florida Supreme Court's decision in Mr. Mungin's case flies in the face of due process, and is inconsistent with this Court's decisions in *Brady, Banks*,

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every day for 20 years but until Gillette decided to disclose the truth to counsel, turn over the inventory receipt, and sign an affidavit there was no claim to pursue. Rather than address the truthful information provided by Gillette and its effect on the fairness of Mr. Mungin's capital trial, the Florida Supreme Court imposed a time bar because the State does not want the merits addressed.

Kyles, and *Strickler*. Certiorari review is warranted.

CONCLUSION

Petitioner respectfully submits that certiorari to the Florida Supreme Court in the instant case is warranted.

Respectfully submitted,

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November 19, 2021