ATTACHMENT A

320 So.3d 624
Supreme Court of Florida.

Anthony MUNGIN, Appellant,

v.

STATE of Florida, Appellee.

No. SC18-635

February 13, 2020

Synopsis

Background: Defendant filed a successive motion for postconviction relief following affirmance of conviction for first-degree murder and death sentence, 689 So.2d 1026, and affirmance of the prior denials of postconviction motions, 141 So.3d 138 and 259 So.3d 716. The Circuit Court, Duval County, No. 161992C003178AXXXMA, Angela M. Cox, J., denied motion. Defendant appealed.

The Supreme Court held that claims raised in third postconviction motion were discoverable through due diligence more than a year before motion was filed.

Affirmed.

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

Attorneys and Law Firms

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

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

Opinion

PER CURIAM.

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

FACTS AND PROCEDURAL BACKGROUND

In 1993, Mungin was sentenced to death for the first-degree murder of Betty Jean Woods. The facts of the murder were stated in the opinion on direct appeal:

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, ***625** later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.

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

One of the State's witnesses was Malcolm Gillette, a deputy sheriff who played a relatively minor role in the police investigation. Deputy Gillette testified at trial that he stood by while other officers executed a search warrant and arrested Mungin. Gillette testified that he discovered a beige Dodge Monaco in a parking lot near where Mungin was arrested. Gillette ran the license plate and learned that the car was stolen, so he called for a tow truck to transport it to an impound lot. He filled out the relevant paperwork, including an "inventory and vehicle storage receipt." Gillette testified at trial that he saw two spent shell casings in the stolen car, but on the inventory and vehicle storage receipt, Gillette made a notation indicating he saw "nothing visible" in the car.

The jury found Mungin guilty and recommended death, and we affirmed the conviction and sentence. *Id.* Mungin's judgment became final when the United States Supreme Court denied certiorari review in October 1997. *Mungin v. Florida*, 522 U.S. 833, 118 S.Ct. 102, 139 L.Ed.2d 57 (1997).

On September 25, 2017, Mungin filed his third successive postconviction motion.[1] Attached was an affidavit signed by Deputy Gillette dated September 24, 2016. Gillette swore he did not see any shell casings in the Dodge Monaco and that, before the trial, he did not review the paperwork he had filled out. Mungin claimed that Gillette's affidavit gave rise to inferences of evidence tampering. Mungin alleged that the State committed a *Brady*[2] violation by failing to divulge that Gillette saw no shell casings and committed a *Giglio*[3] violation by allowing Gillette to give false testimony at trial. Alternatively, Mungin alleged that defense counsel was ineffective by failing to speak to or cross-examine Deputy Gillette, and that the information in Gillette's affidavit was newly discovered evidence that was likely to produce an acquittal at retrial.

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

2 *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

3 *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

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

ANALYSIS

Generally, postconviction claims in capital cases are untimely if filed more than a year after the judgment and sentence became final. Fla. R. Crim. P. 3.851(d). For an otherwise untimely claim to be considered timely as newly discovered ***626** evidence, it must be filed within a year of the date the claim became discoverable through due diligence. *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013). It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim. *Rivera v. State*, 187 So. 3d 822, 832 (Fla. 2015).

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

In fact, Deputy Gillette was not merely known to the defense, he was Mungin's close friend and former wrestling partner. He visited Mungin in prison and wrote him letters. Gillette testified at the evidentiary hearing that he had been in contact with the defense team "over the last twenty years on and off" and that he had discussed his affidavit with an investigator "probably a dozen times" over several months before eventually signing it. The third successive postconviction motion offers no explanation as to why Gillette's evidence could not have been ascertained long ago by the exercise of due diligence. *See* Fla. R. Crim. P. 3.851(d)(2)(A).

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

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

It is so ordered.

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

All Citations

320 So.3d 624, 45 Fla. L. Weekly S65

End of Document

ATTACHMENT B

Supreme Court of Florida

TUESDAY, JUNE 22, 2021

CASE NO.: SC18-635
Lower Tribunal No(s).:
161992CF003178AXXXMA

ANTHONY MUNGIN vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and Reconsideration filed with this Court on April 5, 2021, is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.
COURIEL and GROSSHANS, JJ., did not participate.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

TODD G. SCHER
JASON W. RODRIGUEZ
BERNARDO ENRIQUE DE LA RIONDA
HON. ANGELA M. COX, JUDGE
HON. JODY PHILLIPS, CLERK
HON. MARK H. MAHON, CHIEF JUDGE

ATTACHMENT C

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

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

DIVISION: CR-C

STATE OF FLORIDA

v.

ANTHONY MUNGIN,
Defendant.
_____/

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

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

I. FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. POSTCONVICTION PROCEDURAL HISTORY AND PRIOR CLAIMS

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

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

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

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

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

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

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

III. PROCEDURAL HISTORY OF INSTANT MOTION

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

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

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

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

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

IV. DISCUSSION

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

Claim One (a) - Brady

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Claim One (b) - Ineffective Assistance of Counsel

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

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

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

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

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

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

Claim One (c) – Giglio

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

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

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

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

Claim One (d) – Newly Discovered Evidence

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

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

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

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

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

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

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

Cumulative Error

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

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

In view of the above, it is:

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

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

ANGELA M. COX
Circuit Court Judge

Copies to:

Lisa A. Hopkins, Esq.
Assistant Attorney General
The Capitol, PL-01
400 S. Monroe Street
Tallahassee, FL 32399
Lisa.Hopkins@myfloridalegal.com

Bernardo de la Rionda, Esq.
Assistant State Attorney
311 W. Monroe St.
Jacksonville, FL 32202
SAO4DuvalCriminal@coj.net

Todd G. Scher, Esq.
Attorney for Defendant
1 E. Broward Blvd., Ste. 444
Fort Lauderdale, FL 33301
TScher@msn.com

Anthony Mungin
D.O.C. # 288322
Union Correctional Institute
7819 N.W. 228th Street
Raiford, Florida 32026

CERTIFICATE OF SERVICE

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

Deputy Clerk

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

CLERK CIRCUIT COURT DUVAL COUNTY, FLORIDA