No. 21-6472

In The

Supreme Court of the United States

ANTHONY MUNGIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

APPENDIX TO BRIEF IN OPPOSITION TO CERTIORARI

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-635

ANTHONY MUNGIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial (following an evidentiary hearing) of Mr. Mungin's successive motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

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

"T" – transcript of trial testimony;

"1PC-R" – record on appeal following denial of Mr. Mungin's first Rule 3.851 motion;

"2PC-R" – record on appeal following denial of Mr. Mungin's second Rule 3.851 motion;

"3PC-R" – record on appeal following denial of Mr. Mungin's third Rule 3.851 motion;

"4PC-R " – page number of record in instant appeal to this Court following the denial of Mr. Mungin's fourth Rule 3.851 motion.

All other references will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Mungin requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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INTRODUCTION

When the Court reviews Mr. Mungin's case and the significant new information that has come to light since trial that undermines confidence in the outcome of the guilt and penalty phases, it must be first remembered that, on direct appeal, the Court determined, *as a matter of law,* that there was insufficient evidence of premeditation presented by the State and that the trial court had erred in not granting a judgment of acquittal. *Mungin v. State,* 689 So. 2d 1026, 1029 (Fla. 1995) [*Mungin I*]. However, the Court, over a dissenting opinion, upheld Mr. Mungin's conviction for first degree murder because it determined that there was sufficient evidence to sustain a verdict for *felony murder* given (1) evidence that Mr. Mungin entered the store carrying a gun, (2) that $59.05 was missing from the store, (3) that money from the cash box was gone, (4) that someone tried to open a cash register without knowing how, and (5) Mr. Mungin left the store carrying a paper bag. All of these factors rest on the assumption that it was actually Mr. Mungin who entered the store, took the money, and left the store carrying a paper bag. That assumption has been substantially undermined since the 1995 direct appeal opinion, and the current litigation pushes this case into the realm of reasonable doubt once and for all. At a minimum, confidence in the continuing reliability of the jury's 7-5 recommendation for death is undermined given the cumulative nature of the evidence uncovered in his collateral litigation.

As presented in prior proceedings, the State's case for guilt was thin at best, relying substantially on the putative eyewitness testimony of Ronald Kirkland, who was the lynchpin 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). *See Mungin I* at 1028 ("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, identified the man as Mungin").

In prior proceedings, Mr. Mungin presented evidence substantially undermining Kirkland's credibility—evidence that this Court must assess cumulatively along with the evidence presented below when determining whether the outcome of Mr. Mungin's guilt or penalty phase was constitutionally undermined. For example, this Court has noted that the testimony of George Brown, presented at the prior evidentiary hearing, "does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting . . . " *Mungin v. State*, 141 So. 3d 138, 146 (Fla. 2013) [*Mungin III*]. The Court has also noted that the jury in Mr. Mungin's case was not presented with other evidence undermining Kirkland's credibility, such as the fact that he had been on probation at the time of

trial. *Mungin v. State*, 932 So. 2d 986, 998-99 (Fla. 2006) [*Mungin II*]. The jury also did not know that Kirkland had told Detective Conn that, at the time he made his identification of Mr. Mungin in the photo display, he could not swear in court that the man in the photo was the same man he saw exiting the store on the day of the murder. *Mungin II* at 999.

In short, there is now substantial evidence now in this record that further undermines the credibility of Kirkland's already dubious eyewitness identification. Yet the jury was not made aware of this additional evidence wholly weakening Kirkland's confident trial testimony.

Mr. Mungin's jury also never knew that he had an alibi for the time of Ms. Wood's murder. The jury never knew this because trial counsel failed to investigate the alibi. As this Court has determined, trial counsel Charles Cofer "was confused about the details of Mungin's alibi defense." *Mungin II* at 1000.

The other portion of the State's case involved forensic evidence, which is the subject of the instant proceedings below and in this appeal. For reasons known only to the prosecution team in this case, the State introduced two casings discovered in a Dodge Monaco that it claimed was driven by Mr. Mungin to the Jacksonville crime scene and, later, back to Georgia (T877; State Trial Exhibits 21, 22). Not only did the State choose to introduce these two casings over defense objection (T898-99), it tied them to the Dodge Monaco that the State averred was the vehicle Mr. Mungin

used to leave the crime and the weapon found when Mr. Mungin was arrested. In the State's view, the casings from the Dodge Monaco were crucial to its case as it argued to the jury during its closing argument (T985) ("And we know that car was involved because there is two shell casings recovered from that car. So, here is the car. That happened to match the shell casing that is recovered from the gun. I'm sorry. From the scene of the Jacksonville homicide, and that matched having been fired from that gun"). *See also* T986 ("You have got that in Georgia, you have the other shootings, you have Jacksonville here, and you have the got the car. All those pieces of evidence are linked in a trail of evidence that show this defendant was the person who did it"); T1000-01 ("You also have the car being recovered, that is, the Dodge Monaco, being recovered 75 to a hundred yards from where the defendant is arrested, and you happen to have two shell casings which are right here, which, again, are matched to this gun. That's the car that was used to get back to Georgia").

Two of the most central parts of the State's case against Mr. Mungin –the putative Kirkland identification and the casings found in the Dodge Monaco – have been substantially called into question during the collateral proceedings in this case. The evidence undermining Kirkland's identification has been addressed by the Court in prior opinions; the evidence about the casings found in the Dodge Monaco is the subject of this appeal. Both must be considered cumulatively. It is now time for a new jury to hear this case with knowledge of all of the true facts. Alternatively, in

light of the evidence presented below, particularly when considered cumulatively to all of the other information that the jury never received, Mr. Mungin's death sentence, imposed by a court over a 7-5 death recommendation by the jury, should be vacated.

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. This 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) [hereinafter *Mungin I*].

On September 17, 1998, the CCRC-North office filed a Rule 3.850 motion on behalf of Mr. Mungin (Supp. 1PCR3-44). That motion was subsequently amended

with the filing of a consolidated amended Rule 3.850 motion, containing seventeen (17) numbered claims for relief (1PCR 76). The State filed a response to this motion (1PCR 79-105).

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).

This 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) [hereinafter *Mungin II*].

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 (2PCR 1-75). The motion, Mr. Mungin's second Rule 3.851 motion, raised two claims and 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 (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). In Claim I, Mr. Mungin alleged that he was denied an adequate adversarial testing at the guilt and penalty phases of his capital trial in light of newly-discovered evidence of constitutional violations as evidenced in the Brown

affidavit (2PCR 6 *et seq*.). In Claim II, Mr. Mungin alleged constitutional violations with regard to lethal injection (2PCR 101-102).

The court summarily denied Mr. Mungin's motion with a State-prepared proposed order (2PCR 130-140). Mr. Mungin timely appealed to this Court, which subsequently reversed and remanded for an evidentiary hearing. *Mungin v. State*, 79 So. 3d 726 (Fla. 2011) [hereinafter *Mungin III*].

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 prior defense 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). This Court affirmed the denial of relief. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013) [hereinafter *Mungin IV*].

Subsequently, Mr. Mungin returned to federal court, where he amended his habeas corpus petition with the new claims arising out of state court. That petition

remains in abatement pending the outcome of the final state court litigation ongoing in Mr. Mungin's case in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), and the ongoing litigation involving the instant appeal.

On or about January 12, 2017, Mr. Mungin filed a Rule 3.851 motion in light of *Hurst*, and the denial by the court of that motion is presently pending in this Court. *See Mungin v. State*, Case No. SC17-815.

On September 25, 2017, Mr. Mungin filed another Rule 3.851 motion 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 alleged that the information contained in Mr. Gillette's affidavit constituted newly discovered evidence. The motion further alleged that these constitutional violations, singularly and cumulatively, deprived Mr. Mungin of a fair trial and sentencing hearing.

Following the filing of the State's written response (4PC-R. 32-44), the lower

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

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

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).[3] That hearing was conducted on January 12, 2018 (4PC-R. 164-369).[4] Following the submission of post-hearing memoranda by the parties (4PC-R. 49-76; 77-136), the lower court entered an order denying relief (4PC-R. 137-55).

This appeal and Initial Brief follow.

[3] After Mr. Mungin filed his Rule 3.851 motion and the State filed its response, counsel received a communication from Judge Angela Cox's chambers to schedule the case management conference. This was the first time that Mr. Mungin's counsel was aware that his case had been assigned to Judge Cox. The prior Rule 3.851 motion filed by Mr. Mungin relating to the *Hurst* issues was presided over and denied by Judge Linda McCallum, who, unbeknownst to Mr. Mungin at the time, had been a homicide prosecutor in the Duval County State Attorney's Office at the time that office was prosecuting Mr. Mungin at trial. The propriety of Judge McCallum's appointment without notice to Mr. Mungin is at issue in the pending appeal in No. SC17-815. Mr. Mungin does find it curious that there had apparently been a change in the judicial assignment to Mr. Mungin's case between the time of the denial of the *Hurst* 3.851 motion by Judge McCallum and the filing of the subsequent 3.851 motion that was apparently assigned to Judge Cox for her disposition.

[4] A summary of the testimony from the evidentiary hearing will be contained in the argument section of this Initial Brief.

STATEMENT OF THE FACTS FROM TRIAL[5]

1. The Guilt Phase

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

[5] In this brief, Mr. Mungin will not set forth the extensive testimony adduced at the prior two evidentiary hearings; that testimony is set forth in the prior briefs filed in the appeals in those cases. Mr. Mungin incorporates that testimony and evidence by specific reference in the instant proceeding. He does, however, provide a factual statement from the trial testimony, as it is relevant to the proceedings under review in this appeal.

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 then called a number of witnesses who were referred to by both parties as *Williams*-rule witnesses.[6] 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

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

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 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 license 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).[7]

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 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. Penalty Phase

During the penalty phase, the State called one witness, Cecil Towle of the Tallahassee Police Department (T1125). Towle testified to his interview of Meihua Wang Tsai, the victim of the Tallahassee shooting (T1126-27). At the time of trial, Ms. Tsai was in China (T1128). Towle provided Ms. Tsai's account of the Tallahassee shooting to the jury (T1127-28). The state also offered records of Mr.

[7] 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.

Mungin's judgment and sentence for the Monticello and Tallahassee crimes (T1135

Mr. Mungin called a number of witnesses at the penalty phase, starting with his grandmother, Hagar Mungin, of White Oak, Georgia (T1137-38). Mrs. Mungin and her husband had raised Anthony since he was five (5) years old, apparently because Anthony's mother, who lived in New Jersey, had too many children and had to work (T1139). Mrs. Mungin had raised fifteen (15) children of her own before she took in Anthony (T1140). Anthony's mother would visit once or twice a year (T1143-44).

Anthony attended elementary school in Woodbine, Georgia, and did fine there (T1140). He was a very manageable child, always quiet; he never gave his grandmother any trouble (T1141). He was honest and would help his grandmother and do as she told him (T1143). He also got along well with his grandfather (T1143). The Mungin home was in a remote area, with no children nearby (T1141-42). Mrs. Mungin's youngest child, still at home when she took in Anthony, was about sixteen (16) or seventeen (17) (T1145). He did play with Anthony (T1145). Mrs. Mungin did not allow Anthony to bring other children home to play because she had raised enough children and was raising Anthony; she did not want to raise any more (T1141). When Anthony was eighteen (18), he left his grandmother's house and moved in with an uncle in Jacksonville (T1142-43).

Anthony's younger cousin, Angie Jacobs, testified that when she visited Mrs.

Mungin's home, she saw that Anthony was respectful of his grandparents, and seemed close to them (T1147). Anthony's older cousin, Clifton Butler, confirmed that Anthony was obedient to his grandparents (T1150). The grandfather walked with a stick, and Anthony would fetch things for him to save him from having to walk (T1150). Butler said that while Anthony lived with his grandparents, he attended church regularly (T1150-51). Butler had not had much contact with Anthony in recent years (T1151-52).

Tracy Black testified that Anthony is the father of her daughter (T1153-54). When she got pregnant in 1975, Anthony asked her to marry him, but she decided not to accept, due to the influence of her family (T1154). Their daughter, Jennifer, was born on April 28, 1986 (T1154). Anthony remained in contact with Tracy and Jennifer (T1154). He provided support for the first year after Jennifer was born (T1155).

Camden County, Georgia, Deputy Sheriff Malcolm Gillette, who had testified for the State at the guilt phase, testified for the defense at the penalty phase (T823-28, 1156-57). He and Anthony were close friends in high school, and were on the wrestling team together (T1157). Both were small boys (T1157). The Anthony who Gillette knew was not violent at all; he was always quiet and got along with everybody (T1157-58). Gillette had no contact with Anthony after 1984 (T1159).

Freddie Green, a Kingsland, Georgia, police officer, testified that he had

known Anthony since elementary school (T1160). In high school, Green was on the football team, and Anthony was the team manager (T1161). Being the team manager involved washing towels, jerseys, pants, cleaning up the locker room, bringing water to the field, and assisted as otherwise needed (T1161). Anthony did a good job as the team manager (T1162). As to how Anthony got along with teachers and students at high school, Green said he had never heard any complaints (T1161-62). Green had not had contact with Anthony since high school (T1162-63).

Ralph Pierce, the administrator of the Camden County School System, testified that when Anthony was a student at the Camden County High School, Piece was the athletic director and head football coach (T1164). Anthony had tried out for the football team, but he was very small, a hundred (100) pounds (T1164). At the suggestion of Coach Brewer, an assistant coach, Anthony was made team manager (T1164). As team manager, Anthony was responsible for making sure the equipment was in good working order and the players had what they needed (T1165). There was a lot of work to be done, and Anthony was dedicated to his job (T1165). Anthony was trustworthy, he always had the coach's keys and access to everything (T1165). Pierce felt that Anthony enjoyed the camaraderie of being with the team and coaches (T1165). He would also sometimes rake leaves at Pierce's house to earn a few dollars (T1166). Pierce said that Anthony was not aggressive or violent toward other students (T1166).

Gene Brewer, the assistant superintendent for the Harris County, Georgia, schools, testified that he had known Anthony at Camden County High School (T1167-68). Brewer said that Anthony had come out for football in the spring of his eighth grade year, but had weighed only 85 or 88 pounds and the equipment was too heavy for him (T1168). Brewer recruited Anthony for team manager, and also for wresting in the 100-pound class (T1168). Anthony was a varsity wrestler for three (3) years (T1169). He was very small, even for his weight class, but wanted very much to be a member of the team, so he had to work very hard (T1169-70). This involved eating properly, working out with weights, running, attending practices, doing his very best, and being prepared to accept defeat (T1169-70). Team members were also expected to act appropriately in class and in the community (T1170).

Brewer testified that Camden County High School is at the south end of the county and Anthony's home was at the north end, so Anthony often spent the night or the weekend at Brewer's home after wrestling competitions and football games (T1170-71). Anthony ended up spending quite a bit of time with Brewer; he became like part of the family, and like a son to Brewer (T1171). Brewer's own son is a couple of years younger than Anthony, but because Anthony was small and Brewer's son was tall, they matched up, interacted well, and were like brothers (T1171). Brewer's son remembered Anthony as always laughing during that time (T1171). Brewer remembered Anthony as having been an average student, who made mostly

Cs and some Ds; Anthony had to work hard, particularly in English (T1171). His grades kept him from wrestling during his senior year (T1172).

Brewer testified that Anthony was not a violent child (T1172). He had to coach aggressiveness into Anthony for wrestling (T1172). He had to remind Anthony that he was going to be challenged physically and if he did not do something, he could get hurt (T1172).

After Anthony's senior year, he worked for Brewer some, but after that, they had no contact (T1172). Brewer kept up with Anthony's activities through one of his wrestling partners (T1173).

A photograph of the wrestling team from the Camden County High School yearbook was admitted into evidence (T1177-78). In the picture, Anthony appears to be the smallest boy on the team (Defense Exhibit 1).

Glen Young, Anthony's classification officer at the Cross City Correctional Institution, appeared as a defense witness (T1176). Young testified that Anthony had come to Cross City to serve a habitual life sentence on his attempted murder conviction from Leon County, and that during the six (6) months that Anthony was under his supervision, he had no disciplinary reports (T1177, 1179). Young also testified, essentially, that life sentences cannot be counted on to keep inmates in prison any particular amount of time (T1176-820.

Dr. Harry Krop, a forensic psychologist, testified to Anthony's drug and

alcohol abuse, and to his psychological state (T1184-1206). Dr. Krop found no evidence of any major mental illness or personality disorder (T1194). He found that Anthony functions in the average range of intelligence, with no evidence of neurological impairment (T1194). Anthony did suffer from a history of drug and alcohol abuse, from about the age of 20 (T119401196). He used crack cocaine extensively for five or six y ears (T1195-96). He was leading a normal life until he started abusing drugs (T1195). Anthony's crimes were probably motivated by his need to support his drug habit (T1196).

Dr. Krop expressed the opinion that Anthony could be rehabilitated (T1197). The factors leading to that conclusion were: the normal life Anthony led before he started using drugs; his average intelligence; the lack of any diagnosable psychological disorder; and the fact that Anthony had not been a management problem in prison (T1197-98). Dr. Krop also expressed the opinion that Anthony would be able to function in an open prison population (T1198). This tied in with Anthony's rehabilitation potential, including his history of functioning in prison without disciplinary reports, and without engaging in violence (T1198).

SUMMARY OF THE ARGUMENT

Mr. Mungin was denied an adversarial testing at the guilt and penalty phases of his capital trial. The State violated due process and its disclosure obligation under *Brady v. Maryland* by withholding material exculpatory information from the defense in the form of impeachment evidence relating to witness Malcom Gillette. At trial, Gillette testified that when he discovered the Dodge Monaco located near the house where Mr. Mungin was arrested in Georgia, he saw two shell casings on the floor of the backseat of the Monaco. However, unbeknownst to the defense and the jury, Mr. Gillette had filled out an inventory storage receipt after he located and inspected the car on which he noted there was "nothing visible" in the car.

Mr. Mungin submits that this favorable impeachment evidence was never disclosed to defense counsel prior to trial. To the extent that the lower court concluded that trial counsel had access to this information or that the State had actually disclosed this information to the defense, Mr. Mungin submits that counsel rendered prejudicially ineffective assistance of counsel in failing to cross-examine Gillette at trial and impeaching him with the information contained in the inventory storage receipt. Indeed, if, as the lower court appeared to conclude, the State did disclose this information to the defense, then the State failed to correct Gillette's trial testimony in violation of due process and *Giglio v. United States*. Mr. Mungin also submits, in the alternative, that the information to which Gillette testified qualifies

as newly discovered evidence warranting a new trial or a resentencing.

The lower court's order makes factual findings that are not supported by competent and substantial evidence, and its legal conclusions are inconsistent with law from this Court and the United States Supreme Court. Reversal for a new trial and/or a new sentencing hearing is warranted.

ARGUMENT

I.

MR. MUNGIN WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL DUE TO THE SINGULAR AND COMBINED EFFECTS OF THE DUE PROCESS VIOLATIONS THAT OCCURRED, THE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE FROM THE DEFENSE, THE KNOWING PRESENTATION OF FALSE EVIDENCE, AND NEWLY DISCOVERED EVIDENCE. THE LOWER COURT'S ORDER IS GROUNDED ON FACTS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND REACHES LEGAL CONCLUSIONS THAT ARE CONTRARY TO PRECEDENT FROM THIS COURT AND FROM THE UNITED STATES SUPREME COURT. A NEW TRIAL AND/OR A RESENTENCING ARE WARRANTED.

1. Standards of Review

This appeal is before the Court from the denial of a Rule 3.851 motion in a capital case following an evidentiary hearing. This Court reviews the issues presented here *de novo*, as they involve questions of law, or mixed questions of law

and fact. *See Waterhouse v. State*, 83 So. 3d 84 (Fla. 2012). The Court will defer to any factual findings made by the lower court that are subsidiary to the legal issues only if supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766 (Fla. 2004).

2. Introduction to Issues

Mr. Mungin has established his entitlement to relief as a result of the evidence adduced at the evidentiary hearing before the lower court. And upon cumulative consideration of all of the evidence that the jury did not hear, Mr. Mungin is confident that this Court will determine that he did not receive a fair trial or a reliable sentencing proceeding.

Mr. Mungin understands that his appeal comes to this Court from a denial by the lower court following an evidentiary hearing. In this brief, Mr. Mungin will explain how many of the lower court's putative "findings" that undergird its ultimate legal determinations are simply unsupported by competent and substantial evidence. Much of the lower court's understanding of the legal concepts at issue here is, as explained here, discordant with the legal precedent the court purports to rely on. Important errors of fact and law permeate the lower court's order. Mr. Mungin is confident that this Court's strict review of the record will lay bare these errors and that the Court will reverse and remand for either a new trial or a new sentencing proceeding.

The central issue presented at the evidentiary hearing regarded the 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. As presented in prior proceedings in this case and explained in more detail in the Introduction to this brief, 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).

But 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 has since 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 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 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 was never disclosed to the defense prior to trial. Mr. Gillette's affidavit and subsequent evidentiary hearing testimony 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. Mungin's jury should unquestionably have been given the true picture of the realities of the case.

3. Evidence Adduced at Evidentiary Hearing

Mr. Mungin presented several witnesses at the evidentiary hearing in support of his allegations: Charles Cofer; Malcom ("Tony") Gillette; Dale Gilbreath; and 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. Below, Mr. Mungin summarizes the evidence presented at the evidentiary hearing.

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).[8]

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*[9] (4PC-R. 182). Outside of what the transcripts would reflect, Mr. Cofer had no independent recollection of what Gillette said in his deposition or at trial with regard to 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

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

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

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).[10]

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).[11]

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

[11] 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

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 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

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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).

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).[12]

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 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

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

"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).[13]

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

[13] On redirect examination, Mr. Mungin's counsel asked Mr. Cofer if, as a defense attorney, he viewed as inconsistent the information contained in the inventory receipt ("nothing visible") and the deposition testimony of Gillette that he "saw a casing" in the Dodge Monaco (4PC-R. 218). The State objected to this question and the Court sustained the objection (4PC-R. 219). On proffer, Mr. Cofer stated that they were inconsistent (*Id*). Despite sustaining the State's objection to the question posed to Mr. Cofer and his answer ("they were inconsistent"), the trial court's order later *relied on* Mr. de la Rionda's explanation that "he did not perceive the testimony to be inconsistent" (4PC-R. 151). In other words, the lower court was not interested in evidence from defense counsel that, in his perspective as a defense attorney, there was an inconsistency between the information contained in the inventory receipt ("nothing visible") and Gillette's deposition testimony that he saw "a casing," whereas the court considered and relied on Mr. de la Rionda's perception that there was no inconsistency. This, of course, is unfair and evidences the lower court's determination to rule in favor of the State notwithstanding the evidence and the actual facts presented at the evidentiary hearing.

(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*).[14] 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

[14] 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).

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 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).[15] 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).[16] 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 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

[15] Gillette acknowledged that Ms. Bolin had once asked him if he knew anyone named Ice, and "was trying to find things" and "to get to the truth of this" (4PC-R. 250-51).

[16] 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").

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).[17] 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 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

[17] 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).

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).

4. Mr. Mungin is Entitled to Relief. The Lower Court's Order Rests on Factual and Legal Errors.

After recounting the procedural history of Mr. Mungin's case, the lower court 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).

The lower court initially addressed the *Brady* aspect to Mr. Mungin's claim and its understanding of the legal framework of a *Brady* claim; indeed, most of the lower court's order is devoted to addressing 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) (citing *Wright v. State*, 857 So. 2d 861, 870 (Fla. 2003)). The court also expressed its understanding that a *Brady* claim has a diligence requirement (4PC-R. 144) (citing *Freeman v. State*, 761 So. 2d 1055, 1062 (Fla. 2000) (quoting *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993)). The court's reliance on *Wright* as relevant to its analysis of Mr. Mungin's claim is misplaced. *Wright* did not address the withholding of impeachment evidence by the State or by law enforcement and thus is inapposite to this case. The second proposition (the "diligence" requirement) is wrong as a matter of law.

In *Wright*, the Court addressed a *Brady* claim based on allegations that the

State withheld from the defense "information contained in police files concerning other possible suspects and other criminal activity in the same neighborhood." *Wright*, 857 So. 2d at 870. This is the factual scenario in which the Court determined that "other criminal activities and the existence of other criminals in the same neighborhood where this murder occurred" was not material information required by *Brady* to be disclosed because of the "mere possibility" it might be favorable. That does not approximate the information alleged by Mr. Mungin to have been withheld by the State, which is unquestionably impeachment evidence of a prosecution witness who provided key testimony used by the State to forensically link Mr. Mungin to the crime. Indeed, as noted below, the lower court acknowledged the unquestionable inconsistency between the information contained in the inventory receipt filled out by Gillette in 1990 and his subsequent deposition and trial testimony in Mr. Mungin's case. That there was information withheld by the State that brings to light this actual inconsistency is, of course, the very sort of "favorable" evidence under *Brady* that the State is obligated to disclose: impeachment evidence. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) ("The evidence at issue must be favorable to the accused, either because it is exculpatory, *or because it is impeaching* . . . ") (emphasis added).

The lower court's imposition of a "diligence" requirement on part of the defense to ferret out exculpatory evidence in the possession of the prosecution or law

enforcement is flatly contrary to the actual state of the law. Diligence is not an element that a defendant must prove in order to establish a meritorious *Brady* claim: "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.

As to its findings in Mr. Mungin's case on the *Brady* aspect of the claim, the lower court first determined that Mr. Mungin failed to establish that the evidence was "favorable" (4PC-R. 144). The sole basis for this determination was the lower court's "finding" that Mr. Mungin "was unable to *prove* law enforcement planted evidence" against him (*Id*.) (emphasis added). *See also* 4PC-R. 145 ("this Court finds Defendant was unable to substantiate the evidence tampering allegation, finding that Deputy Gillette's statement was purely speculative"). Setting up a legal straw man ("planting of evidence" must be "proven"), the lower court then proceeds to knock it down with "findings" based on isolated snippets of testimony that are not

borne out by competent and substantial evidence.

The lower court cited no case standing for the proposition that Mr. Mungin was required to "prove" that law enforcement "planted evidence" in his case because that is not what the law requires. "Favorable" evidence can be "either exculpatory or impeaching." *Mordenti v. State*, 894 So. 2d 161, 170 (Fla. 2004) ("Information from the [withheld] date book that conflicted with Gail's testimony with regard to these important components of the conspiracy, most assuredly, could have impeached Gail, whose credibility comprised the Sate's entire case against Mordenti. Therefore, the first *Brady* prong is satisfied"). Despite its wrong understanding that Mr. Mungin had to "prove" that evidence was planted, he lower court seemingly acknowledged the obvious: that *there is a real actual inconsistency* between what Gillette wrote in the inventory receipt (Defense Exhibit 3) and what he testified to during his deposition and at trial:

> In Defendant's case, Deputy Gillette filled out an inventory sheet and noted nothing visible . . . 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.

(4PC-R. 145).[18] The lower court did not reconcile this dichotomy or recognize the

[18] That there was information withheld by the State that establishes this actual inconsistency is the very sort of "favorable" evidence under *Brady* that the State is obligated to disclose. See *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) ("The

favorable nature of the inconsistency because it did not advance the court's legal framework of analyzing whether this inconsistency "proved" that law enforcement "planted" evidence. Indeed, it declined to even attempt to do so by writing that "Gillette was unable to offer any explanation [for this discrepancy], and stated he would never knowingly lie on the stand or under oath" (*Id*.). Irrespective of his "explanation," its character as impeaching evidence established the favorable nature of the withheld information contained in the inventory receipt. That is all that the first prong of *Brady* requires.

The lower court attempted to minimize Gillette's testimony on the critical parts relevant to Mr. Mungin's claim by pointing out that the passage of time "has left him unclear on the details" and had only a "minimal role" in the case (4PC-R. 144). However, a "minimal role" does not mean an insubstantial or insignificant role. Gillette provided testimony that the State deemed important enough to present to the jury on an issue that no one else could have testified to—the discovery of the casings in the Dodge Monaco that were later forensically identified as coming from the weapon used to shoot Ms. Woods:

> Q [by ASA de la Rionda] Did you see anything inside the car?
>
> A [by Mr. Gillettte] Yes, sir. I saw some cartridges,

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evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching . . . ").

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). The two expended shells found in the Dodge were used in the gun that shot Ms. Woods and were introduced into evidence by the State at trial (T828, 853, 884-85).

The lower court's attempt to diminish Gillette's testimony by noting that the passage of time "left him unclear on the details" is not backed up by any competent or substantial evidence. In fact, a review of the various pages of the evidentiary hearing transcript cited by the lower court to support its allegation that the passage of time left Gillette "unclear on the details" reveals the misleading nature of the lower court's attempt to suggest that Gillette's putative memory lapses was consequential to the issues presented by Mr. Mungin.

Page 73 of the transcript reflects that Gillette did not recall off the top of his head the year that Mr. Mungin's trial took place (4PC-R. 236). The lower court failed to explain how this affected Gillette's other testimony on the relevant issues. Page 97 of the transcript reflects no discussion whatsoever by Gillette professing a lack of memory due to the passage of time, nor any question posed to him on that topic

(4PC-R. 260). Page 99 of the transcript reveals that Mr. Gillette did not independently recall the specifics of his deposition given in a 1992 deposition (4PC-R. 262), hardly evidence of a fatally flawed memory, particularly when he then testified, without hesitation or qualification, that he testified truthfully at the deposition (*Id.*). Page 101 of the transcript reflects that Gillette did not independently recall a specific question asked to him by the prosecutor during his 1992 deposition but once shown the deposition Gillette was able to answer the question (4PC-R. 264). The last two pages cited by the trial court about Gillette being "unclear on the details" are pages 104-05. Page 104 reflects no answer given by Gillette where he professes a lack of memory or recall about anything, nor any question posed to him on that topic (4PC-R. 267). And finally, page 105 of the transcript reveals the exact opposite of what the trial court understood Gillette to be saying. On page 105, Gillette is *reinforcing* the fact that he did "not recall seeing the bullets" when he found and looked into the Dodge Monaco:

> I have no recollection, clear recollection like I do the day I got married I remember it very clearly. I do not recall seeing bullets in the car. I wrote on here [the inventory sheet] that there was nothing visible. I stated in here [my deposition and trial] 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). In other words, this page of Gillette's testimony *wholly supports* Mr. Mungin's claim that Gillette wrote "nothing visible" on the inventory sheet yet

testified differently at deposition and before the jury at trial. That the lower court viewed this testimony as demonstrating a lack of recall on Gillette's part establishes the lower court inattention to any of the testimony that favored Mr. Mungin.

Perhaps the most significant portion of the lower court's order is its discussion of (and obvious misunderstanding between) the "inventory receipt" Gillette filled out immediately after he discovered the Dodge Monaco on September 18, 1990, and the "incident report" that Gillette subsequently completed recounting his involvement in Mr. Mungin's case. The lower court determined, based on an inaccurate and inattentive reading of the evidentiary hearing testimony and evidence, that the "inventory receipt" that Gillette filled out contemporaneous with the discovery of the Monaco reflecting that he observed "nothing visible" must have been the same thing as the "incident report" Gillette completed and that was discussed by the prosecutor and defense counsel at Gillette's deposition. Nothing could be further from the truth. The "inventory receipt" was different from the "incident report" referred to and discussed at Gillette's deposition. The former was not disclosed by the State prior to Mr. Mungin's trial; the latter, according to the deposition, was. But the critical differences between the two documents, which is the crux of the issue here, were never addressed in the lower court's order. The distinction is important because the court rejected Mr. Mungin's *Brady* claim in part because it determined, based on an inaccurate reading of the record and the evidence,

that the defense at trial had access to the information that Gillette had observed "nothing visible" in the Dodge Monaco and therefore the State did not fail to disclose that information nor fail to correct any false or misleading testimony.

Gillette explained at the evidentiary hearing that he located a 1978 Dodge Monaco in an area near the house where Mr. Mungin was arrested (4PC-R. 226). Part of his normal routine in such circumstances was to fill out a property and inventory receipt, which he did in this case; Defense Exhibit 3, the property and inventory receipt, 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*). Based on what the inventory receipt says, Gillette wrote there was "**nothing visible in the car**" after conducted a standard search of the vehicle (*Id*.) (emphasis added). He also noted that he did not unseal the car and that he did not open or search the trunk (4PC-R. 228).

Gillette testified that he recalled being deposed in Mr. Mungin's case (4PC-R. 229), and 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 on the inventory receipt (4PC-R. 235). Nor is his trial testimony consistent with the entry he wrote on

the inventory receipt (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 would have alerted his superior officers about his discovery and 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 at the evidentiary hearing, 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 a 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 looking at the "inventory receipt" (4PC-R. 264, 266).[19] It was the inventory receipt, and not the 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 statement that "evidence could have been tainted without my knowledge" because "that was my belief" (4PC-R. 293).

On redirect examination, Gillette again cleared up the confusion about the "inventory sheet" 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

[19] 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).

nothing about bullets or casings) could well have been the "report" he completed, not the inventory receipt (*Id*.).

While the State was unsuccessful in trying to confuse Gillette about the difference between the inventory receipt and his "incident report," it was regrettably successful in confusing the lower court, which appeared to credit prosecutor de la Rionda's testimony that he "specifically addressed the documents in Deputy Gillette's deposition" at which defense counsel was present (4PC-R. 147). But the lower court's choice of loose language (referring to "the documents") is demonstrative of the lack of competent and substantial evidentiary support for the court's assumption that the State must have disclosed Gillette's inventory sheet because "documents" were addressed during Gillette's deposition.[20]

Aside from Gillette's own uncontradicted testimony explaining the difference between the "inventory storage receipt" and the "incident report" that the lower court avoids discussing, a careful review of the evidentiary hearing testimony, the documents admitted at the hearing, and Gillette's deposition all establish that there are two different documents, one not disclosed prior to trial (the inventory sheet reflecting "nothing visible") and the other disclosed and discussed at the deposition

[20] It is important to note that it would merely be an assumption that the State must have disclosed the inventory receipt reflecting "nothing visible" because Mr. de la Rionda had no specific recollection of Defense Exhibit 3, which is the inventory receipt in question (4PC-R. 347).

(the incident report).

During Gillette's 1992 deposition, prosecutor de la Rionda did correct Gillette on some initial confusion he exhibited about whether the 1990 search of the house where Mr. Mungin was arrested or his discovery of the Dodge Monaco came first (4PC-R. 263-64). In questioning Gillette at the deposition, de la Rionda referred to "a report" completed by Gillette reflecting that the search of the house took place on September 18, 1990, at 21:35 hours, whereas the discovery of the car took place on September 19, 1990, at 12:27 AM (4PC-R. 264) (Defense Exhibit 7). It is this "report" that the prosecutor at the evidentiary hearing was attempting to argue was the same as the "inventory storage receipt" also completed by Gillette that revealed there was "nothing visible" in the Monaco when he inspected it. But there is nothing on the inventory storage receipt (Defense Exhibit 3) that says anything about the earlier search of the house on September 18, 1990, nor the date and time of the search of the house. Conversely, there is nothing in the "incident report" completed by Gillette that makes any reference whatsoever to the fact that he observed "nothing visible" when he conducted the visual inspection of the Monaco (4PC-R. 288-90). The discussion at the deposition concerned information contained in Gillette's "incident report" (introduced into evidence below as Defense Exhibit 7), ***not*** the different document called the "inventory storage receipt (Defense Exhibit 3). During Gillette's deposition he was never asked about or confronted with the inventory

storage receipt that stated "nothing visible." At his deposition Gillette was *only* confronted with and corrected by de la Rionda about *the incident report* about the sequence of the search of the house and the recovery of the car. See 4PC-R. 272-73 ("Q: Now that you have had an opportunity to read that deposition today, the part that I just showed you on cross examination, doesn't that make reference to *that report*? A: Yes, sir. What was just read makes reference *to the report*") (emphasis added). Ultimately, de la Rionda himself was forced to acknowledge that while both the inventory storage receipt filled out by Gillette and his incident report bear some of the same information, there was nothing in Gillette's incident report that makes any mention of Gillette's observations of the interior[21] of the Dodge Monaco or of the shell casings (4PC-R. 353).

The lower court never ultimately determined, one way or the other, if the State disclosed, or failed to disclose, the information contained in Gillette's inventory storage receipt to the defense, although in rejecting the ineffective assistance of counsel aspect to the claim it did assume that trial counsel Cofer was deficient in

[21] Mr. de la Rionda later testified that in his view there was no inconsistency between the inventory storage receipt indicating that Gillette saw "nothing visible" in the Monaco and his trial testimony that he did observe casings because "he was just documenting on what was the outside of the vehicle" (4PC-R. 362). This is not accurate. Gillette made it clear that he noted "nothing visible" after he "looked in the car from the outside . . . *I did look inside of the car or I would [] not have wrote nothing visible*" (4PC-R. 267) (emphasis added).

failing to confront Gillette at trial with the fact that he initially observed "nothing visible" when he looked inside of the Dodge Monaco (4PC-R. 149). This assumption presumes that trial counsel did not have possession of the impeaching information contained in the inventory storage receipt.[22] The court did, however, conclude that the evidence was not "material" under the *Brady* standard because there was other evidence to support the conviction (4PC-R. 147). Sufficiency of the evidence is not the standard for analyzing whether withheld information is material to warrant a new trial: "This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone." *Kyles v. Whitley*, 514 U.S. 419, 435 n.8 (1995). As the United States Supreme Court has explained:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Way v. State, 760 So. 2d 903, 913 (Fla. 2000) (citation omitted).

[22] Despite the court's assumption of deficient performance, the order does contain one sentence stating that "[t]he record indicates Mr. Cofer was aware of the inventory sheet where Deputy Gillette indicated nothing was visible" (4PC-R. 148). But the lower court simply references the portion of Gillette's deposition, at which defense counsel was present, where de la Rionda confronts Gillette about the contents of his "incident report" (*Id.*). As explained in great detail above, the "incident report" is not the same as the "inventory storage receipt."

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." The lower court thus 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 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. Mungin's jury should unquestionably have been given the true picture of the realities of the case.

While there is certainly disagreement between the parties as to a number of issues in this case, there are some points of apparent agreement: Mr. Gillette testified in his deposition and at trial that he saw "some cartridges" (two) in the Dodge

Monaco when he discovered it in the early hours of September 19, 1990, whereas the Inventory and Vehicle Storage Receipt he filled out at the time revealed that, upon looking into the car through the windows, there was "nothing visible." There can also be no disagreement about whether Gillette was questioned about this at trial; trial counsel Cofer did not cross-examine Gillette at all, on any topic whatsoever. There can be no dispute that the State never corrected Gillette's trial testimony as was its obligation pursuant to *Giglio v. United States*, 405 U.S. 150 (1972). And there can be no dispute that Mr. Mungin's jury was unaware of this important inconsistency in the evidence. What *is* at issue in this proceeding is *why* the jury was not apprised of the fact that no casings were initially observed in the Dodge Monaco when Tony Gillette discovered it and whether confidence is undermined in the outcome of trial or sentencing in light of this information.[23]

[23] Mr. Mungin wishes to address one matter raised by the lower during the hearing and addressed briefly in its order. At the hearing, the lower court asked Mr. Gillette if it was possible that he could have seen the casings in the car after he completed the inventory sheet and after the car was jostled up and down off of the tow truck upon its arrival at the Sheriff's Office (4PC-R. 298-99). On reviewing the transcript, however, there is some apparent confusion that Mr. Mungin wishes to clarify. Mr. Gillette responded to the court that "it could be possible" but then testified that he "normally would not go back and re-examine a car" (4PC-R. 299). That Gillette's observation of "nothing visible" refers to his initial discovery of the car (as opposed to a post-jostling observation) is very clear from everything in this record. Gillette was clear that once the wrecker arrived to tow the car to the Sheriff's Office, he was "done with it" at that point (*Id.*). While he would accompany the wrecker to the Sheriff's Office to "secure" it that does not mean that he conducted another visual search. Rather, "securing" the car "just means that I have taken it to the Sheriff's Department" to be picked up by someone else (*Id.*). There is nothing in

Mr. Mungin submits that the answer first lies in separate but interrelated legal theories: either the State failed to disclose the inventory receipt to defense counsel prior to trial, thus violating its obligations under *Brady*, or trial counsel in fact had the inventory receipt and unreasonably failed to impeach Gillette with the information contained therein during trial, and thus rendered ineffective assistance of counsel in violation of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). Additionally, Mr. Mungin submits that the State failed in its obligation to correct the false and/or misleading testimony given by Gillette at his deposition and, more importantly, at Mr. Mungin's trial, in violation of its obligations under *Giglio*. Finally, Mr. Mungin submits that the inventory receipt and its contents constitute newly discovered evidence. *See Jones v. State*, 591 So. 2d 911 (Fla. 1991). Under each and all of these legal theories, Mr. Mungin deserves a new trial or, at a minimum, a new sentencing hearing.

At trial, Gillette testified that he saw two pistol casings in the back behind the driver's seat of the 1978 Dodge Monaco. However, Gillette has now testified under

---

the record to indicate that Gillette performed a second visual inventory of the car after the car had been towed to the impound lot. Any suggestion that the jostling from the tow truck somehow dislodged the casing or casings also is belied by the fact that when the car finally reached the FDLE lot in Tallahassee, a previously undiscovered beer can and soda can were discovered *under* the front seat (4PC-R. 332). It beggars belief that the jostling of a tow truck would dislodge shell casings but not two cans.

oath that that testimony was not true. He was mistaken. In light of the Inventory Receipt he was never shown before his deposition or his trial testimony, he has now sworn, under oath, that he did not see any casings in the Dodge Monaco. Mr. Mungin has established that the prosecution, in violation of *Brady*, withheld this Inventory Receipt; or trial counsel in fact had this document but unreasonably failed to use it to impeach Gillette's trial testimony. And given that the State's position below appeared to be that it had disclosed Gillette's Inventory Receipt to the defense, and in fact the trial court appeared to agree, the State knew or should have known that Gillette's trial testimony about seeing the shell casing was false or, at best, misleading. Thus the State violated *Giglio*. What is certain is that jury was never made aware of the fact that Gillette initially did not see any shell casings in that Dodge Monaco and relief is warranted. *See State v. Gunsby*, 670 So. 2d 920 (Fla. 1996) (addressing *Brady/Giglio/Strickland* claim pled in the alternative); *Smith v. Wainwright*, 799 F.2d 1442, 1444-45 (11th Cir. 1986) (same).

Police reports and evidentiary hearing testimony adduced in this case establish, according to the timeline of when the car was stolen and when Ms. Woods was killed in Jacksonville, that Mr. Mungin did not steal the car and was not in possession of the car at the time of the crime. Law enforcement, however, took the position that this car was used by Mr. Mungin to commit the crime. And the State argued that to the jury, going so far as to introduce the two casings found in the

Dodge Monaco. In light of the truth—that Gillette saw "nothing visible" when he first located and impounded the car—Mr. Mungin could have made a credible argument to the jury that someone in law enforcement planted incriminating evidence in the car in attempt to connect Mr. Mungin to the car or at least Mr. Mungin's counsel could have made such an argument. **It simply makes no sense that any shell casings were in the car in question because all three shell casings had already been found at the three crime scenes in question, as Mr. Mungin is established at an evidentiary hearing** (4PC-R. 329-30). Why would shell casing(s) be in a car that was not the scene of a crime? No one had been shot in the car, so why were there shell casings there? Mr. Mungin submits that this makes no sense.

Moreover, according to Dale Gilbreath's report and evidentiary hearing testimony, he observed only *one shell casing* on the back floor of the Monaco when the Monaco was at the Camden sheriff's office impound lot (4PC-R. 314). Then, a *second* heretofore undiscovered shell casing was suddenly discovered only when the Monaco reached the FDLE facility and inventoried by Steve Leary (4PC-R. 327). So we go from *no shell casing(s)* seen when the car is initially impounded by Gillette; then the car is then impounded, brought to the Camden Sheriff's Office, and Gilbreath claims to observe what "looked like *a .25 caliber aluminum shell casing*" on the back floorboard (4PC-R. 322); then the car is driven to FDLE under Gilbreath's custody and *yet another casing* is *then* discovered by FDLE analyst

Leary. To top it all of, Leary testified at trial that he did not mark on the envelope that the casings he located had come from a Dodge Monaco (T854). AND we have Gillette testifying mistakenly to the jury that he observed *two* casings when he first discovered the car. All of this occurred in the context of trial counsel Cofer having clearly expressed doubts about the provenance and chain of custody of these casings; for example, during Gilbreath's deposition, Cofer said to Gilbreath "Something is clinging in my mind here about this Monaco. Did you have involvement in searching it, or did you look through it or anything?" to which Gilbreath responded "No, I looked in the windows. I never even opened the car" (Gilbreath Deposition at 95; Def. Exhibit 2). And finally, there is the unusual incident that occurred when trial counsel attempted to view the casings in question at the State Attorney's Office prior to trial (4PC-R. 191). To say the least, the circumstances regarding these casings are puzzling and troubling. The jury should have known about all of this. A new trial should be granted so a jury can fairly determine the true facts of this case.

The importance of the information testified to at the evidentiary hearing by Mr. Gillette cannot be overstated in terms of the ramifications on an already weak case against Mr. Mungin. The crime in Jacksonville for which Mr. Mungin was convicted occurred on Sunday, September 16, 1990, at 1:55 PM. According to a police report by Officer Rick Cornaire dated September 16, 1990, car owner Sharon Gannon saw her car parked in front of her house (610 Carlton Street) on Saturday,

September 15, 1990, at 8:00 PM. On Sunday, September 16, 1990, at 1:00, she observed that her car was gone. She mentioned someone named Lynn Huff as the person who probably had stolen it. In other words, according to this police report, the car was stolen between Saturday, September 15, 1990, at 8:00 PM, and Sunday, September 16 1990, at 1:00. According to Detective Gilbreath's homicide report at page 12,[24] Debron Sibley stated that he had taken Mr. Mungin to Jacksonville on September 15, 1990, at approximately 6:30 PM and took him back to Kingsland, Georgia, at approximately 9:00 PM This establishes that Mr. Mungin could not have stolen the car from Saturday, September 15, 1990, as set forth in Officer Cornaire's report.

Additional information regarding the events taking place on Sunday, September 16, 1990, is also relevant to the information presented here. Brian Washington, who testified at Mr. Mungin's first evidentiary hearing, testified that he saw Mr. Mungin on Sunday, September 16, 1990, at 10:30 AM at Mom and Pop Store in Kingsland, Georgia (1PC-R. 407-08).[25] He recounted the brief conversation they had during which Mr. Mungin said he needed a ride to Jacksonville, and

[24] Gilbreath's report was introduced at the evidentiary hearing as Defense Exhibit 8 (4PC-R. 143).

[25] Washington knew it was September 16 because of several birthdays in his family in September and September 16 was a Sunday, which is the day is takes his wife to church (1PC-R. 412).

Washington told him he could give him a ride but had to first take his wife to church (1PC-R. 408). After he took his wife to church, Washington picked up Mr. Mungin from the house of his cousin, Angie Jacobs, at around 10:30 AM and dropped him off in Jacksonville somewhere near Golfair Boulevard and 27th Street about an hour later (1PC-R. 409-10).

According to Philp Levy's testimony at Mr. Mungin's first evidentiary hearing, Levy saw Mr. Mungin on Sunday in the middle of September, 1990, at his aunt's house at 1104 West 27th Street between 11:30 AM and 1:00 PM (1PC-R. 433). They hung out at Levy's aunt's house for a while and then went to the corner of 28th Street. Then Levy saw Mr. Mungin go into Donetta Dues's house on 28th Street (*Id*.).[26] After, Mr. Mungin went to Vernon Longworth's house directly across the street (1PC-R. 433-34). The last time Levy saw Mr. Mungin was between 4:30 PM and 5:30 PM; he was not driving a car (1PC-R. 434-35).

According to Vernon Longworth's testimony at Mr. Mungin's first evidentiary hearing, he last saw Mr. Mungin on Sunday September 16, 1990, when Mr. Mungin came to his house for a few hours to visit (1PC-R. 479). Mr. Mungin stayed at his house until 2:30 or 3:00 PM. Like Levy, Mr. Longworth did not see Mr. Mungin driving a car.

[26] Dues was a former girlfriend of Mr. Mungin (1PC-R. 433).

In sum, these police reports and evidentiary hearing testimony cited above establish, according to the timeline of when the car was stolen and when Ms. Woods was killed in Jacksonville, that Mr. Mungin could not have stolen and was not in possession of the car at the time of the crime. Law enforcement, however, took the position that this car was used by Mr. Mungin to commit the crime. In light of the information contained in Mr. Gillette's affidavit, information he confirmed at the evidentiary hearing which establishes that the jury did not hear significant important evidence about these casings "found" in the Dodge Monaco, it is clear that at least there is an inference that someone in law enforcement planted incriminating evidence in the car in attempt to connect Mr. Mungin to the car *or at least Mr. Mungin's counsel could have made such an argument*. *See Way v. State,* 903 So. 2d 903, 910 (Fla. 2000) (withheld evidence found material because "photographs could have been used in support of an alternate defense theory"). It makes no sense that the shell casings were in the car in question because all three shell casings had already been found at the three crime scenes in question. At the least, the disclosure of the inventory sheet reflecting that Gillette saw "nothing visible" when he first found the Dodge Monaco and inventoried its contents would have led to admissible impeachment evidence to undermine his credibility and the credibility of the entire law enforcement investigation in this case.

The information now revealed regarding the shell casings is evidence that

unquestionably is exculpatory in nature and was improperly withheld by the State in violation of *Brady* and its progeny. Moreover, the State, at Mr. Mungin's trial, knowingly presented false or misleading evidence from Gillette, in violation of due process, *Giglio,* and its progeny. Alternatively, to the extent that the State will continue to insist that it disclosed the Inventory Receipt in question to defense counsel, Mr. Mungin has established that Mr. Cofer rendered prejudicially ineffective assistance of counsel for failing to impeach Gillette at trial, in violation of the Sixth Amendment and *Strickland*. The *Strickland* prejudice standard is the same as the *Brady* materiality standard and requires establishing that confidence is undermined in the outcome. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995).

Mr. Mungin also asserts that the information contained in Mr. Gillette's affidavit to which he testified at the hearing is newly-discovered evidence warranting relief. *See Jones v. State*, 591 So. 2d 911 (Fla. 1991). The lower court rejected this aspect to Mr. Mungin's claim, concluding (wrongly) that the record reflected that defense counsel "had access to the inventory sheet and knew of its existence" (4PC-R. 152). As explained in above, there is no competent and substantial record support to conclude that trial counsel "had access to" or "knew of" the existence of the inventory sheet. Moreover, it is the information contained in the inventory sheet that is the issue—that Gillette initially wrote "nothing visible" when he conducted his inventory of the Dodge Monaco. The lower court focused

only on the document when it is the information contained in the document that is the critical information the jury did not know.

To determine the weight of the new evidence presented by Mr. Mungin, as well as the likelihood that it would produce an acquittal at retrial, this Court must not assess the newly discovered evidence in a vacuum. In *Jones*, this Court stated that the trial court "will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones*, 591 So. 2d at 916. "This cumulative analysis must be conducted so that the trial court has a 'total picture' of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a *Brady* claim." *Lightbourne v. State*, 742 So. 2d 238, 247-48 (Fla. 1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)). Evidence offered for impeachment purposes must also be included in the trial court's cumulative analysis. *Robinson v. State*, 770 So. 2d 1167, 1171 (Fla. 2000). Newly discovered evidence can also result in the vacation of a death sentence. *See Bolin v. State*, 184 So. 3d 492, 498 (Fla. 2015) (“If, as here, the defendant is seeking to vacate his sentence, the second prong requires that the evidence would probably produce a less severe sentence on retrial.”).

This Court is required to consider the new evidence offered pursuant to *Jones* cumulatively with other newly discovered evidence and with *Brady* material, and the previously presented *Brady* material and evidence that trial counsel unreasonably

failed to develop and present. When all of this evidence is considered cumulatively, it is clear that Mr. Mungin was denied a constitutionally adequate adversarial testing. *State v. Gunsby,* 670 So. 2d 920 (Fla. 1996); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004). A new trial must be ordered. At a minimum, Mr. Mungin's death sentence must be vacated or a resentencing ordered.

Mr. Mungin notes that the newly-discovered evidence analysis attendant to his death sentence has been altered in light of recent legal developments. Unlike the prejudice analysis of a *Strickland* claim or the materiality analysis of a *Brady* claim, the second prong of a newly-discovered evidence claim looks forward to what will more likely than not occur at a new trial or a resentencing. *See Swafford v. State,* 125 So. 3d 760, 776 (Fla. 2013); *Hildwin v. State*, 141 So. 3d 1178, 1181-87 (Fla. 2014). Logically, then, the law that would govern that future proceeding would have to be part of the analysis. In this case, Florida's revised capital sentencing statute would apply at a resentencing and would require the jury to unanimously determine that sufficient aggravators exist and that they outweigh the mitigating circumstances. It would also require the jury to unanimously recommend a death sentence before the judge would be authorized to impose a death sentence. *Hurst v. State*, 202 So. 3d 40 (Fla. 2017). Mr. Mungin submits that this new law, which did not exist when he previously presented his constitutional claims in prior collateral proceedings, requires revisiting his previous constitutional claims. Mr. Mungin acknowledges that

the Court has recently rejected a similar claim in *Walton v. State*, 246 So. 3d 246 (Fla. 2018), but he urges the Court to revisit that decision under the circumstances of this case.

At Mr. Mungin's penalty phase proceeding, five jurors voted in favor a life sentence. This was after the jury had been instructed that the sentencing recommendation was to be based on "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." The newly discovered evidence presented in Mr. Mungin's previous Rule 3.851 motions must be evaluated under the standard set forth in *Swafford* and *Hildwin* and that means that all of the evidence that would be admissible at a resentencing which includes the mitigating evidence presented to meet the prejudice prong of the *Strickland* standard governing ineffectiveness claims and the undisclosed exculpatory evidence presented to show that the State failed to meet its *Brady* obligation. With all the new evidence that would be admissible at a resentencing, the State cannot demonstrate beyond a reasonable doubt that not a single juror would have vote in favor of a life sentence. A single juror voting for a life sentence would mean that a life sentence would be the only sentencing option.

CONCLUSION

Based on the evidence and the record, Mr. Mungin respectfully submits that his conviction and sentence of death are due to be vacated at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to all cou8nsel of record via the Florida electronic filing portal this 6th day of September, 2018.

/s/Todd G. Scher
TODD G. SCHER

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 14 point Times New Roman type, a font that is proportionately spaced.

/s/ Todd G. Scher
TODD G. SCHER

IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-635
L.T. NO. 1992-CF-3178
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The relevant facts concerning the September 16, 1990, murder of Betty Jean Woods is recited in the Florida Supreme Court's opinion on direct appeal.

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard *Williams* rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.
>
> First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.
>
> 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 normal life before drugs, his average intelligence, and his clean record while in prison.
>
> The jury recommended death by a vote of seven to five. The trial judge followed the jury's recommendation and sentenced Mungin to death. In imposing the death penalty, the trial judge found two aggravating factors: (1) Mungin had previously been convicted of a felony involving the use or threat of violence to another person; and (2) Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. The trial judge found no statutory mitigation and gave minimal weight to the nonstatutory mitigation that Mungin could be rehabilitated and was not antisocial.

State v. Mungin, 689 So. 2d 1026, 1027 (Fla. 1995) (footnotes omitted) (*Mungin I*). The United States Supreme Court denied certiorari on October 6, 1997. *Mungin v. Florida*, 522 U.S. 833 (1997) (*Mungin II*).

Mungin subsequently brought a postconviction motion, pursuant to Florida Rules of Criminal Procedure 3.851, wherein he raised several claims. Following a *Huff*[1] hearing, an evidentiary hearing was held as to three of Mungin's claims: (1) ineffective assistance of counsel during the guilt phase of his trial; (2) the existence

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

of newly discovered evidence; and (3) ineffective assistance of counsel during the penalty phase of his trial on the basis that his counsel should have presented evidence related to his difficult childhood. *See Mungin v. State*, 932 So. 2d 986, 992 (Fla. 2006) (*Mungin III*). The postconviction trial court denied all of Mungin's claims; he raised seven issues of appeal:

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

Id. at 993 n. 6.

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

Mungin III, 932 So. 2d at 993 n. 7.

[2] *Ring v. Arizona*, 536 U.S. 584 (2002).

The Florida Supreme Court denied all of Mungin's postconviction claims. *Mungin III*, 932 So. 2d 986. The opinion was issued on April 6, 2006. Mungin subsequently filed a motion for rehearing, which was denied on June 13, 2006, and an amended version of his petition was filed on July 1, 2007.

Mungin filed a successive motion to vacate under Florida Rules of Criminal Procedure 3.851, raising an additional *Brady* claim and an additional *Giglio* claim. The postconviction court summarily denied relief and it was remanded for an evidentiary hearing by the Florida Supreme Court. *Mungin v. State*, 79 So. 3d 726, 734, 738 (Fla. 2011) (*Mungin IV*). After the evidentiary hearing, the postconviction court denied relief and that was affirmed on appeal. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013) (*Mungin V*). Mungin also filed a motion to vacate based on *Hurst*,[3] which was denied. That denial is currently pending appeal in front of the Florida Supreme Court in case number SC17-815.

On September 27, 2017, Mungin, through counsel, filed this Successive Motion to Vacate Judgments of Conviction and Sentences. The State filed its response on October 13, 2017. An evidentiary hearing was held on January 12, 2018, and the parties submitted written closings. On March 21, 2018, the postconviction court issued a written order, denying relief. This appeal followed.

[3] *Hurst v. Florida*, 136 S.Ct. 616 (2016).

SUMMARY OF THE TESTIMONY

Charles Cofer

Charles Cofer was Mungin's counsel at trial. Cofer was lead counsel, while Lewis Buzzell was co-counsel. (Evid. Hrg. Trans. 11). Cofer confirmed that he would expect the State to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). (Evid. Hrg. Trans. 18-19). He also stated that he did not "have independent recollection of what was said during the deposition [he] took" and he did not have a recollection of what was in the transcript of the Tallahassee or other deposition that was not taken by him. (Evid. Hrg. Trans. 20). Cofer also admitted that he did not have an independent recollection of whether he had possession of the property receipt completed by Officer Gillette at the time of the deposition or the trial, but he agreed that it was the kind of document he would normally receive during discovery. (Evid. Hrg. Trans. 22). Defense had Cofer identify two exhibits from the trial, State's Exhibit 21 and State's Exhibit 22. (Evid. Hrg. Trans. 34-35). The exhibits were the shell casings that were recovered from the Dodge Monaco. The label on State's Exhibit 21 noted that the cartridge casing came from the right rear floor of the vehicle. The label on State's Exhibit 22 noted that the cartridge casing came from beneath the driver's seat. (Evid. Hrg. Trans. 34-35).

Cofer did not have an independent recollection of reviewing the evidence with the State prior to the trial; however, there was a note in his file indicating that such

a meeting had occurred. (Evid. Hrg. Trans. 39). Cofer was confronted with the transcript of the deposition of Officer Gillette, where it was pointed out that on page 57, the State asked questions of Officer Gillette regarding his report and Cofer agreed that the questions were consistent with the vehicle storage receipt. (Evid. Hrg. Trans. 43-44). During Officer Gillette's deposition, Officer Gillette testified that he saw the casing through the window but did not open the vehicle. (Evid. Hrg. Trans. 47). When reading from the deposition transcript, the question asked by the State was: "[t]he report there indicates that it was done at 9/18 at 2135 you would have recovered the car after that." (Evid. Hrg. Trans. 49). The deposition transcript clearly reflected that Officer Gillette reviewed the report they were discussing because, when asked if the report refreshed his memory, Officer Gillette replied, "[y]eah, that refreshed my memory. That is correct because everything I filled out on paperwork comes straight off log charts." (Evid. Hrg. Trans. 49; Def. Exh. 2:57). Cofer agreed that the deposition transcript reflected that Officer Gillette testified in his deposition that he saw one casing inside the Dodge Monaco from the outside of the vehicle, but he did not go into the car to conduct a search. (Evid. Hrg. Trans. 50).

Malcolm Gillette

Malcolm Gillette was the Georgia deputy sheriff who recovered the Dodge Monaco. Gillette knew Mungin from high school when they were partners on the same wrestling team. (Evid. Hrg. Trans. 61). Gillette had a limited role in the

investigation of this case when it was in Georgia. (Evid. Hrg. Trans. 61). The sergeant on the case, Rob Mastriani, requested Gillette locate the vehicle that Mungin arrived in. Sergeant Mastriani was involved with executing a search warrant and arresting Mungin. (Evid. Hrg. Trans. 63). The vehicle was located on the other side of a wooded area, about a hundred yards from the house. (Evid. Hrg. Trans. 63-64).

When he located the vehicle, a Dodge Monaco, Gillette filled out an inventory sheet that was entered into evidence as Defense Exhibit 3. (Evid. Hrg. Trans. 64). Gillette admitted that he did not go into the Monaco. (Evid. Hrg. Trans. 65). He also agreed that in his deposition and in his guilt-phase trial testimony, he stated that he observed a casing when he looked through the window of the Monaco. (Evid. Hrg. Trans. 70). Gillette testified that, while he was waiting for the wrecker to arrive to pick up the Monaco, he filled out the property receipt so that he had a copy to give to the driver, so that he would have a record of which car to pull. (Evid. Hrg. Trans. 72). Gillette admitted that he does not have an independent recollection of why he testified that he observed the casing in the Monaco. (Evid. Hrg. Trans. 73).

Gillette admitted that he visited Mungin after the trial about 10-15 years ago, while Mungin was on death row. (Evid. Hrg. Trans. 78-79). He also received a letter from Mungin that was received around the time that Gillette visited Mungin in prison. (Evid. Hrg. Trans. 79).

Mungin's investigator, Rosalind Bolin, spoke with Gillette about writing the affidavit. (Evid. Hrg. Trans. 80). Gillette has had contact with Bolin "over the last probably 20 years on and off." (Evid. Hrg. Trans. 81). Gillette discussed the affidavit with Bolin more than once. (Evid. Hrg. Trans. 82). When asked how long before the affidavit was signed that he and Bolin discussed the matter, Gillette stated, "I would say probably months before I filled the affidavit out." (Evid. Hrg. Trans. 84). It was after Gillette and Bolin had discussed Gillette's presence at Mungin's house when it was searched and his recovery of the Monaco that Bolin asked Gillette to sign the affidavit. (Evid. Hrg. Trans. 90).

Gillette corrected his statement from the affidavit and stated that he did not recall not seeing any of his reports or depositions prior to testifying and that it was possible that he did review his deposition prior to trial. (Evid. Hrg. Trans. 93-94).[4]

Gillette stated that he has "never knowingly lied on the stand." (Evid. Hrg. Trans. 97). When he testified at trial that he observed something in the vehicle without searching the vehicle, it was the truth as he knew it at the time. (Evid. Hrg. Trans. 97). Gillette also stated that his testimony at his deposition in Georgia, where he stated that he saw the casing in the back of the Monaco looking through the window, was what he believed at the time of his testimony. (Evid. Hrg. Trans. 99-100).

[4] In his affidavit, Gillette claimed to have never received them.

Gillette claimed that he did not see the casing because he wrote "nothing visible" on the inventory sheet. (Evid. Hrg. Trans. 104). However, he also stated that he has never lied while testifying. (Evid. Hrg. Trans. 104). He then testified:

> I do not recall seeing the bullets. I have no recollection, clear recollection like I do the day I got married I remember it very clearly. I wrote on here that there was nothing visible. I stated in here that I saw bullets. I have absolutely, unequivocally no understanding or why these two things are not consistent. I wish I had an answer for you but I don't.

(Evid. Hrg. Trans. 105). Gillette agreed that his memory was better in 1992, when the deposition was taken, versus 2016, when he wrote the affidavit. (Evid. Hrg. Trans. 105-06). He also agreed that he testified to the best of his ability at the deposition. (Evid. Hrg. Trans. 106). When asked if the deposition contained a reference to the report that Gillette claimed to not have seen prior to testifying at trial, Gillette confirmed that the report was referenced. (Evid. Hrg. Trans. 109-10). The doors on the Monaco, after it was found by Gillette, were never opened and it was put on the wrecker. (Evid. Hrg. Trans. 111). Gillette did not check off that there was a radio in the vehicle when he was filling out the property receipt and he was unsure if there was even a radio in the Monaco. (Evid. Hrg. Trans. 113). With regards to the property receipt, he stated, "[y]eah. I mean based on this I would assume there is no radio in there." (Evid. Hrg. Trans. 113).

Gillette testified that he had no knowledge of anyone tampering or putting anything into the Monaco and that he would have made documentation if he had

seen any tampering. (Evid. Hrg. Trans. 116). Gillette stated that he would have had to stay with the vehicle until someone else took it from him so there would be a clear chain of custody. (Evid. Hrg. Trans. 119). The normal procedure meant that he would have turned it over to someone from the Jacksonville Sheriff's Office when they arrived to take the Monaco. (Evid. Hrg. Trans. 119).

Gillette testified that there were two different forms that would be used when a car was taken into custody — one for evidentiary purposes and one for inventory purposes. (Evid. Hrg. Trans. 133). He also agreed that it is possible that he could have seen something in the vehicle after he had filled out the inventory receipt. (Evid. Hrg. Trans. 135-36).

Dale Gilbreath

Detective Dale Gilbreath was the lead detective on this case. (Evid. Hrg. Trans. 141-42). Gilbreath examined his continuation report he wrote for the case, as well as a notice of impoundment report. (Evid. Hrg. Trans. 143-44). The notice of impoundment, which was for the Monaco, indicated that the Monaco did have a radio. (Evid. Hrg. Trans. 146).

Gilbreath went to Woodbine, Georgia, to determine what he could do in the case. (Evid. Hrg. Trans. 149-50). He received a call from dispatch and went to the sheriff's office in Woodbine, Georgia, where he took the Monaco into custody. (Evid. Hrg. Trans. 150). When he took custody of the Monaco, Gilbreath observed

a shell casing was on the back floorboard through the window of the car. (Evid. Hrg. Trans. 151). Gilbreath was able to recognize the casing as a .25-caliber casing based on his experience as a detective in the major crimes division of the Jacksonville Sheriff's Office. (Evid. Hrg. Trans. 159-60).

While the car was being towed from Woodbine to Jacksonville, Gilbreath followed the vehicle with Detective Quinn Baxter. (Evid. Hrg. Trans. 153-54). The Florida Department of Law Enforcement (FDLE), which did an examination of physical evidence, recovered two casings and four latent prints from the Monaco. (Evid. Hrg. Trans. 157-58).

Gilbreath stated that he did not conduct a search inside the Monaco when he arrived at the Camden Sheriff's Department because

> [t]he vehicle was sealed. I — it had been in their locked impound yard. I was told it had not been searched by their deputy and I knew that it was going — the entire vehicle was going to be taken to FDLE by me so it wouldn't have to be processed there. It could be processed in total there at FDLE.

(Evid. Hrg. Trans. 161). Steve Leary of FDLE processed the Monaco and took photographs of the interior. (Evid. Hrg. Trans. 164). Dave Williams of FDLE conducted a ballistics examination on the casings recovered from the vehicle and he wrote a report stating that he was able to match up the casings from the vehicle and the casing from the homicide scene in Jacksonville. (Evid. Hrg. Trans. 165). He was also able to match up the casings to the gun found in the defendant's home that was

searched. (Evid. Hrg. Trans. 165). According to Leary's report, a root beer can and Budweiser can were recovered from underneath the front passenger seat. (Evid. Hrg. Trans. 169).

The Monaco was recovered about a block away from the home of Mungin's aunt, where Mungin was arrested. (Evid. Hrg. Trans. 168).

Bernardo De La Rionda

Mr. De La Rionda was the lead prosecutor on the case. (Evid. Hrg. Trans. 183). De La Rionda was aware of his obligations under *Brady*[5] and *Giglio*[6] as a prosecutor. (Evid. Hrg. Trans. 183). He agreed that he has a duty to correct false or misleading testimony. (Evid. Hrg. Trans. 183). De La Rionda testified that he provided discovery reports, which would have included the inventory property receipt. (Evid. Hrg. Trans. 184). "My recollection is I would have tendered to defense counsel copies of all the reports and everything. I attempted to as best I can — I don't know if I documented every single little paper, how many pages, et cetera, but I documented like reports of Jacksonville Sheriff's Office, you know, Camden County." (Evid. Hrg. Trans. 184). De La Rionda admitted that he might not have been as detailed in his discovery submissions in listing every document included, but that the record would speak for itself. (Evid. Hrg. Trans. 186).

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

He stated that to the best of his recollection, he did provide the property receipt in discovery at the trial phase. (Evid. Hrg. Trans. 187). De La Rionda believed it was provided based on the testimony at Gillette's deposition in Georgia, where De La Rionda needed to correct the timeline because he believed Gillette was mistaken. (Evid. Hrg. Trans. 188).

De La Rionda also testified that photographs were taken of the Monaco by FDLE. (Evid. Hrg. Trans. 191). He did not admit many photographs at the trial because he believed the evidence to be overwhelming and did not think he needed to enter more photographs. (Evid. Hrg. Trans. 193). The original photographs, including photographs that showed the interior of the Monaco, were shown to Mungin's defense counsel at the evidentiary hearing. (Evid. Hrg. Trans. 196). One of the photographs showed the casing on the rear floorboard of the Monaco. (Evid. Hrg. Trans. 197). The other casing was found beneath the seat and therefore, a photograph could not be taken of the casing. (Evid. Hrg. Trans. 197).

De La Rionda did not see Gillette's testimony as an inconsistency because "he was just documenting on what was the outside of the vehicle. In other words, he did not on behalf of his agency do a thorough inventory of the vehicle." (Evid. Hrg. Trans. 199). From the time Gillette found the vehicle to when it was towed to the Camden Sheriff's Department and then to Jacksonville Sheriff's Office, there was no dispute about what was or was not in the vehicle. (Evid. Hrg. Trans. 199).

"[N]obody could — had time to put anything in the car or take anything out of the car, and the gist of the evidence was what was found by Mr. Leary." (Evid. Hrg. Trans. 199). The car was examined by FDLE in Jacksonville. (Evid. Hrg. Trans. 200).

There were no additional witnesses that testified at the evidentiary hearing.

RECORD CITATIONS

Citations to the record shall be designated as follows: The direct appeal record shall be referred to by "ROA" and followed by the volume and page number; references to Appellant's Motion shall be referred to by "Motion" followed by the page number; references to the evidentiary hearing transcripts shall be referred to by "Evid. Hrg. Trans." and the page number. Any other references will be self-evident.

SUMMARY OF THE ARGUMENT

The lower court properly summarily denied Appellant's successive motion for postconviction relief.

Mungin's successive motion is time barred under the rule. The successive motion was filed one year from the date of the affidavit from Deputy Gillette. However, the motion and the affidavit failed to establish when Deputy Gillette was first approached about the statements made in the inventory report, as well as his testimony from his deposition and the trial. Mungin failed to establish when Deputy Gillette was approached during the evidentiary hearing. Any motion to vacate must

be filed within one year of the case being final, unless it falls within one of three narrow exceptions. It is clear from the testimony that the evidence did not fall within the exceptions and the motion is procedurally barred.

The prove a claim under *Giglio*, a defendant must prove (1) the testimony was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. In this case, Deputy Gillette's testimony at trial was not false. By Deputy Gillette's own admission, he has never knowingly lied while testifying and he testified from his memory. De La Rionda testified that he did not think the testimony was false because Deputy Gillette was just documenting what was on the outside of the vehicle rather than doing a thorough evaluation for evidentiary purposes. The testimony was also not material because it did not discredit the substantial evidence used to convict Mungin.

To prove a claim under *Brady*, a defendant must prove (1) the evidence was favorable — either exculpatory or impeaching; (2) the evidence was willfully or inadvertently suppressed by the State; and (3) the evidence was material and the defendant was prejudiced. In this case, the evidence did not meet the standards of *Brady*. During his deposition, Deputy Gillette was confronted with his inventory report, thereby showing that the evidence was not suppressed. The evidence was also not material. There was substantial evidence, without the casings found in the Monaco, that was used to connect Mungin to the murder — including the gun found

where he was arrested matching the bullet recovered from the victim's head. Mungin failed to prove how he was prejudiced and the postconviction court properly found no violation under *Brady*.

To establish a claim of ineffective assistance of counsel, the defendant must show (1) trial counsel's performance was deficient; and (2) the deficient performance caused the defendant prejudice that undermined the validity of the verdict. The court, in finding that the claim was procedurally barred, still addressed the claim in the abundance of caution. The court found that, even assuming trial counsel was deficient, his failure to cross-examine Deputy Gillette at trial about the inventory report did not prejudice Mungin in light of the overwhelming evidence of guilt. As such, the postconviction court properly found that Mungin failed to prove a claim of ineffective assistance of counsel.

Because each of Mungin's claims were meritless, he is not entitled to have all of his previous claims re-evaluated under a cumulative error analysis. Where alleged errors are found to be meritless or procedurally barred, the law clearly states that a claim of cumulative error cannot stand. The postconviction court properly found that because the instant claims in the successive motion for postconviction relief were meritless, Mungin's claim of cumulative error must also be rejected.

Because Mungin's claims are without merit and the postconviction court properly denied the claims, the State is respectfully requesting that this appeal be denied.

ARGUMENT

A. Appellant's claims are procedurally barred because they were filed more than a year after his case became final and do not fall within any of the narrow exceptions as defined by law.

Rule 3.851(d)(1), Florida Rules of Criminal Procedure, provides that any motion to vacate a judgment of conviction and sentence shall be filed within one year of the date that judgment and conviction became final. For purposes of this rule, Mungin's conviction and sentence to death became final on October 6, 1997. *Mungin II*, 522 U.S. 833. Mungin filed this instant motion on September 25, 2017, almost 20 years after his sentence and conviction became final. Therefore, on its face, the motion is untimely.

Mungin's Rule 3.851 motion could be considered timely filed, if his claim falls within three narrow exceptions to the one-year limitations period outlined in Rule 3.851(d), Florida Rules of Criminal Procedure. One of these exceptions, and the one Mungin seeks to invoke, is a claim of newly discovered evidence pursuant to Rule 3.851(d)(2)(A), Florida Rules of Criminal Procedure. A defendant does not, however, have unlimited time in which to bring a newly discovered evidence claim. Rather, a defendant must bring a claim of newly discovered evidence within one

year of the time he discovered the evidence or with due diligence could have discovered it. *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013) ("[t]o be considered timely filed as newly discovered evidence, the successive 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable through due diligence" quoting *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008)).

Although Mungin asserts that the affidavit of Malcom A. Gillette is newly discovered evidence and that he filed his motion within one year from the date the affidavit was signed, Mungin did not assert when he came into contact with Gillette or the circumstances leading up to Gillette signing the affidavit. The date for the filing of a motion for postconviction relief based on newly discovered evidence is not based on the date of the signed affidavit, but rather on the date that the evidence was discovered. Mungin makes no mention of when this information was discovered or could have been discovered with due diligence and he failed to present evidence to show when this information was discovered.

At the evidentiary hearing, it was patently clear that the motion was filed more than a year after the inconsistencies of Gillette's testimony were discovered. Gillette visited Mungin after the trial and received a letter from Mungin. (Evid. Hrg. Trans. 78-79). Gillette also testified that Mungin's investigator, Bolin, and he have had contact on multiple occasions since the trial. (Evid. Hrg. Trans. 81-83). He also

stated that Bolin had contacted him months prior to the affidavit being drafted and signed by Gillette and that he and Bolin discussed the affidavit more than once. (Evid. Hrg. Trans. 83).

This information could easily have been discovered shortly after the trial through due diligence of postconviction counsel. The reports were provided in discovery prior to trial, as De La Rionda testified during the evidentiary hearing. Gillette was one of the witnesses who testified at trial and he testified at a deposition, where he was confronted with the property receipt, as reflected in the transcript of the deposition.[7] As such, the motion was filed well outside the one-year time limit for claims of newly discovered evidence.

Therefore, the State asserts that the motion to vacate is untimely and must be dismissed. Additionally, even if this motion was timely, Mungin's claims of newly discovered evidence and *Brady* and *Giglio* violations are without merit.

B. Appellant failed to establish a claim under *Giglio* and the postconviction court correctly denied relief.

Mungin claims that Gillette's testimony is evidence of a *Giglio* violation. (Initial Brief at 60-67). However, the evidence failed to establish a violation under *Giglio* and the postconviction court properly denied relief.

[7] A copy of the transcript was entered into evidence as Defense Exhibit 1.

To establish a *Giglio* violation, "it must be shown that (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003). *See also Ventura v. State*, 794 So. 2d 553, 562 (Fla. 2001); *Rose v. State*, 774 So. 2d 629, 635 (Fla. 2000). A statement is material under *Giglio*, if "there is a reasonable probability that the false evidence may have affected the judgment of the jury." *Ventura*, 794 So. 2d at 563 (quoting *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991)).

By Gillette's own admission in his affidavit, as well as his testimony at the evidentiary hearing, he testified from his memory. Gillette was adamant that he has never knowingly testified dishonestly. In his affidavit, his knowledge is clearly based on his reading of his report and the property receipt and he stated that he did not have an independent recollection of the events. It is possible that Gillette, after he had already written the property receipt, saw the casing in the vehicle while waiting for Gilbreath to take possession of the vehicle.

De La Rionda testified that he did not think the inconsistencies were material because Gillette never did an actual search of the Monaco. As Gillette admitted at the evidentiary hearing, he did a visual search from the outside and did not enter the vehicle. Gilbreath also testified that he did a visual search from the outside of the vehicle and did not go inside because the vehicle was going to be turned over to FDLE for processing once it was brought to Jacksonville. Leary, who did an actual

search of the vehicle, including taking photographs, found one of the casings underneath a seat. That casing, as well as the root beer and Budweiser cans, would not have been visible from the outside of the vehicle and it is unrealistic to believe Gillette would have seen them.

Additionally, Gillette's recantation is about a collateral issue and is not material. The evidence against Mungin was overwhelming, even without the evidence collected from the Monaco. A customer identified Mungin as being the person who left the store quickly with a brown paper bag shortly before Woods was found. A .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification were found when police searched Mungin's residence after his arrest in Kingsland, Georgia, on September 18, 1990. "An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house." *Mungin I*, 689 So. 2d at 1027. This Court did not even mention the cartridges found in the Dodge Monaco. The casings were matched to the gun that was found in the house of Mungin's aunt, where Mungin was arrested.

The postconviction court noted that Gillette's testimony became uncertain during the evidentiary hearing. (Order at 15). After more than 20 years, Gillette was unable to explain the inconsistency between his testimony at trial and the inventory report but was adamant that he would have never knowingly lied on the stand. (Evid. Hrg. Trans. 97). The postconviction court properly ruled that Mungin was unable to

prove Gillette falsely testified at trial. (Order at 15). Additionally, the postconviction court found De La Rionda's testimony to be that he did not perceive the statements as false because Gillette merely documented what was on the outside of the vehicle, rather than doing a thorough inventory for evidentiary purposes. (Order at 15). Finally, the postconviction court properly ruled that Gillette's testimony was not material because it would not have affected the jury's verdict in light of the substantial evidence against Mungin. (Order at 15).

Consequently, Mungin failed to prove a *Giglio* violation and this claim was properly denied.

C. Appellant failed to establish a claim under *Brady* and ineffective assistance of counsel and the postconviction court correctly denied relief.

Mungin asserts that the evidence presented substantiated a *Brady* violation. (Initial Brief at 46-59). Gillette's testimony also does not meet the standard of a *Brady* violation. There are three elements of a *Brady* claim: "(1) [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Way v. State*, 760 So. 2d 903, 910 (Fla. 2000). *See also Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), *cert. denied*, 531 U.S. 1155 (2001).

To establish the materiality prong, a defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result

of the proceeding would have been different." *Wickham v. State*, 124 So. 3d 841, 851 (Fla. 2013) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* With regards to the second prong of *Brady*, "[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." *Floyd v. State*, 18 So. 3d 432, 451 (Fla. 2009) (quoting *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993)).

Gillette's affidavit and testimony do not meet the standards of a *Brady* violation because this information was equally accessible to both the State and the defense at the time of the trial. Gillette admits in his affidavit that he noted "nothing visible" in the property receipt he completed in this case. See Affidavit. However, he further states that his testimony was based on his recollection. See Affidavit. His report was available to the defense at the time of trial. De La Rionda testified that he provided the property receipt to defense counsel prior to trial and the property receipt was referenced during Gillette's testimony at the deposition. Under *Floyd*, because both the State and defense had equal access to the information, there is no *Brady* violation.

While Gillette's statement in the affidavit that he noted nothing visible in his report and testified to seeing two cartridges in the vehicle could be used as

impeachment, his contradiction is not material and Mungin cannot prove prejudice. There was overwhelming evidence of Mungin's guilt without the testimony of the cartridges found in the vehicle. This Court, in the direct appeal, did not mention the cartridges found in the Dodge Monaco, but highlighted the cartridges found in Mungin's home, along with his identification card and the .25-caliber pistol. *Mungin I*, 689 So. 2d at 1028. This Court also pointed out that the bullet recovered from the victim had been fired from the pistol found in Mungin's home. *Id.* The cartridges found in the vehicle were not material to prove Mungin as the shooter. This evidence would not have caused a different outcome in the trial.

Mungin relies on *Banks v. Dretke*, 540 U.S. 668 (2004), to establish that prosecutors have a duty to correct the record regarding **significant** exculpatory or impeaching material. However, this case is distinguishable from *Banks* because the information from Gillette's affidavit and testimony are not significant impeachment material and do not meet the standard for a *Brady* violation.

Mungin also argues that, as an alternative to the *Brady* claim, the affidavit establishes that trial counsel provided ineffective assistance of counsel. However, this claim must be denied. "A defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by filing successive motions." *Jones v. State*, 591 So. 2d 911, 913 (Fla. 1991). Mungin has previously raised claims of ineffective assistance of counsel, which were addressed after an evidentiary hearing.

Mungin III, 932 So. 2d at 995-1000. The trial court denied the ineffective assistance of counsel claims and this Court affirmed the denial. *Id*.

To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1994). "Judicial scrutiny of counsel's performance must be highly deferential." *Pagan v. State*, 29 So. 3d 938, 949 (Fla. 2009) (citing *Strickland*, 466 U.S. at 690). There is a strong presumption that trial counsel was effective in their representation. *Id*. (citing *Strickland*, 466 U.S. at 689). The standard for evaluation is not whether an attorney could have done more. *Id*. "A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id*. (citing *Strickland*, 466 U.S. at 689). "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Id*. (quoting *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000)).

The strong presumption that counsel's performance was sound is even stronger when trial counsel is experienced. *See Cummings v. Sec'y, Fla. Dept. of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009) (citing *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000) (en banc)). In Florida, minimum standards have

been established for appointment of defense attorneys in capital cases. Fla. R. Crim. P. 3.112. Those rigorous standards govern not just the qualifications of lead counsel on a capital case, but also co-counsel on a capital case in order to ensure the quality of representation afforded to a defendant facing capital punishment. As such, defendants facing capital punishment are often benefited with the legal expertise and experience of some of the most seasoned and knowledgeable lawyers available.

To establish prejudice, the defendant must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. 668. This Court has determined that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Rutherford v. State*, 727 So. 2d 216, 219 (Fla. 1998). "To assess that probability, we consider 'the totality of the available mitigation evidence — both adduced at trial, and the evidence adduced in the [postconviction] proceedings' — and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

In its order denying relief, the postconviction court found that Appellant failed to establish that the evidence was favorable. (Order at 8). The Court relied on the fact that, "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." (Order at 9; Evid. Hrg. Trans. 73, 97, 99, 101, 104-05). Additionally, De La Rionda testified that "there was no time for evidence to be added or taken out of the vehicle." (Order at 9; Evid. Hrg. Trans. 199). This testimony was undisputed at the evidentiary hearing. Detective Gilbreath's testimony regarding the discovery of the shell casings in the Monaco were consistent with FDLE Analyst Leary's findings. (Order at 9). The postconviction court, therefore, properly found that Mungin was unable to substantiate the evidence tampering allegation and that "Deputy Gillette's statement was purely speculative." (Order at 9). *See Crain v. State*, 78 So. 3d 1025, 1038 (Fla. 2011) (finding postconviction relief was not warranted based on "mere speculation"); *see also Davis v. State*, 736 So. 2d 1156, 1159 (Fla. 1999) (holding defendant cannot prevail in postconviction context based on "tenuous speculation").

The postconviction court noted that while 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." (Order at 10; Evid. Hrg. Trans. 116, 130). The postconviction court properly found that Mungin failed to prove that the State willfully or inadvertently suppressed that Deputy Gillette did not see the casings in the Monaco and that he failed to prove that the evidence was material. (Order at 10-11).

The postconviction court also properly found Mungin failed to prove his claim of ineffective assistance of counsel. Mr. Cofer testified that he did not have an independent recollection of Mungin's trial and trial preparation. (Evid. Hrg. Trans. 24-26). The postconviction court found that, even if Mr. Cofer's performance was deficient, Mungin failed to establish prejudice because of the overwhelming evidence presented against Mungin at trial. (Order at 13-14). The court noted "[s]pecifically, 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 [Mungin's] home." (Order at 14; ROA Vol. XIV at 621-22, 624, 658-59; ROA Vol. XV at 836-44, 847-48, 883-87). Thus, the postconviction court properly found that there was no reasonable probability that the outcome would have been different if Deputy Gillette had been confronted with the statements on the inventory report, as well as his statements during the deposition and at trial. (Order at 14).

As such, because Mungin failed to prove a *Brady* violation and ineffective assistance of counsel, this claim was properly denied by the postconviction court.

D. The evidence does not establish a claim of newly discovered evidence and Mungin was properly denied relief.

In order to set aside his conviction based on newly discovered evidence, Mungin must show (1) the evidence was unknown by trial counsel, by the party, or by counsel at the time of trial and the defendant or his counsel could not have known of it by the use of due diligence; and (2) the newly discovered evidence must be of

such nature that it would probably produce an acquittal on retrial. *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998); *see also Robinson v. State*, 865 So. 2d 1259, 1262 (Fla. 2004). In analyzing the second prong, once it is determined that there are no evidentiary bars to the evidence being admitted, the trial court should consider whether the evidence goes to the merits, is impeachment evidence, or whether the evidence is cumulative to other evidence in the case. *See Williamson v. Dugger*, 651 So. 2d 84, 89 (Fla. 1994); *Johnson v. Singletary*, 647 So. 2d 106, 110-11 (Fla. 1994). Further, when the evidence is from a witness to the events that occurred at the time of the crime, the trial court should also consider the length of the delay and the reason the witness failed to come forward sooner. *Jones*, 709 So. 2d at 521-22.

This evidence could have been known through due diligence at trial, as well as during postconviction proceedings. Gillette testified at trial and was a known witness to all parties. Additionally, trial counsel had access to the police reports in this case. Gillette's affidavit is based on his review of his police report that he wrote when he was involved in the case. At best, Gillette's affidavit would be used as impeachment evidence. By his own admission, Gillette testified at trial based on his recollection of the events. During his testimony, the State asked if Gillette had seen anything in the vehicle. Gillette responded, "Yes, sir, I saw some cartridges, some pistol cartridges." (ROA Vol. XV at 828). Now he is saying, **based on what was noted in his report**, he did not see anything. See Affidavit. During the evidentiary

hearing, Gillette agreed that he did not remember seeing his reports or deposition transcript prior to testifying at trial, and that his statement in his affidavit was meant to reflect his lack of recollection. Gillette also agreed that his memory was better when the deposition was taken than it is now.

This Court, in the direct appeal, did not mention the cartridges found in the Dodge Monaco, but highlighted the cartridges found in Mungin's home, along with his identification card and the .25-caliber pistol. *Mungin I*, 689 So. 2d at 1028. The Court also pointed out that the bullet recovered from the victim had been fired from the pistol found in Mungin's home. *Id.* The cartridges found in the vehicle were not material to prove Mungin as the shooter.

Mungin did not sufficiently address Gillette's failure to come forward with this information years ago. Gillette made no mention of why he came forward now to contradict his trial testimony in either his affidavit or his evidentiary hearing testimony. He never explained his failure and delay in bringing this information forward. Mungin was convicted in January 1993; more than 23 years passed before Gillette signed an affidavit. *Archer v. State*, 934 So. 2d 1187, 1198 (Fla. 2006) (trial court skeptical regarding the length of delay and rejecting witness's explanation for his failure to recant trial testimony until 12 years after trial). Gillette has had regular contact with Mungin's defense team and Mungin himself. This evidence cannot meet the standards of newly discovered evidence.

Gillette's recantation is about a collateral issue. A customer identified Mungin as being the person who left the store quickly with a brown paper bag shortly before Woods was found. A .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification were found when police searched Mungin's residence after his arrest in Kingsland, Georgia, on September 18, 1990. "An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house." *Mungin I*, 689 So. 2d at 1027. Gillette's testimony regarding the vehicle, by his own admission, was based on his recollection. While his testimony may have been a mistake of fact, it was not intentionally false.

The postconviction court properly found that the evidence did not meet the standards of newly discovered evidence. The court noted that defense counsel had access to the inventory sheet and knew of its existence. (Order at 16; ROA Vol. I at 12-15; ROA Vol. XV at 827-28; Evid. Hrg. Trans. 42, 49-50; Def. Exh. 1 at 56-58). The statement was clearly known by both parties at trial. Moreover, the evidence was "not of the nature that would probably produce an acquittal on retrial." (Order at 17). Thus, the postconviction court properly denied the claim of newly discovered evidence.

E. Mungin is not entitled to relief under a cumulative analysis of his previously denied claims.

Mungin asserts that based on the claims he has raised over the years and this newly discovered evidence, there is a reasonable probability that it would raise reasonable doubt in the mind of at least one juror. (Initial Brief at 76-78).

However, in assessing the cumulative analysis of the numerous postconviction motions raised by Mungin over the course of 20 years, they do not entitle him to a new trial. Just filing a new affidavit does not raise old claims and make them have merit. The trial court should rely on its holdings regarding these claims raised over the years in determining what evidence should be looked at cumulatively. *See Tompkins v. State*, 994 So. 2d 1072, 1087 (Fla. 2008) (finding that Tompkins was not entitled to cumulative relief after looking at the trial court's conclusions in the claims raised in the prior postconviction motions). For example, this Court found that Mungin's prior *Brady* and *Giglio* claims were properly denied after an evidentiary hearing because Mungin was unable to meet the standards under each test. *Mungin V*, 141 So. 3d at 142-47. This Court also noted that Mungin was not entitled to a cumulative error analysis where the claims are found to be meritless. *See, e.g., Walker v. State*, 88 So. 3d 128, 137 (Fla. 2012) ("Because Walker has failed to provide this Court with any basis for relief in any of his postconviction claims, Walker is not entitled to relief based on cumulative error.").

Further, this Court has no duty to evaluate a claim that is procedurally barred — it does not factor into a cumulative analysis if it was not properly bought before this Court. Lastly, even assuming Gillette's recantation testimony is reliable, such testimony does not rebut the trial testimony of the identification, as well as the gun, Mungin's identification card, and ammunition found in Mungin's house during a search, and again this will only be considered impeachment testimony. Because Gillette's affidavit is of marginal weight, it does not change any prior conclusions or is likely to produce a new trial even taken cumulatively with the other evidence presented at post-trial hearings.

> 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 ground 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.").

(Order at 17). The postconviction court properly denied Mungin's cumulative error claim because all of the previous claims were meritless.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the postconviction court's order denying Appellant relief on his Successive Motion to Vacate Judgments of Conviction and Sentences with Request for Evidentiary Hearing. Appellant committed the murder and robbery of Betty Jean Woods. The evidence of guilt was overwhelming. The bullet recovered from Ms. Woods matched with the gun that was recovered from Appellant's residence, along with his identification card. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentence . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 at 695. "A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id*. at 696. The record affirmatively demonstrates beyond a doubt that even if the alleged errors had been committed, there is no chance that the outcome would have been different.

In conclusion, Appellee respectfully requests that this Honorable Court affirm the postconviction court's Order denying his claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Todd Scher, tscher@msn.com, Attorney for Appellant.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of the type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ *Lisa A. Hopkins*
COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN.,
Appellant,

vs. **Case Number SC18-635**

STATE OF FLORIDA,
Appellee.
_____/

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

REPLY BRIEF OF APPELLANT

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REPLY TO APPELLEE'S "SUMMARY OF THE TESTIMONY"

Beginning on page 5 of the Answer Brief [hereinafter AB], the Appellee sets out its "summary" of the evidentiary hearing testimony. The Appellee points to no fact as summarized by Mr. Mungin in his Initial Brief as wrong or inaccurate; instead, the Appellee provides its own version of the facts, taking out-of-context cherry-picked parts of the testimony and presenting them as "facts" while at the same time ignoring and/or misrepresenting the actual facts.

Most seriously, the Appellee **intentionally**[1] uses misleading words when referring to the inventory "receipt" filled out by Mr. Gillette, interchangeably calling it a "report" in order to falsely claim that the prosecution did not commit a *Brady*[2] violation because the defense possessed a "report" authored by Gillette. They are two different documents. This strategy of intentionally muddying the difference between the two documents is not limited to the "Summary of the

[1] There can be no doubt that the Appellee is intentionally misleading this Court through its knowing use of the terms inventory "receipt" versus "report." The difference between the two documents is one of the most important aspects of this case, and Mr. Mungin's Initial Brief devoted extensive discussion to the difference between Gillette's inventory "receipt" (which he filled out contemporaneously to the time when he made the observations he memorialized in that inventory "receipt") and a "report" he later filled out regarding his role in the case and which was discussed at his pretrial deposition. Mr. Mungin's Initial Brief also contained a detailed discussion of the factual errors made by the lower court in failing to recognize the difference between Gillette's inventory "receipt" and the "report" he later prepared. The difference between the inventory receipt versus Gillette's incident "report" is a crucial aspect of this case and the Appellee can hardly claim otherwise, making its whitewashing of the record all the more egregious.

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

Testimony" section of the Appellee's brief. It permeates it. But "the State cannot dictate reality by fiat," *Hardwick v. Sec'y, Fla. Dep't. of Corr.*, 803 F.3d 541, 555 (11th Cir. 2015), and the actual testimony reveals the falsity of many of the Appellee's "factual" statements.

Difference between Gillette's inventory "receipt" and his "report"

The State's strategy of misleading the Court as to certain facts is most on display in the portions of its "Summary of the Testimony" devoted to discussing the information contained in the actual document that Mr. Mungin alleged to have been suppressed by the State prior to trial: Gillette's inventory storage receipt.[3] For example, when "summarizing" the evidentiary hearing testimony of Charles Cofer, Mr. Mungin's trial counsel, the Appellee writes that Cofer was "confronted" with Gillette's pretrial deposition wherein "the State asked questions of Officer Gillette regarding his report and Cofer agreed that the questions were consistent with the vehicle storage receipt" (AB at 6). It is true that, at the evidentiary hearing, the State asked Cofer questions about Gillette's pretrial deposition. It is also true that during that deposition Gillette was asked about a "report" he prepared

[3] Unfortunately, the Appellee was successful in the circuit court in muddying the facts to such an extent that the trial court itself was confused when it wrote that the prosecutor "specifically addressed the documents in Deputy Gillette's deposition" (4PC-R. 147). The prosecutor did no such thing during Gillette's deposition; he only referenced an incident report prepared by Gillette which made no mention whatsoever of bullets, or casings, or any observations Gillette made when he inspected the Dodge Monaco in the morning of September 19, 1990.

detailing his role in the case. But Cofer did not "agree" that the questions asked by the prosecutor to Gillette during Gillette's pretrial deposition "were consistent with the vehicle storage receipt" as written by the Appellee; the way this sentence is written implies (falsely) that the document being referred to by the prosecutor during Gillette's deposition was "the vehicle storage receipt." It was not.

In reality, what Cofer said at the evidentiary hearing was that the prosecutor's question to Gillette at Gillette's deposition "contains *facts which are consistent with this inventory of vehicle search, vehicle storage receipt, yes*" (4PC-R. 43) (emphasis added).[4] This is an accurate statement; as Gillette would later explain, although there is an overlap in some of the information contained in the inventory storage receipt he filled out immediately after his discovery of the Dodge Monaco in the early morning hours of September 19, 1990, and the incident report he later would prepare, they were *two separate documents*. For starters and most obviously, one was called an incident report and one was called an inventory receipt (4PC-R. 259). Both documents refer to the fact that Gillette found the car

[4] When the prosecutor pressed Cofer at the evidentiary hearing about the "report" mentioned at Gillette's deposition and tried to get Cofer to agree that the "report" was the same as "the actual document, that is defense exhibit–the inventory" that was the document alleged by Mr. Mungin to have been withheld by the State prior to trial (4PC-R. 206), Cofer would not agree because he had no recollection "of whether or not [he] had that document" (4PC-R. 207). However, Cofer unequivocally testified that if he had a document suggesting that Gillette had observed "nothing visible" in the Dodge Monaco (which is what the inventory storage receipt said) when at trial he testified that he observed shell casings, he would have used it to impeach Gillette and confront him with the inconstency (4PC-R. 187-88).

and had it transported to the Sheriff's Office, and both contain general descriptive information such as the date and time he discovered the car, the type of car, etc. ***But there is nothing in the narrative section of the incident "report" that mentions bullets or casings at all*** (4PC-R. 290). Gillette did not believe he was referring to the inventory receipt when, during his pretrial deposition, he was being questioned about a "report" he had prepared (4PC-R. 264, 266). It was the inventory receipt–not the incident report–that made reference to the fact that there was "nothing visible" in the Dodge Monaco, as Gillette himself emphasized at the evidentiary hearing:

> I do not recall seeing bullets in the car. I wrote on here [the inventory receipt] that 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).

The inventory storage receipt filled out by Gillette is a separate and distinct document from the incident report he later prepared. They are two separate documents despite containing some overlapping information just as a driver's licence and a passport are separate documents containing some overlapping information. A driver's license and a passport both contain an individual's name and birth date. But a driver's licence also contains a driver's licence number, and

a passport contains a passport number. In other words, different information. A driver's license contains a person's status as an organ donor, whereas a passport does not. In other words, different information. A driver's license contains an individual's current address without identifying the individual's place of birth, whereas a passport does not contain an individual's current address but does state the individual's place of birth. In other words, different information. Just like the inventory storage receipt filled out by Gillette and Gillette's incident report. Two different documents despite containing certain overlapping information.

Testimony from Gillette about Affidavit

The Appellee also sets forth a truncated, oversimplified, and ultimately misleading "summary" about the testimony concerning Gillette and his interactions with Mr. Mungin's investigator, Rosalie Bolin, that led to Gillette himself writing and signing an affidavit on September 24, 2016 (AB at 8). For example, the Appellee writes that Bolin "spoke with" Gillette "about writing the affidavit" and immediately follows that sentence with a snippet of Gillette's testimony where he testified that he has had contact with Bolin "over the last probably 20 years on and off" (AB at 8) (citing pages 80-81 of the evidentiary hearing transcript).[5] The way

[5] The Appellee references the pagination of the original version of the evidentiary hearing transcript; pages 80 and 81 are found at 4-PCR. 243-44. The Appellee's brief never cites to the paginated record before this Court; rather, it merely refers to the pagination of the evidentiary hearing transcript or the original pagination of the trial court's order. Mr. Mungin will attempt as best he can to reconcile the pages cited by the Appellee with the proper page in the record.

that the Appellee has cherry-picked parts of the testimony is designed to give the reader (this Court) the (false) impression that the information provided by Gillette in the affidavit he himself wrote and signed was perhaps decades old.

The Appellee leaves out of its "summary" more facts than it includes. It is true that investigator Bolin had contacted Gillette many years ago about Mr. Mungin's case; after all, Gillette had been a trial and penalty phase witness and had personally known Mr. Mungin when they grew up together in Georgia (4PC-R. 244). Bolin's only motivation in persisting in her contact with Gillette was "to get to the truth" (4PC-R. 245). Although he could not testify under oath to the exact time line, Gillette denied that it had been "years" after he spoke with Bolin about the information contained in his affidavit that he wrote and signed the affidavit, despite the prosecutor's persistent attempts to get Gillette to testify otherwise:

> Q [by Mr. de la Rionda] Okay. And so she's contacted you. I am assuming you didn't know her before?
>
> A [by Mr. Gillette] I did not know her before this case.
>
> Q Okay. So she contacted you when specifically was the first time? You mentioned 20 years so would it have been like 1997 or there or 2007?
>
> A Sir, honestly I have – I have no idea.
>
> Q Okay. And the contacts that you had with Ms. Bolin, were those in person or by phone?

A Mostly by phone. We had met in person before.

Q So you talked to her by phone, correct?

A Yes, sir.

Q And she just call you out of the blue, I am helping to represent Anthony Mungin, I have some questions of you?

A Actually she said I am representing Mr. Mungin and we are just trying to get to the truth.

Q Sure.

A She says that all the time.

Q Sure. And did she tell you how she got your name?

A I don't recall that specifically. I remember her – no. Not concerning me. I remember us talking about someone that she said she got a name out of the file but I don't think she was referring to me.

Q All right. So she would have asked you about the – what you saw in the car I am assuming, correct?

A I don't – I don't know. She didn't ask me about what – everything I saw in the car. I do recall – I think I recall her asking me if I saw anything that stood out to me in the car.

Q Okay. *And that would have been years before you did this affidavit, correct, that she asked you that?*

A *I can't say that it was years before she asked me to fill the affidavit out that she asked me that question.*

Q *Well, was it at least a year or two before that*?

A I *can't – I can't testify.* I mean I can assume.

Q No. I don't want you to assume – I don't want you to assume or anything. I am just saying this affidavit came because you met with her and you filled this out, correct?

A Yes, sir.

Q So prior to filling this out, which you stated you prepared yourself, you had discussed this with Ms. Bolin, correct?

A Yes. That is correct.

Q And would it be fair that you discussed it with Ms. Bolin more than one time?

A The affidavit, yes, that would be fair. *I just don't know the time line, sir.* I doesn't seem to me – I am surprised that it's been almost two years since I typed the affidavit. I guess time just flies.

(4PC-R. 244-46) (emphasis added).

Under the prosecutor's persistent questioning, Gillette acknowledged that it could have been months (not years) between the time he discussed with Bolin the information he later wrote in his affidavit, and the day he signed the affidavit (September 24, 2016) (4PC-R. 84). The decision about what to put into the affidavit and when to sign it was entirely Gillette's; in fact, Gillette explained that 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). He "wanted to make sure that there was no influence to anything that was not of my own accord" (4PC-R. 254).

Testimony from ASA de la Rionda about Inventory Storage Receipt

In "summarizing" the evidentiary hearing testimony of trial prosecutor de la Rionda, the Appellee persists in misleading the Court about the facts. Again cherry-picking parts of testimony and merging them together, the Appellee writes that de la Rionda "testified that he provided discovery reports, which *would have included the inventory property receipt*" (AB at 12) (citing page 184 of the evidentiary hearing transcript) (emphasis added). This is a misrepresentation of de la Rionda's testimony.

When explicitly asked about Gillette's inventory receipt and his recollection about that document, de la Rionda testified "*I don't know if I recalled specifically the specific paper*" (4PC-R. 347) (emphasis added). He went on to explain that he understood his obligations under *Brady* and *Giglio*,[6] and that the inventory storage receipt was the type of document that he "would provide" in discovery pursuant to

[6] *Giglio v. United States*, 450 U.S. 150 (1972).

those obligations, and that based on his "normal procedures" he did "to the best of my recollection" (4PC-R. 350).

But upon further exploration of Mr. de la Rionda's "recollection," he acknowledged that "in terms of precisely this thing [the inventory storage receipt] I don't have an independent memory right now of this thing" (4PC-R. 351). His assumption that he had disclosed the inventory receipt was based on his "normal procedures" as well as his reading of Gillette's deposition; but in the deposition de la Rionda only referred to the "incident report" prepared by Gillette (4PC-R. 351-52). The specific document de la Rionda was questioning Gillette about during the deposition was referred to as a "report" (4PC-R. 352).[7] Mr. de la Rionda acknowledged that the inventory storage receipt and the incident report were two different documents and both made reference to the date (09/19/90) and the time (0027) (4PC-R. 352). They both also indicated the name, type, model, and color of the car in question (*Id.*). **But the only document of the two that revealed anything about Gillette's observations about the Monaco and anything about "nothing visible" was the inventory storage receipt, not the incident report.**

[7] Upon cross-examination by the State at the evidentiary hearing, de la Rionda reiterated that it was his recollection that Gillette was confronted with "*a report* that had the information pertaining to the Dodge Monaco during his deposition" (4PC-R. 361) (emphasis added). The "report," as de la Rionda's direct examination testimony had earlier established, only contained a narrative about the car being taken and later secured at the Camden County Sheriff's Office; it did not reflect the information written by Gillette on the inventory storage receipt: "nothing visible."

The narrative on the incident report "just talks about the car and taken to Camden County Sheriff's Office and then Keith Kelley's Wrecker Service secured it for processing" (4PC-R. 353).

ARGUMENT IN REPLY

MR. MUNGIN WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL DUE TO THE SINGULAR AND COMBINED EFFECTS OF THE DUE PROCESS VIOLATIONS THAT OCCURRED, THE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE, THE KNOWING PRESENTATION OF FALSE EVIDENCE, AND NEWLY DISCOVERED EVIDENCE. THE LOWER COURT'S ORDER IS GROUNDED ON FACTS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND REACHES LEGAL CONCLUSIONS THAT ARE CONTRARY TO PRECEDENT FROM THIS COURT AND FROM THE UNITED STATES SUPREME COURT. A NEW TRIAL AND/OR A RESENTENCING ARE WARRANTED.

A. Introduction.

The Appellee does not take issue with Mr. Mungin's brief insofar as it discusses the proper standards of review in this appeal of the denial of relief following an evidentiary hearing. In fact, the Appellee does not address the standard of review at all, an omission that is particularly glaring given that it is raising a procedural defense that was rejected (at least implicitly if not explicitly) by the lower court. The Appellee failed to cross-appeal the rejection of the procedural defense it now attempting to resurrect. For the reasons set forth below,

the Court should reject the State's attempt to urge a procedural bar. And, as to the merits of the issues, Mr. Mungin submits that nothing in the Appellee's brief undermines his position that he is entitled to a new trial or, at a minimum, a resentencing proceeding in light of the record as it now stands in this case.

B. Alleged Procedural Bar.

The State first argues that all of the issues raised by Mr. Mungin– those same issues on which the lower court determined that an evidentiary hearing was necessary–are procedurally barred for a variety of reasons (AB at 17). First and foremost, Mr. Mungin submits that by granting an evidentiary hearing on the merits of the claims raised by Mr. Mungin, the trial court at least implicitly rejected the procedural bar defense the State raised in its written response to Mr. Mungin's Rule3.851 motion. In failing to cross-appeal the lower court's rejection of its procedural defense and its granting of an evidentiary hearing, the State has waived any argument that Mr. Mungin's claims are procedurally barred. *See Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State").[8]

[8] *Cannady* involved a capital appeal where the State attempted to argue that the defendant was deserving of the death penalty in light of an aggravator that had not been presented to the jury or the trial judge. This Court found that because "the State did not file a cross-appeal on this issue," it had "not been preserved for appeal." *Cannady*, 620 So.2d at 170

There was a case management hearing in this case, at which the parties were given the opportunity to argue their respective positions on the necessity of an evidentiary hearing (Supp. 4PC-R. 377-85). Mr. Mungin's counsel argued for the need for an evidentiary hearing (*Id*. at 381-82). Counsel also brought to the lower court's attention the fact that the State, in its written response, had argued that Mr. Mungin's motion was technically deficient for failing, in its view, to adequately allege certain details about the diligence underlying the claims; in response, Mr. Mungin's counsel argued that "if there is anything else that the Court determines is a pleading deficiency, . . . the proper recourse is for the Court to so order and allow an amendment so I can have the opportunity to correct any deficiency" (*Id*. at 382).

The State, at the case management hearing, advanced two reasons why the motion should be summarily denied. First, it argued that "this is time barred" because "Gillette testified at trial" and acknowledged that "he was testifying from his memory" (*Id.*). Second, the issue of the shell casings was, in the State's view, a "collateral issue" and that this Court did not mention the shell casings that were found in the vehicle (*Id*. at 382-83).[9]

[9] The State *did* certainly mention the shell casings at trial; it argued repeatedly to the jury that the casings from the Dodge Monaco were crucial to its case against Mr. Mungin. See T985 ("And we know the car was involved because there is two shell casings recovered from that car. So, here is the car. That happened to match the shell casing that is recovered from the gun. I'm sorry. From the scene of the Jacksonville homicide, and that matched having been fired from that gun"); T986 ("You have got that in Georgia, you have the other shootings, you have Jacksonville here, and you have got the car. All those pieces of evidence are linked in a trail of evidence that show this

After hearing the parties' arguments, the trial court ruled:

> I have reviewed the motion and the response, as well as the law as it relates to the discovered evidence, I'm going to grant the motion for an evidentiary hearing. You'll receive an order and the order will outline any deadlines.

(Supp. 4PC-R. 383-84). The court subsequently entered a written order reiterating that "this Court will grant Defendant an opportunity to present evidence at an evidentiary hearing on issues raised" in his successive Rule 3.851 motion (4PC-R. 45). The court went on to detail those specific claims: a *Brady* claim, an ineffective assistance of counsel claim, a *Giglio* claim, and a newly discovered evidence claim (*Id.* at 45-46). At no time did the court mention any procedural bar; indeed, any such ruling would have rendered moot the need for an evidentiary hearing.

Following the evidentiary hearing, the court permitted the parties to file post-hearing memoranda. The State's memorandum included a section called "Time Barred" in which it argued, as it does now, that Mr. Mungin's Rule 3.851 motion was time barred (4PC-R. 64-66). In the court's order, however, it made no determination that Mr. Mungin's motion was untimely or otherwise procedurally barred or subject to dismissal or denial. To the contrary: the lower court "found all

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defendant was the person who did it"); T1000-01 ("You also have the car being recovered, that is, the Dodge Monaco, being recovered 75 to a hundred yards from where the defendant is arrested, and you happen to have two shell casings which are right here, which, again, are matched to this gun. That's the car that was used to get back to Georgia").

of the claims of individual error . . . to be without merit" (4PC-R. 17). Despite the ability to ask the court to reconsider its merits ruling in its order, specifically noting that it had failed to address the State's time bar arguments, the State did not avail itself of that avenue either.

The Appellee has sat on its hands and has waived any argument now, on appeal, that Mr. Mungin's motion is time-barred or that there were evidentiary gaps that undermine his counsel's diligence. The lower court granted an evidentiary hearing on the 4 sub-claims identified by the court in its post-case management hearing order, Mr. Mungin presented his evidence, and the court ruled on the merits of those claims. The Appellee's attempt to belatedly argue that the lower court should have found Mr. Mungin's Rule 3.851 motion to be procedurally barred as untimely should be rejected. It offers no reason why the lower court was incorrect in determining at the case management hearing that an evidentiary hearing was warranted. *See Franqui v. State*, 59 So.3d 82, 95 (Fla. 2011) (postconviction court's decision to grant an evidentiary hearing is "ultimately based on written materials before the court" and is "tantamount to a pure question of law, subject to de novo review"). Based on the "materials before the court," the lower court determined that an evidentiary hearing was required, implicitly if not explicitly rejecting the State's invocation of a procedural bar. Certainly, if the

court had any concern that Mr. Mungin's motion may have been barred, it would have been obligated to allow him to amend the motion to correct the deficiencies argued by the State that went directly to the timeliness of the motion. It did not because it rejected the State's procedural bar arguments.

The Appellee's after-the-fact attempt to justify a procedural bar never found by the trial court turns appellate procedure upside down. If the Appellee wished to pursue its procedural bar defense on appeal, it could and should have filed a cross-appeal in the trial court, as allowed for and explained in the rules of appellate procedure. *See* Fla. R. App. P. 9.140 (c)(1) (explaining procedure for State cross-appeals in criminal and collateral proceedings). Or it could and should have filed an appeal from the circuit court's order granting Mr. Mungin an evidentiary hearing. The State is aware of these procedures because it has followed them in other cases.

For example, in *Waterhouse v. State*, 82 So.3d 84 (Fla. 2012), this Court addressed an appeal in a capital case from the denial of a successive Rule 3.851 motion; the motion had been summarily denied in part but the trial court had granted an evidentiary hearing on a newly-discovered evidence claim. The Court noted that the case was before it on an appeal by Waterhouse of the claims which were summarily denied by the trial court and on cross-appeal by the State

"challenging the postconviction court's determination that Waterhouse's second claim was timely filed pursuant to rule 3.851(d)(2)(A)." *Waterhouse*, 82 So.3d at 95.

The State has appealed or cross-appealed circuit court rulings in capital cases in a variety of contexts, either on an interlocutory basis or from a final order. In *State v. Sireci*, 502 So.2d 1221 (Fla. 1987), the Court addressed the State's appeal of the granting by the trial court of an evidentiary hearing on a successive Rule 3.850 motion in a capital case. The Court noted its precedent establishing that "the state may appeal from an adverse judgment in a 3.850 proceeding" and that such an appeal was within this Court's exclusive jurisdiction to hear appeals in capital cases. *Id*. at 1223. *Accord State v. White*, 470 So.2d 1377 (Fla. 1985); *State v. Fourth Dist. Court of Appeal*, 697 So.2d 70 (Fla. 1997). In *State v. Lewis*, 656 So.2d 1248 (Fla. 1994), the State sought interlocutory review by way of appeal from an order entered by the circuit court in a capital case allowing for limited discovery in a Rule 3.850 proceeding. And in *State v. Kokal*, 562 So.2d 324 (Fla. 1990), this Court, by way of a writ taken by the State, addressed an order by the circuit court ordering disclosure of the prosecutor's file in a capital Rule 3.850 proceeding.

Citing no case or other legal authority, the State argues that the date for the filing of Mr. Mungin's successive Rule 3851 motion did not begin to run on the date that Gillette signed the affidavit but rather when Gillette first told investigator Bolin of the information that later formed the basis of his affidavit–an affidavit which contained allegations and information that the lower court determined could not be conclusively refuted by the record (AB at 18). This is wrong, especially under the facts of this case. Although Gillette was unclear on the exact time-frame between when he and Bolin discussed the inventory storage receipt and when he wrote and signed the affidavit,[10] that ultimately is not the relevant question here; the question is whether Mr. Mungin filed his Rule 3.851 motion "within one year of the date upon which *the claim* became discoverable through due diligence" (AB at 18) (citing *Reed v. State*, 116 So.3d 260, 264 (Fla. 2013)) (emphasis added).

Mr. Mungin's case unquestionably filed his Rule 3.851 motion within one year of when Gillette signed the affidavit. There has been no suggestion otherwise. What is lost on the State is that Mr. Mungin did not have a "claim" to bring to court until Gillette signed the affidavit. The unrefuted testimony on this record reveals the following chronology. Gillette, after having been contacted by investigator Bolin about Mr. Mungin's case, took it upon himself to obtain records

[10] So too was the circuit court. *See* 4PC-R. 152 ("this Court notes the time line of when Deputy Gillette was asked to write the affidavit and when it was executed is unclear").

from his former employer, the Camden County Sheriff's Department, and discovered the inventory storage receipt at issue (4PC-R. 271). He then had further discussions with Bolin, who at some point offered to provide him a draft affidavit for him to review so that a formal sworn statement could be obtained; Gillette refused the offer because he "wanted to make sure there was no influence to anything that was not of my own accord" (4PC-R. 254). In fact he insisted to Bolin that he was going to write out his own statement: "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 make sure that this affidavit had what I knew to be true" (4PC-R. 247). Gillette then, on his own and on his own time-line, wrote out an affidavit, signed it on September 24, 2016, and submitted it to Bolin (4PFC-R. 246). In other words, the content and timing of the sworn document giving rise to a claim in Mr. Mungin's case were solely within Gillette's control and outside of Mr. Mungin's control (especially after Gillette rebuffed Bolin's offer to have a draft statement prepared for his review). *Gillette alone decided the content of the affidavit; he alone decided that he was going to sign it; and he alone decided when he was going to sign it.*

The Appellee envisions a different set of criteria for capital defendants who may discover new evidence and bring a claim to a court. Rather than having a capital litigant's counsel conduct a competent and thorough investigation and, in

accordance with his ethical duties to the court and to his client, file a motion in a court of law raising a claim that has been investigated to the best of counsel's ability and supported by a sworn affidavit, the Appellee endorses a system whereby the minute a lawyer or investigator in a capital case is told by some person or persons about some new nugget of information that may or may not have a bearing on the case, the lawyer is required to file a claim in court within one year of that initial "discovery" of the information, no matter how unverified or even unreliable it might turn out to be.[11] This is a curious position given that the State's general disdain for piecemeal litigation. But this is the logical conclusion of the Appellee's position in Mr. Mungin's case. Yet were Mr. Mungin to have run into court before Gillette decided to write and sign an affidavit, the State would no doubt have complained that Mr. Mungin's allegations were unsupported and speculative. And the State would have been right. Without the signed affidavit, Mr. Mungin reasonably believed he had no claim sufficient to bring to court under the ethical standards required of counsel and the legal standards attendant to Rule

[11] Although not always, there are those cases in which it takes a long time to verify the accuracy of information that is provided by a witness to collateral counsel or his investigator, or even discern if there is any useful information at all. For example, in *Waterhouse, supra*, the Court noted that placing "the onus of verifying every aspect of an unambiguous police report" would "create a substantial amount of work in a capital case," especially where "collateral counsel's resources are [] not unlimited." *Waterhouse*, 82 So.3d at 103. In *Johnson v. State*, 44 So.3d 51 (Fla. 2010), this Court, in finding diligence in a capital case alleging newly discovered evidence of a *Giglio* violation, observed that it took years for collateral counsel to decipher handwritten notes by the trial prosecutor; counsel at one point had to send the notes to another part of the state to be deciphered by someone else. *Id.* at 72 n.18.

3.851 motions. Mr. Mungin filed the motion within a year of Gillette signing it. The motion was timely, and the lower court issued no ruling otherwise.

Just as the law finds no support for the Appellee's position, the Appellee's misrepresentations of the record provide no factual support for an after-the-fact determination of a procedural bar. As explained in detail in the introductory section of this Reply Brief, the inventory storage receipt was not the "report" that Gillette was asked about during his pretrial deposition. Nor did the prosecutor testify with any certainty that he provided the inventory storage receipt in discovery. The Appellee can repeat this falsehood as many times as it likes but it does not make it true.

Mr. Mungin's claims were brought in a timely fashion under the circumstances of his case. The lower court did not find to the contrary. The Appellee's arguments must be rejected.

C. Mr. Mungin's Constitutional Claims.

In his Initial Brief, Mr. Mungin detailed the facts and law underlying each of the asserted bases for relief on which the circuit court granted an evidentiary hearing: a *Brady* claim, a *Giglio* claim, a claim of ineffective assistance of counsel, and a claim of newly discovered evidence. The section of the Appellee's brief devoted to addressing Mr. Mungin's individual claims largely discusses the legal

standards for each of the claims. But the Appellee's brief comes up short when attempting to persuasively explain Mr. Mungin's disentitlement to relief in light of an accurate depiction of the evidence and the testimony adduced at the evidentiary hearing.

To the extent that the Appellee does address the facts, it merely regurgitates the same false and or/misleading facts that pervade its brief from beginning to end. Once again, muddling the difference between Gillette's inventory storage receipt and his incident report, the Appellee argues that "[h]is report was available to the defense at the time at trial" (AB at 23). Mr. Mungin does not disagree that Gillette's "incident report" was available to the defense trial; it was the "incident report" that was discussed at Gillette's deposition. But this has nothing to do with the *inventory storage receipt* on which Gillette wrote "nothing visible" with reference to his inspection of the Dodge Monaco. As to the inventory storage receipt and whether the State had disclosed it to defense counsel prior to trial, the Appellee merely repeats the same false information, asserting with unabashed certainty that prosecutor de la Rionda "testified that he provided the property receipt to defense counsel prior to trial and the property receipt was referenced during Gillette's testimony at the deposition" (AB at 23). Mr. Mungin directs the Court to the introductory section of this Reply Brief where he establishes the

absolute falsity of these two propositions that the Appellee presents as true facts. Not even the trial court order, which was replete with factual errors as detailed in Mr. Mungin's Initial Brief, reached any definitive conclusion about the inventory storage receipt. It merely assumed it had been disclosed based on an incorrect interpretation of Gillette's deposition and the "report" mentioned therein–an interpretation peddled by the State below and again on appeal in this Court. There is simply no basis whatever–much less competent and substantial evidence–to support any finding that Gillette's inventory storage receipt was disclosed to the defense or that it was the "report" discussed during Gillette's deposition.

Despite its attempts to blur the truth, the Appellee ultimately acknowledges what even the trial court did not: that Gillette's statement that he noted "nothing visible" in his "report"[12] and his trial testimony "to seeing two cartridges in the vehicle *could be used as impeachment*" because the two statements are contradictory (AB at 23-24) (emphasis added).[13] The Appellee argues that this contradiction is not "material" because of the "overwhelming evidence of

[12] The Appellee's loose language notwithstanding, it never disputes that Gillette's "incident report" – the "report" that is discussed during his deposition and thus available to the parties – says **nothing, not one word**, about Gillette's observations of and in the Dodge Monaco. This is because the incident report is different from the inventory storage receipt.

[13] The trial court recognized the inconsistency (4PC-R. 145), but failed to acknowledge the impeaching nature of the contradiction because it did not fit in with the lower court's legal framework that required Mr. Mungin to "prove" that law enforcement "planted" evidence.

Mungin's guilt without the testimony of the cartridges in the vehicle" and the issue of the cartridges is a "collateral" one (AB at 21, 24), yet ignores the fact that the State chose to introduce the cartridges into evidence, present the jury with testimony about these cartridges, and argue their significance to the case during closing arguments. *See* T985; 986; 1000-01. The Appellee speaks of the "customer" (Kirkland) that identified Mungin as the person who left the store with a brown paper bag shortly before Ms. Woods was shot (AB at 21), yet ignores the fact that this Court has determined that the testimony of George Brown, who testified at a prior evidentiary hearing, "does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting . . . " *Mungin v. State*, 141 So.3d 138, 146 (Fla. 2013). And this Court, on direct appeal, hardly defined the evidence against Mr. Mungin as "overwhelming" in determining that the trial judge had erred in not granting a judgment of acquittal on the charge of premeditated murder. *Mungin v. State*, 689 So.2d 1026 (Fla. 1995). Mr. Mungin also reminds the Court that the jury at the penalty phase returned a recommendation for death by the slimmest margin possible (7-5) under a statutory scheme that has since been found to be unconstitutional. The Appellee does not at all address Mr. Mungin's arguments as to the unreliability of his sentence given the new evidence presented below. *See* Initial Brief at 70-71.

To the extent that this Reply Brief does not address each and every factual or legal misstatement by the Appellee, Mr. Mungin is satisfied that his Initial Brief more than adequately sets forth an accurate statement of the facts and the legal standards attendant to his claims for relief. The Appellee's brief does not really challenge many of Mr. Mungin's arguments; indeed it is rather unresponsive to the Initial Brief. It certainly does not provide sufficient justification, legal or factual, to affirm the lower court's order. Mr. Mungin submits that he is entitled to a new trial; at a minimum, he is entitled to a resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was filed on this Court's electronic filing portal, which will serve all counsel of record in this matter, on this 31st day of October, 2018.

/s/ Todd G. Scher
TODD G. SCHER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210 (a)(2).

/s/ Todd G. Scher
TODD G. SCHER

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-635

ANTHONY MUNGIN,
Appellant,

v.

STATE OF FLORIDA,
Appellee,
_____/

MOTION FOR REHEARING AND/OR RECONSIDERATION

COMES NOW THE APPELLANT, ANTHONY MUNGIN, by and through undersigned counsel, and, pursuant to Fla. R. App. P. 9.330, moves this Court for rehearing and/or clarification of its recent opinion issued on February 13, 2020, in the above-captioned case. In support of this motion, Mr. Mungin states as follows:

On February 13, 2020, the Court issued a per curiam opinion affirming the denial of Mr. Mungin's Rule 3.851 motion, a motion denied following an evidentiary hearing ordered by the lower court. *Mungin v. State,* 2020 WL 7281179 (Fla. Feb. 13, 2020). This motion seeks rehearing of the Court's erroneous determination that Mr. Mungin's Rule 3.851 motion was time-barred, and clarification of its reasoning therefor.

The Court's Holding

Rather than address the actual facts adduced at the evidentiary hearing, the

lower court's findings, or the net effect of all of the information that the jury did not know[1] on the ultimate fairness of Mr. Mungin's capital trial, the Court imposed a time bar to all of Mr. Mungin's claims. But no procedural bar was ever found by the lower court. And at no time did the State avail itself of its ability to cross-appeal the adverse procedural ruling it received by the lower court,[2] thus waiving any reliance on a time bar in this appeal. The Court never addresses the State's waiver,

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[1] The Court cabins its recounting of "the facts of the murder" to only those "facts" as "stated in the opinion on direct appeal." *Mungin v. State*, 2020 WL 728179 at *1 (Fla. Feb. 13, 2020). Yet one of the "facts" about this case found on direct appeal was this Court's determination that the trial court erred in not granting a judgment of acquittal to Mr. Mungin on the charge of premeditated murder. *Mungin v. State*, 689 So.2d 1026, 1029 (Fla. 1995). Moreover, while the Court quotes "facts" as synthesized from trial, these are decidedly not the actual known "facts of the murder." The actual "facts" include all of the information presented by Mr. Mungin in subsequent collateral proceedings, including the "fact" that the credibility of the testimony of the "customer" mentioned in the direct appeal opinion—Ronald Kirkland—has been substantially called into question ***by this Court*** as a result of Mr. Mungin's collateral proceedings. *See, e.g. Mungin v. State*, 141 So.3d 138, 146 (Fla. 2013) (testimony of George Brown, presented at prior evidentiary hearing, "does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting"). This Court has also noted that the jury in Mr. Mungin's case was not presented with other evidence undermining Kirkland's credibility, including the fact that he was on probation at the time of his testimony in Mr. Mungin's trial and the fact that Kirkland had told the lead detective that, at the time he made his identification of Mr. Mungin in the photo display, he could not swear in court that the man in the photograph was the same person he saw exiting the store on the day of the murder. *Mungin v. State*, 932 So.2d 986, 998-99 (Fla. 2006).

[2] Following the evidentiary hearing and the submission of post-hearing memoranda, the lower court determined that "the claims of individual error . . . to be without merit" (4PC-R. 17). There was no discussion of a procedural bar.

sending the signal that only defendants, and not the State, have to follow the rules. *But see Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State"). The Court should rehear this case and address the State's waiver of its procedural argument.[3]

The imposition of a time bar under the circumstances of this case is erroneous because the Court overlooked and/or misapprehended the factual underpinnings of Mr. Mungin's claim as well as the actual issue raised by Mr. Mungin about Deputy Gillette and the information he possessed that had not been previously disclosed. Moreover, in imposing a time bar, the Court appears to have imposed obsolete pleading requirements for successive Rule 3.851 motions that are not required by

[3]The State is aware of its appellate options in these types of circumstances. For example, in *Waterhouse v. State*, 82 So.3d 84 (Fla. 2012), this Court addressed an appeal in a capital case from the denial of a successive Rule 3.851 motion; the motion had been summarily denied in part but the trial court had granted an evidentiary hearing on a newly-discovered evidence claim. The Court noted that the case was before it on an appeal by Waterhouse of the claims which were summarily denied by the trial court and on cross-appeal by the State "challenging the postconviction court's determination that Waterhouse's second claim was timely filed pursuant to rule 3.851(d)(2)(A)." *Waterhouse*, 82 So.3d at 95. The State has appealed or cross-appealed circuit court rulings in capital cases in a variety of contexts, either on an interlocutory basis or from a final order. *See State v. Sireci*, 502 So.2d 1221 (Fla. 1987); *State v. White*, 470 So.2d 1377 (Fla. 1985); *State v. Fourth Dist. Court of Appeal*, 697 So.2d 70 (Fla. 1997); *State v. Lewis*, 656 So.2d 1248 (Fla. 1994); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).

Rule 3.851 when Mr. Mungin filed his motion (or now for that matter), not imposed in other cases, and not at all mandated by the one case cited by the Court in support of such a novel pleading requirement. Mr. Mungin addresses these matters in turn below.

Mr. Mungin's Constitutional Claims Were Timely Raised Below

The Court generally outlined the factual claims undergirding Mr. Mungin's Rule 3.851 motion, filed on September 25, 2017, noting that the essence of the factual allegations arose from an affidavit executed by Deputy Malcom Gillette on September 24, 2016. *Mungin,* 2020 WL 7281179 at *1.[4] The Court also correctly noted that Mr. Mungin's Rule 3.851 motion raised a number of constitutional claims, including *Brady*,[5] *Giglio*,[6] and ineffective assistance of counsel;[7] he also alleged newly discovered evidence. *Id.*

The first problem with the Court's analysis is its determination that the mere fact that Gillette was a known witness at the time of trial somehow, as a matter of law, disqualifies any exculpatory information he later discloses from *ever* forming

[4]To be sure, there is no issue before this Court—nor was there any issue before the lower court—that Mr. Mungin failed to file his Gillette-based Rule 3.851 motion within a year of Gillette *signing his affidavit*.

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

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

[7] *Strickland v. Washington,* 466 U.S. 668 (1984).

the basis of a later Rule 3.851 motion based on a *Brady* or *Giglio* violation or a claim of ineffective assistance of counsel or one of newly discovered evidence. *Mungin*, 2020 WL 7281179 at *2 ("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"). This determination rests on a fundamental misapplication of the law and an ill-focused analysis; it also encourages the withholding of evidence in the hope that a defendant may never stumble across it.

The issue is not whether Gillette was a trial witness or a childhood friend of Mr. Mungin's or how many times Mr. Mungin may have spoken with Gillette over the years; Mr. Mungin was never alleging that Gillette himself was a newly discovered witness who possessed important exculpatory information withheld by the State. What he *did* allege was the ***State withheld exculpatory information*** within Gillette's possession that was not available for Mr. Mungin to pursue in court **until he signed the affidavit in 2016**. "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act." *Ventura v. State*, 479 So. 2d 479, 481 (Fla. 1996). The Court's conclusion is contrary to

United States Supreme Court precedent. In *Banks v. Dretke*, the United States Supreme Court wrote:

> Our decisions lend 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. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred."

540 U.S. 668, 695-6 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999)). "A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

The Court's analysis in Mr. Mungin's case conflicts with *Waterhouse*, *supra.* There are often cases in which it takes a long time to verify the accuracy of information that is provided by a witness to collateral counsel or his investigator, or even discern if there is any useful information at all. For example, in *Waterhouse, supra*, the Court noted that placing "the onus of verifying every aspect of an unambiguous police report" would "create a substantial amount of work in a capital case," especially where "collateral counsel's resources are [] not unlimited." *Waterhouse*, 82 So.3d at 103. In *Johnson v. State*, 44 So.3d 51 (Fla. 2010), this Court, in finding diligence in a capital case alleging newly discovered evidence of a *Giglio* violation, observed that it took years for collateral counsel to decipher handwritten notes by the trial prosecutor; counsel at one point had to send the notes

to another part of the state to be deciphered by someone else. *Id.* at 72 n.18.

The Court's errors outlined above lead into the second problem with the Court's analysis: its misstatements of the actual testimony and other evidence in the record about Gillette's information and how he came to disclose it to Mr. Mungin's counsel when he did. *Mungin*, 2020 WL 7281179 at *2 ("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 of times' over several months before 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") (quoting Fla. R. Crim. P. 3.851 (d)(2)(A); *Jones v. State*, 732 So.2d 313, 322 (Fla. 1999)).

While the Court did correctly note 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 misstates the context of these statements and fails to put them in the proper context of a *Brady*/*Giglio* claim. The most important part of Gillette's testimony, overlooked by the Court, is 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 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 Court imposed a time bar because the State does not want the merits addressed. Rehearing is warranted.

Improper Reliance on *Jones v. State*

In imposing a time bar to Mr. Mungin's claims, the Court also appears to be imposing a pleading requirement for successive Rule 3.851 movants that does not appear in the rule and has never been previously imposed by the Court since adoption of Rule 3.851. Citing *Jones v. State,* 732 So.2d 313, 322 (Fla. 1999), the Court wrote that Mr. Mungin's Rule 3.851 motion "offers no explanation as to why Gillette's evidence could not have been ascertained long ago by the exercise of due diligence,"; the Court further represents that *Jones* "held" that "when a motion asserts an untimely claim, the defendant must include a sworn allegation explaining his inability to assert the claim earlier." *Mungin*, 2020 WL 7281179 at *2. But that is

not what this Court "held" in *Jones*; nor does Rule 3.851 impose any such requirement. A review of the history of Rule 3.850 motions and Rule 3.851 motions reveals this Court's misapprehension in citing *Jones* in the present circumstances.

Jones addressed an initial **Rule 3.850** motion in a capital case. The initial postconviction motion at issue in *Jones*, filed in 1992, was a Rule 3.850 motion, not a Rule 3.851 motion. Prior to 1993, Rule 3.851 motions were only authorized for cases where a death warrant was signed. *See In re Rules of Criminal Procedure*, *Rule 3.851*, 503 So.2d 320 (Fla. 1987). The Rule 3.851 presently in operation did not come about until 1994. *See Allen v. Butterworth*, 756 So.2d 52, 57 (Fla. 2000); *In re Rule of Criminal Procedure 3.851*, 626 So.2d 198 (Fla. 1993).

The distinctions between former Rule 3.850 motions and the present Rule 3.851 are critical to understanding the Court's error and the concern Mr. Mungin has over the Court's apparent embrace of a two-decade old discussion in a Rule 3.850 case, for it can only cause further confusion to the lower courts and parties involved in capital litigation. The passage in *Jones* cited by the Court in its opinion in Mr. Mungin's case refers to a *Brady* claim raised by Clarence Jones; the specific *Brady* allegations at issue were made in an amendment to Jones's Rule 3.850 motion several years after seeking leave to amend. *Jones*, 732 So.2d at 321-22. The lower court determined that those *Brady* allegations were time barred with the following explanation:

> The court might be inclined to accept the defendant's argument on the timeliness of this claim if there had been a proper sworn allegation explaining the reasons for the delay in presenting the issue. **Rule 3.850 requires that a postconviction motion be submitted under oath.** If the motion asserts an untimely claim, then the defendant must also include a sworn allegation explaining the defendant's inability to assert the claim earlier . . . The amended postconviction motion in this case makes no allegation regarding the timeliness of the claim. **Without a sworn statement of facts that justify an exception to the time limit in rule 3.850(b), the court must consider the claim as untimely.**

Id. at 322 (quoting lower court's order) (emphasis added). After quoting from the lower court's order, this Court simply wrote: "We find no error in this ruling." *Id.* In light of this review of *Jones*, it is clear that this Court did not "hold" that a defendant "must include a sworn allegation explaining his inability to assert the claim earlier" as it indicated it did in the *Jones* parenthetical in Mr. Mungin's opinion; all the *Jones* Court did was find "no error" with the trial court's "reasoning."[8]

Moreover, as noted above, *Jones* addressed a Rule 3.850 motion filed in 1992, not a Rule 3.851 motion filed in 2017. Allegations in Rule 3.850 motions and

[8] Of further concern regarding the citation to and reliance on *Jones* is the fact that the federal court subsequently determined that this Court's procedural bar ruling on this particular *Brady* claim was erroneous and based on a misreading of the record in the case. *See Jones v. Tucker*, 2012 WL 1658928 (N.D. Fla. 2012) ("But the Florida Supreme Court decision did not rest on an *adequate* state ground. The trial court's stated ground for deeming the Bevis-memo claim untimely simply did not apply to that issue. Only as a result of the confusion between claims II and XIV did the trial court deem the Bevis-memo claim untimely. **The Supreme Court's adoption of the trial court's reasoning was inadequate for the same reason. Mr. Jones did not procedurally default this claim"**) (emphasis added).

amendments thereto were required to be made under a specific written oath signed by the defendant under penalty of perjury, *see Scott v. State*, 464 So.2d 1171 (Fla. 1985), and the version of Rule 3.850(d) in operation at the time Jones filed his Rule 3.850 motion required a sworn oath. *It was the lack of sworn oath,* along with confusion about the record, *see* supra n.8, that led the lower court to chide Jones's failure to file a sworn allegation explaining his putative lack of diligence, a determination with which this Court merely expressed agreement. *Jones*, 732 So.2d at 322.

But the Court in Mr. Mungin's case overlooked that this Court changed the provisions of Rule 3.851 in 2014 and, *inter alia,* ***eliminated the oath requirement***. *See In re Amendments to Florida Rules of Jud. Admin. Etc*., 148 So.3d 1171, 1175 (Fla. 2014) ("Also in subdivision (e), we eliminate the requirement that capital postconviction motions be filed under oath. The rule now requires that the postconviction motion contain a certification from the attorney filing it that he or she discussed the contents of the motion fully with the defendant, that the attorney has complied with Rule Regulating the Florida Bar 4-1.4, and that the motion is filed in good faith. We agree with the Subcommittee that this provision should be sufficient to ensure that postconviction motions will be presented in good faith, and contain no frivolous or meritless claims"). Mr. Mungin's Rule 3.851 motion was filed in full compliance with the requirements imposed by the Court and by the rules as they

presently operate (4PC-R 25).

This is not to say that the current Rule 3.851 does not require a defendant to make certain allegations in a successor motion. But all the rule requires is a defendant to allege, in relevant part, that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851 (d)(2)(A). This is hardly the same thing as requiring a defendant to provide "sworn allegations explaining his inability to assert the claim earlier." *Mungin*, 2020 WL 7281179 at *2. Moreover, while the Court sweepingly concluded that Mr. Mungin's Rule 3.851 motion "offered no explanation" why Gillette's evidence could not have been discovered earlier, *id.*, the actual motion itself belies the Court's characterization. *See, e.g.* 4PC-R ("Because the State has the ultimate duty to disclose exculpatory evidence to the defense, and the existence of this evidence was not previously disclosed by the State, and was only discovered recently though the efforts of Mr. Mungin's present collateral counsel, . . . "); *id*. at 14 ("In Mr. Mungin's case, despite having numerous opportunities to do so, the State failed to ever 'set the record straight' at any time in the pretrial or trial proceeding, or during Mr. Mungin's prior collateral proceedings, about the fact that Mr. Gillette never saw the bullets or casings and that the State knew it. Under the authority of *Banks* and *Strickler*, Mr. Mungin submits that the fact that the instant claim was not presented in his earlier

Rule 3.851 motions is not dispositive; indeed it is irrelevant").

Mr. Mungin moves the Court reconsider its citation to and reliance on *Jones*, a case discussing obsolete pleading requirements, the holding of which was later proved incorrect by a federal court.

WHEREFORE, the Appellant, Anthony Mungin, moves the Court to grant the relief as requested in this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of February 2019, I electronically filed the foregoing motion with the Clerk of Court by using the electronic filing portal which will send a notice of electronic filing to all counsel of record.

/s/ Todd G. Scher

FLORIDA SUPREME COURT

NOTICE OF CORRECTION

DATE: March 18, 2021

CASE OF: ANTHONY MUNGIN V. STATE OF FLORIDA

DOCKET NO.: SC18-635 **OPINION FILED:** February 13, 2020

ATTENTION: ALL PUBLISHERS

THE FOLLOWING CORRECTION HAS BEEN MADE IN THE ABOVE OPINION:

On p. 6, line 4, "; see also Jones v. State, 732 So. 2d 313, 322 (Fla. 1999) (holding that when a motion asserts an untimely claim, the defendant must include a sworn allegation explaining his inability to assert the claim earlier)" has been removed.

SIGNED: OPINION CLERK

Supreme Court of Florida

THURSDAY, MARCH 18, 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/or Reconsideration is hereby denied in light of the corrected opinion issued March 18, 2021.

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

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-635

ANTHONY MUNGIN,
Appellant,

v.

STATE OF FLORIDA,
Appellee,
_____/

MOTION FOR REHEARING AND/OR RECONSIDERATION

COMES NOW THE APPELLANT, ANTHONY MUNGIN, by and through undersigned counsel, and, pursuant to Fla. R. App. P. 9.330, moves this Court for rehearing and/or clarification of its recent opinion issued on March 18, 2021, in the above-captioned case. In support of this motion, Mr. Mungin states as follows:

On March 18, 2021, the Court issued a per curiam corrected opinion affirming the denial of Mr. Mungin's Rule 3.851 motion, a motion denied following an evidentiary hearing ordered by the lower court. *Mungin v. State,* 2020 WL 728179 (Fla. Feb. 13, 2020, as corrected on March 18, 2021). This motion seeks rehearing of the Court's erroneous determination that Mr. Mungin's Rule 3.851 motion was time-barred, and clarification of its reasoning therefor.

The "Facts" of the Case

The Court begins its opinion with an assertion that a quotation from the direct

appeal opinion in Mr. Mungin's direct appeal sets forth the "facts of the murder." 2020 WL 728179 at *1. In other words, the Court cabins its recounting and understanding of "the facts of the murder" to only those "facts" as "stated in the opinion on direct appeal." *Id*. Yet one of the "facts" about this case found on direct appeal (but not mentioned in the current opinion) was this Court's determination that the trial court erred in not granting a judgment of acquittal to Mr. Mungin on the charge of premeditated murder. *Mungin v. State*, 689 So.2d 1026, 1029 (Fla. 1995). And while the Court quotes "facts" as synthesized from trial, these are decidedly not the actual known "facts of the murder." The actual "facts" include ***all*** of the information presented by Mr. Mungin in subsequent collateral proceedings, including the "fact" that the credibility of the testimony of the "customer" mentioned in the direct appeal opinion—Ronald Kirkland—has been substantially called into question ***by this Court*** as a result of Mr. Mungin's collateral proceedings. *See Mungin v. State*, 141 So.3d 138, 146 (Fla. 2013) (testimony of George Brown, presented at prior evidentiary hearing, "does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting"). This Court has also noted that the jury in Mr. Mungin's case was not presented with other evidence undermining Kirkland's credibility, including the fact that he was on probation at the time of his testimony in Mr. Mungin's trial and the fact that Kirkland had told the lead detective that, at the time he made his identification of Mr. Mungin

in the photo display, he could not swear in court that the man in the photograph was the same person he saw exiting the store on the day of the murder. *Mungin v. State*, 932 So.2d 986, 998-99 (Fla. 2006). The Court should clarify in its opinion that the "facts" as stated by the Court on direct appeal have significantly changed.

The Court's Holding

Rather than address the actual facts adduced at the evidentiary hearing, the lower court's findings, or the net effect of all of the information that the jury did not know on the ultimate fairness of Mr. Mungin's capital trial, the Court imposed a time bar to all of Mr. Mungin's claims. But no procedural bar was ever found by the lower court, and at no time did the State avail itself of its ability to cross-appeal the adverse procedural ruling it received by the lower court,[1] thus waiving any reliance on a time bar in this appeal. The Court never addresses the State's waiver, sending the signal that only defendants, and not the State, have to follow the rules. *But see Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State"). The Court should rehear this case and address the State's waiver of its

[1] Following the evidentiary hearing and the submission of post-hearing memoranda, the lower court determined that "the claims of individual error . . . to be without merit" (4PC-R. 17). There was no discussion of a procedural bar.

procedural argument.[2]

The Court cites *Applegate v. Barnett Bank*, 377 So.2d 11250 (Fla. 1979), for the proposition that "it matters not" that the lower court denied Mr. Mungin's claims on the merits because, in this Court's view, his claims were untimely. 2020 WL 728179 at *2 n.4. Mr. Mungin submits that it certainly does "matter" that the lower court reached the merits and the State did not cross-appeal its rejection of a procedural bar. Mr. Mungin followed the rules of procedure in filing his notice of appeal; the State did not. *Applegate* is not a criminal case, much less a capital one, and is wholly inapposite to the circumstances presented here. *Applegate,* a case before this Court on its certiorari jurisdiction, addressed a conflict between the Applegate family and the Barnett Bank about a lien. It had nothing to do with a

[2]The State is aware of its appellate options in these types of circumstances. For example, in *Waterhouse v. State*, 82 So.3d 84 (Fla. 2012), this Court addressed an appeal in a capital case from the denial of a successive Rule 3.851 motion; the motion had been summarily denied in part but the trial court had granted an evidentiary hearing on a newly-discovered evidence claim. The Court noted that the case was before it on an appeal by Waterhouse of the claims which were summarily denied by the trial court and on cross-appeal by the State "challenging the postconviction court's determination that Waterhouse's second claim was timely filed pursuant to rule 3.851(d)(2)(A)." *Waterhouse*, 82 So.3d at 95. The State has appealed or cross-appealed circuit court rulings in capital cases in a variety of contexts, either on an interlocutory basis or from a final order. *See State v. Sireci*, 502 So.2d 1221 (Fla. 1987); *State v. White*, 470 So.2d 1377 (Fla. 1985); *State v. Fourth Dist. Court of Appeal*, 697 So.2d 70 (Fla. 1997); *State v. Lewis*, 656 So.2d 1248 (Fla. 1994); *State v. Kokal*, 562 So.2d 324 (Fla. 1990).

capital postconviction case, much less the Court's ability to review an issue that was waived or abandoned by a party who did not file a proper cross-appeal.

Mr. Mungin's Constitutional Claims Were Timely Raised Below

The imposition of a time bar under the circumstances of this case is erroneous because the Court overlooked and/or misapprehended the factual underpinnings of Mr. Mungin's claim as well as the actual issue raised by Mr. Mungin about Deputy Gillette and the information he possessed that had not been previously disclosed.

The Court generally outlined the factual claims undergirding Mr. Mungin's Rule 3.851 motion, filed on September 25, 2017, noting that the essence of the factual allegations arose from an affidavit executed by Deputy Malcom Gillette on September 24, 2016. *Mungin,* 2020 WL 728179 at *1.[3] The Court also correctly noted that Mr. Mungin's Rule 3.851 motion raised a number of constitutional claims, including *Brady*,[4] *Giglio*,[5] and ineffective assistance of counsel;[6] he also alleged newly discovered evidence. *Id.*

The first problem with the Court's analysis is its determination that the mere

[3]To be sure, there is no issue before this Court—nor was there any issue before the lower court—that Mr. Mungin failed to file his Gillette-based Rule 3.851 motion within a year of Gillette *signing his affidavit*.

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

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

[6] *Strickland v. Washington,* 466 U.S. 668 (1984).

fact that Gillette was a known witness at the time of trial somehow, as a matter of law, disqualifies any exculpatory information he later discloses from *ever* forming the basis of a later Rule 3.851 motion based on a *Brady* or *Giglio* violation or a claim of ineffective assistance of counsel or one of newly discovered evidence. *Mungin*, 2020 WL 728179 at *2 ("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"). This determination rests on a fundamental misapplication of the law and an ill-focused analysis; it also encourages the withholding of evidence by the State or by law enforcement in the hope that a defendant may never across it.

The issue is not whether Gillette was a trial witness or a childhood friend of Mr. Mungin's or how many times Mr. Mungin may have spoken with Gillette over the years; Mr. Mungin was never alleging that Gillette himself was a newly discovered witness who possessed important exculpatory information withheld by the State. What he *did* allege was the ***State withheld exculpatory information*** within Gillette's possession that was not available for Mr. Mungin to pursue in court **until Gillette signed the affidavit in 2016**. "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of

an asserted procedural default that was caused by the State's failure to act." *Ventura v. State*, 479 So. 2d 479, 481 (Fla. 1996). The Court's conclusion is contrary to United States Supreme Court precedent. In *Banks v. Dretke*, the United States Supreme Court wrote:

> Our decisions lend 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. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred."

540 U.S. 668, 695-6 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999)). "A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

The Court's analysis in Mr. Mungin's case also conflicts with *Waterhouse*, *supra n.2.* There are often cases in which it takes a long time to verify the accuracy of information that is provided by a witness to collateral counsel or his investigator, or even discern if there is any useful information at all. For example, in *Waterhouse,* the Court noted that placing "the onus of verifying every aspect of an unambiguous police report" would "create a substantial amount of work in a capital case," especially where "collateral counsel's resources are [] not unlimited." *Waterhouse*, 82 So.3d at 103. In *Johnson v. State*, 44 So.3d 51 (Fla. 2010), this Court, in finding diligence in a capital case alleging newly discovered evidence of a *Giglio* violation,

observed that it took years for collateral counsel to decipher handwritten notes by the trial prosecutor; counsel at one point had to send the notes to another part of the state to be deciphered by someone else. *Id.* at 72 n.18.

The Court's errors outlined above lead into the second problem with the Court's analysis: it misstates or overlooks the actual testimony and other evidence in the record about Gillette's information and how he came to disclose it to Mr. Mungin's counsel when he did. *Mungin*, 2020 WL 728179 at *2 ("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 of times' over several months before 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") (quoting Fla. R. Crim. P. 3.851 (d)(2)(A)).

While the Court did correctly note 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 misstates the context of these statements and fails to put them in the proper context of a *Brady*/*Giglio* claim. The most important part of Gillette's testimony, overlooked by the Court, is 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 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 Court imposed a time bar because the State does not want the merits addressed. Rehearing is warranted.

Erroneous Interpretation of Fla. R. Crim. P. 3.851(d)(2)(A)

The current version of Rule 3.851 does require a defendant to make certain allegations in a successor motion. But all the rule requires is a defendant to allege, in relevant part, that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851 (d)(2)(A). While the Court sweepingly concluded that Mr. Mungin's Rule 3.851 motion "offered no explanation" why Gillette's evidence could not have been discovered earlier, the

actual motion itself belies the Court's characterization. *See, e.g*. 4PC-R ("Because the State has the ultimate duty to disclose exculpatory evidence to the defense, and the existence of this evidence was not previously disclosed by the State, and was only discovered recently though the efforts of Mr. Mungin's present collateral counsel, . . . "); *id*. at 14 ("In Mr. Mungin's case, despite having numerous opportunities to do so, the State failed to ever 'set the record straight' at any time in the pretrial or trial proceeding, or during Mr. Mungin's prior collateral proceedings, about the fact that Mr. Gillette never saw the bullets or casings and that the State knew it. Under the authority of *Banks* and *Strickler*, Mr. Mungin submits that the fact that the instant claim was not presented in his earlier Rule 3.851 motions is not dispositive; indeed it is irrelevant").

Mr. Mungin moves the Court reconsider its interpretation of Rule 3.851(d)(2)(A) which led it to seemingly conclude that any information surfacing after a capital defendant's initial Rule 3.851 motion is time barred. 2020 WL 728179 at *2 ("Mungin's claims are untimely, for he filed the instant postconviction motion nearly twenty years after his judgment and sentence became final" and Gillette "was a known witness who was available to the defense since Mungin's 1997 trial"). By overlooking the actual testimony presented below, along with the legal standards governing this matter, the Court erred in its procedural disposition of this case.

WHEREFORE, the Appellant, Anthony Mungin, moves the Court to grant the relief as requested in this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of April 2019, I electronically filed the foregoing motion with the Clerk of Court by using the electronic filing portal which will send a notice of electronic filing to all counsel of record.

/s/ Todd G. Scher

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
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