No. 21-6472

OCTOBER TERM 2021

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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January 18, 2022

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REPLY TO RESPONDENT'S BRIEF IN OPPPOSITION AND TO RESPONDENT'S ASSERTED REASONS THAT THIS COURT LACKS JURISDICTION

Petitioner, Anthony Mungin, herein files this brief Reply to Respondent's Brief in Opposition (BIO) to his Petition for Writ of Certiorari to the Florida Supreme Court. The BIO ignores the questions presented by Petitioner and poses entirely different questions than the ones raised in the Petition. Rather than address the questions presented by Petitioner directly, the BIO obfuscates the issues and poses ones not set forth in the Petition. Accordingly, the BIO's questions presented should not be considered according to the rules of this Court.

Most significantly, the BIO sets out misleading narrative which, in Respondent's view, informs on this Court's ability to hear—indeed its jurisdiction—over Petitioner's petition. Indeed, Respondent devotes a significant portion of its BIO to providing this Court with an alternate set of facts wholly unsupported by the record. This Court's jurisdiction should not be determined by falsity, and it should reject Respondent's attempt to inject a false narrative to thwart this Court's jurisdiction over Petitioner's petition.

I Petitioner's Motion for Rehearing in the Florida Supreme Court was neither unauthorized nor untimely under Florida law.

The BIO contends—in language not susceptible to any ambiguous reading—that this Court lacks jurisdiction over Petitioner's petition because it is untimely under the Court's 150-day period allowed by the Court's COVID-related deadline order (BIO at 1). The Respondent does not contend that the 150-day filing deadline did not apply to Petitioner, *id.*, but rather that his "second, duplicative motion for rehearing . . . did not reset the certiorari petition clock" (BIO at 2). Indeed, not only

was Petitioner's second rehearing motion "duplicative," in Respondent's view, its filing was a violation of Florida "law" (BIO at 2) (citing Fla. R. App. P. 9.330(b)).[1] Respondent is grasping at straws and mispresenting the record in a most disingenuous manner.

It is true that, on February 13, 2020, the Florida Supreme Court issued a written opinion affirming the denial of the lower state circuit court's order denying Petitioner's motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851 (Att. A). At the end of the opinion, the following language appears: "**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.**" (*Id.*) (emphasis added).

On February 27, 2020, Petitioner timely filed a motion for rehearing pursuant to Fla. R. App. P. 9.330. Over a year later, on March 18, 2021, the Florida Supreme Court issued an order indicating that Petitioner's rehearing motion was denied "in light of the corrected opinion issued March 18, 2021) (Att. B). At the conclusion of the corrected opinion, the following language appears: "**NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.**" (*Id.*) (emphasis added). In other words, the identical language that appears in every non-final Florida Supreme Court written opinion.

On April 5, 2021—in full compliance with the proviso in the Court's opinion that its corrected opinion was not to be considered "final" until a motion for rehearing,

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[1] A putative violation of an appellate rule of procedure is hardly tantamount to a "clear violation of Florida law" (BIO at 2). But in any event, there was no "violation" of anything, "law" or rule, in this case, much less a "clear" one.

if filed, was determined—a motion for rehearing with respect to the Florida Supreme Court's "corrected" opinion dated March 18, 2021. Despite now claiming the rehearing motion was a "clear violation of Florida law" and an abuse of the rules, the State of Florida did not respond to Petitioner's motion. *See* Fla. R. App. P. 9.330(a)(3) (allowing for a response to a motion for rehearing within 15 days of service of the motion). Nor did it move to strike Petitioner's motion. Rather, it did nothing. On June 22, 2021, the Florida Supreme Court denied Petitioner's motion for rehearing. It did not deem it untimely, or unauthorized, nor did it strike it *sua sponte*. It *denied* it.

Nothing about Petitioner's undertaking to seek rehearing from the Florida Supreme Court's corrected opinion of March 18, 2021, establishes that this Court lacks jurisdiction due to any putative "timeliness" problem associated with the Florida Supreme Court's rehearing denial. The Florida Supreme Court not only denied Petitioner's first rehearing motion, but it also issued a corrected opinion that was not final until a rehearing motion, if filed, was determined. That is what happened here. Petitioner's petition was filed within the 150-day deadline established by this Court's rules, and Respondent does not contend otherwise. There is no jurisdictional concern in this case other than the one imagined by the Respondent in the BIO.

II Petitioner did raise a federal constitutional challenge in the Florida Supreme Court.

The BIO makes sweeping non-specific allegations that Petitioner did not raise his federal due process claims below (BIO at 12 et seq.). Respondent's position is

confusing, for in the very motion for rehearing that it claims was unauthorized and filed in violation of "the law," Petitioner's *federal constitutional challenge* to the Florida Supreme Court's disposal of his *federal constitutional claims* was explicit: the rehearing motion challenged, among other things, the Florida Supreme Court's imposition of a time-bar—a time bar that had not been imposed by the lower court—and cited, *inter alia*, that its conclusion was contrary to this Court's decision in *Banks v. Dretke*, 540 U.S. 668, 695-96 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999)). As Petitioner argued to the Florida Supreme Court, "[a] rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." (Mot. For Rehearing, Apr. 5, 2021, at 7). Indeed, the BIO acknowledges that "[s]trikingly, the Florida Supreme Court expressly declined to consider the merits of Petitioner's federal claims in light of this state procedural bar" (BIO at 13). That the Florida Supreme Court rejected Petitioner's federal claims without discussion does not mean that the federal nature of his claims was not raised below. That the Florida Supreme Court declined to address the federal issues is the very gravamen of the Petitioner's petition.

Respectfully submitted,

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January 18, 2022

ATTACHMENT A

Filing # 103251207 E-Filed 02/13/2020 11:02:00 AM

Supreme Court of Florida

No. SC18-635

ANTHONY MUNGIN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

February 13, 2020

PER CURIAM.

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

FACTS AND PROCEDURAL BACKGROUND

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

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving

> the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.

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

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

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

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

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

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

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

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

ANALYSIS

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

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

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

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

It is so ordered.

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

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

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

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

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

for Appellant

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

for Appellee

ATTACHMENT B

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

ATTACHMENT C

Filing # 123318864 E-Filed 03/18/2021 11:01:04 AM

Supreme Court of Florida

No. SC18-635

ANTHONY MUNGIN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

February 13, 2020
CORRECTED OPINION

PER CURIAM.

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

FACTS AND PROCEDURAL BACKGROUND

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

It is so ordered.

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

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

An Appeal from the Circuit Court in and for Duval County,
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Todd G. Scher of Law Office of Todd G. Scher, P.L., Hollywood, Florida,

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

for Appellant

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

for Appellee

ATTACHMENT D

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.

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