

No. _____

OCTOBER TERM 2023

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether the prohibition on a federal district court’s ability to dismiss a federal habeas corpus petition—or a claim or claims in a federal habeas corpus petition—on statute of limitations grounds, without affording the petitioner notice and an opportunity to be heard, as held by this Court in *Day v. McDonough*, 547 U.S. 198 (2006), applies with equal force to a federal appeals court which dismisses a federal habeas corpus petition—or a claim or claims in a federal habeas corpus petition—without affording the petitioner notice and an opportunity to be heard on the limitations question, when the district court did not address, much less rule on, a statute of limitations question?

PARTIES TO THE PROCEEDINGS BELOW

Anthony Mungin, an indigent death-sentenced Florida inmate, was the Appellant/Petitioner in the court below. The Secretary of the Florida Department of Corrections was the Appellee/Respondent in the court below.

LIST OF DIRECTLY RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), the following proceedings related to the case at issue in this Petition:

Underlying Trial:

Circuit Court in and for Duval County, Florida:

State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Feb. 23, 1993)

Direct Appeal:

Florida Supreme Court, No. SC60-81358:

Mungin v. State, 689 So. 2d 1026 (Fla. Feb. 8, 1996)

Supreme Court of the United States, No. 96-9161:

Mungin v. Florida, 522 U.S. 833 (Oct. 6, 1997)

First Postconviction Proceeding:

Circuit Court in and for Duval County, Florida

State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 21, 2003)

Florida Supreme Court, No. SC2003-0780:

Mungin v. State, 932 So. 2d 986 (Fla. June 29, 2006)

Second Postconviction Proceeding:

Circuit Court in and for Duval County, Florida

State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Oct. 8, 2009)

Florida Supreme Court, No. SC2009-2018:

Mungin v. State, 79 So. 3d 726 (Fla. Oct. 27, 2011)

Circuit Court in and for Duval County, Florida

State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 21, 2012)

Florida Supreme Court, No. SC2012-0877:

Mungin v. State, 141 So.3d 138 (Fla. Aug. 16, 2013)

Third Postconviction Proceeding:

Circuit Court in and for Duval County, Florida

State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 28, 2017)

Florida Supreme Court, No. SC2017-0815:

Mungin v. State, 259 So. 3d 716 (Fla. Nov. 15, 2018)

Supreme Court of the United States, No. 18-8409:

Mungin v. Florida, 139 S.Ct. 2024 (May 13, 2019)

Fourth Postconviction Proceeding:

Circuit Court in and for Duval County, Florida

State of Florida v. Anthony Mungin, No. 16-1992-CF-03178-AXXX
(Fla. 4th Cir. Ct. Mar. 20, 2018)

Florida Supreme Court, No. SC18-0635:

Mungin v. State, 320 So. 3d 624 (Fla. Feb. 13, 2020)

Supreme Court of the United States, No. 21-6472:

Mungin v. Florida, 142 S.Ct. 908 (Jan. 24, 2022)

Federal Habeas Corpus Petition:

United States District Court, Middle District of Florida

Mungin v. Sec’y, Fla. Dep’t of Corr., Case No. 3:06-cv-00650-BJD-JBT,
2022 WL 3357672 (Aug. 15, 2022)

United States Court of Appeals for the Eleventh Circuit, No. 22-13616

Mungin v. Sec’y, Fla. Dep’t of Corr., 89 F.4th 1308 (Jan. 8, 2024)

TABLE OF CONTENTS

Question Presented	i
Parties to the Proceedings Below	iii
List of Directly Related Proceedings	ii
Table of Contents	v
Table of Authorities	vi
Petition for a Writ of Certiorari	1
Citation to Opinion Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Introduction	2
Statement of the Case	3
Reasons for Granting the Writ	11
Conclusion	25

TABLE OF AUTHORITIES

Cases

<i>Bank of America, N.A. v. Atkin</i> , 303 So. 3d 583 (Fla. 3d DCA 2018).....	22
<i>Bilal v. North Carolina</i> , 287 Fed. Appx. 241 (4 th Cir. 2008).....	16
<i>Chin v. United States</i> , 2019 WL 3857898 (M.D. Fla. Aug. 16, 2019).....	6, 18
<i>Cobb v. United States</i> , 2024 WL 470346 (11 th Cir. Feb. 7, 2024)	25
<i>Day v. McDonough</i> , 547 U.S. 198 (2006)	passim
<i>Downs v. McNeil</i> , 520 F.3d 1311 (11 th Cir. 2008)	6, 18
<i>Ferreira v. Sec’y, Dep’t of Corr.</i> , 494 F.3d 1286 (11 th Cir. 2007).....	6, 18
<i>Gonzalez v. Superintendent Graterford SCI</i> , 655 F. Appx. 96 (3d Cir. 2016)..	25
<i>Granberry v. Greer</i> , 481 U.S. 129 (1987)	15
<i>Holland v. Florida</i> , 560 U.S. 631 (2010).....	17
<i>Hurst v. Florida</i> , 575 U.S. 902 (2015).....	7
<i>Hurst v. Florida</i> , 577 U.S. 92 (2016).....	2
<i>Mayle v. Felix</i> , 545 U.S. 644 (2005).....	12
<i>Meyers v. Sec’y</i> , 2024 WL 470383 (11 th Cir. Feb. 7, 2024)	25
<i>Mungin v. Florida</i> , 522 U.S. 833 (1997)	4
<i>Mungin v. Florida</i> , 139 S.Ct. 2024 (2019)	iii, 8
<i>Mungin v. Florida</i> , 142 S.Ct. 908 (2022)	iii, 8, 23
<i>Mungin v. Sec’y, Fla. Dep’t of Corr.</i> , Case No. 3:06-cv-00650-BJD-JBT, 2022 WL 3357672 (M.D. Fla. Aug. 15, 2022)	iii
<i>Mungin v. Sec’y, Fla. Dep’t of Corr.</i> , 89 F.4th 1308 (11 th Cir. 2024) ...	passim
<i>Mungin v. State</i> , 689 So. 2d 1026 (Fla. 1996)	ii, 4
<i>Mungin v. State</i> , 932 So. 2d 986 (Fla. 2006)	ii, 4
<i>Mungin v. State</i> , 79 So. 3d 726 (Fla. 2011)	ii, 5
<i>Mungin v. State</i> , 141 So.3d 138 (Fla. 2013)	ii, 5
<i>Mungin v. State</i> , 259 So. 3d 716 (Fla. 2018)	iii, 8
<i>Mungin v. State</i> , 320 So. 3d 624 (Fla. 2020)	iii, 7
<i>Sapuppo v. Allstate Floridian Ins. Co.</i> , 739 F. 3d 678 (11 th Cir. 2014).....	25

<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	9
<i>Tennison v. Henry</i> , 2000 U.S. LEXIS 33705 (9 th Cir. 2000).....	18
<i>Wentzell v. Neven</i> , 674 F. 3d 1124 (9 th Cir. 2012).....	15
<i>Wood v. Milyard</i> , 566 U.S. 463 (2012).....	15
<i>Zack v. Tucker</i> , 704 F.3d 917 (11 th Cir. 2013) (en banc)	13

Rules

Fed. R. Civ. P. 6 (a)(1)(C)	6
Fla. R. Crim. P. 3.851 (e)(2)(A)-(C)	17
Fla. R. Jud. Admin. § 2.514(a)(1)(C)	8, 22

Statutes

28 U.S.C. § 1254(1)	1
28 U.S.C. § 2244 (d)	1, 12
28 U.S.C. § 2244 (d)(1).....	13
28 U.S.C. § 2244 (d)(1)(A).....	19
28 U.S.C. § 2244 (d)(1)(B)	10
28 U.S.C. § 2244 (d)(1)(D).....	10
28 U.S.C. § 2263	12

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Mungin prays that a Writ of Certiorari issue to the review the opinion of the United States Court of Appeals for the Eleventh Circuit [“Eleventh Circuit”].

CITATION TO OPINION BELOW

The opinion of the Eleventh Circuit in this cause is reported as *Mungin v. Sec’y, Fla. Dep’t of Corr.*, 89 F.4th 1308 (11th Cir. 2024), and is found at Attachment B of the accompanying Appendix. The order of the Eleventh Circuit denying Petitioner’s timely motion for rehearing/rehearing en banc is not reported and is found at Attachment A of the accompanying Appendix.

STATEMENT OF JURISDICTION

Petitioner invokes this Court’s jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit based on 28 U.S.C. § 1254 (1). The Eleventh Circuit issued its decision on January 8, 2024, and it denied rehearing/rehearing en banc on March 18, 2024. Justice Thomas extended the time for the filing of the Petition up to and including July 16, 2024. This Petition is timely filed.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244 (d) provides as follows:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

INTRODUCTION

At his 1993 trial, Petitioner maintained his innocence of the 1990 murder of Betty Jean Woods in Jacksonville, Florida. At every stage of his state and federal collateral litigation since his trial, Petitioner has challenged the reliability of his trial, the result of which was compromised by, *inter alia*, the combined effects of the ineffective assistance of his trial counsel and of the State's serial withholding of material exculpatory and impeachment evidence prior to and after trial. He has also unceasingly challenged the reliability of his death sentence, the product of judicial factfinding based on a now defunct statutory scheme¹ that provided for an advisory jury to merely recommend a sentence; here, the jury recommended death by a mere majority vote of 7-5. Petitioner reasserts his innocence before this Court and prays for the Court's intervention to review the factually and legally wrong conclusions by the Eleventh Circuit Court of Appeals's published decision described in this Petition.

¹*See Hurst v. Florida*, 577 U.S. 92 (2016).

Petitioner submits that the Eleventh Circuit turned a blind eye to the law and to the truth, failing to acknowledge, much less correct, blatant calculation errors that contributed to its conclusion that two of Petitioner's constitutional claims for relief, which went to the heart of the integrity of his trial, were barred by AEDPA's statute of limitations. Exacerbating the error in the Eleventh Circuit's disposition of Petitioner's case was its failure to give him any notice that his constitutional claims were subject to dismissal due to a violation of the statute of limitations, in direct contravention of an unbroken line of cases beginning with this Court's 2006 decision in *Day v. McDonough*.² And despite having an opportunity to correct these blatant mistakes of law and befuddling miscalculations of filing deadlines when Petitioner brought them to the Eleventh Circuit's attention in a motion for rehearing, the Eleventh Circuit denied rehearing without comment, not even ordering a response from Respondent. Petitioner prays this Court issues the writ of certiorari to review the Eleventh Circuit's decision or, in the alternative, summarily reverses.

STATEMENT OF THE CASE

In 1992, Petitioner was charged with the 1990 murder of Betty Jean Woods in Jacksonville, Florida (R1).³ He was convicted (R342; T1057), and a penalty phase

² 547 U.S. 198 (2006).

³ References to the Record on Appeal in Petitioner's direct appeal to the Florida Supreme Court are designated as "R" followed by the relevant page number. References to the trial transcript are designated as "T" followed by the relevant page number. References to the appellate records in Petitioner's collateral appeals in state court are designated as "PCR" preceded by the identification of the collateral appeal (*i.e.*, 1PCR, 2PCR, etc.) and followed by the relevant page number.

jury recommended death by a 7 to 5 vote (R382; T1256). The trial court sentenced him to death (R401; T1291), and the Florida Supreme Court affirmed over a dissenting vote in favor of a new trial. *Mungin v. State*, 689 So. 2d 1026 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997).

Petitioner thereafter filed a state postconviction motion pursuant to Fla. R. Crim. P. 3.851, a motion he later amended (Supp. 1PCR3-44; 1 PCR 76). After an evidentiary hearing, relief was denied (1PCR 203-09), and the Florida Supreme Court affirmed. *Mungin v. State*, 932 So. 2d 986 (Fla. 2006).

On July 18, 2006, Petitioner timely filed his § 2254 petition (DE:1),⁴ and amended it months later with the district court's leave (DE:3; DE:6).

On August 16, 2007, Petitioner filed a successive state postconviction motion pursuant to Fla. R. Crim. P. 3.851 based on newly discovered evidence stemming from information contained in an affidavit from George Brown, signed on June 30, 2007, as well as an affidavit from Petitioner's trial counsel dated August 3, 2007 (2PCR 1-75; 79-103). At no time did the State contend that Petitioner's successive Rule 3.851 motion was filed outside of any state-imposed deadlines; rather, the State embarked on a course of delay for almost two years.⁵ In the meantime, Petitioner moved to stay

⁴ References are to the docket entries in Petitioner's federal habeas case in the Middle District of Florida, No. 3:06-cv-00650-BJD-JBT.

⁵ The summary denial of Petitioner's successive Rule 3.851 motion was entered by the state trial court on October 8, 2009—over 2 years after Petitioner filed the motion—following delay attributable only to the state and to the state court. After Petitioner filed his Rule 3.851 motion in the state circuit court, the State moved to strike it because it exceeded the page limits set forth in Rule 3.851. The State failed set its motion for a hearing, so it was not heard by the state court judge until a status hearing on March 13, 2008, almost seven months later. The state court struck the

his federal proceedings, but Respondent opposed the stay and responded to the petition itself (DE:10, 12, 16). The district court thereafter entered an order staying Petitioner's case to allow him to exhaust his claims in state court, concluding that "Petitioner's interest in obtaining federal review of his *Brady/Giglio* claims outweighs the competing interests in finality and speedy resolution of the federal petition" (DE:17 at 4). The district court subsequently administratively closed the case in light of its prior order "staying the habeas petition and holding the case in abeyance to allow Petitioner to exhaust his pending, unexhausted claims in the state courts" (DE:22).

After the state circuit court summarily denied Petitioner's 3.851 motion (2PCR 130-40), the Florida Supreme Court remanded for an evidentiary hearing on the merits of the Brown-related *Brady* and *Giglio* claims. *Mungin v. State*, 79 So. 3d 726 (Fla. 2011). Relief was denied following the hearing (3PCR 82-89), and the Florida Supreme Court affirmed. *Mungin v. State*, 141 So. 3d 138 (Fla. 2013). The mandate issued on August 16, 2013.

motion, ordering that a corrected motion be filed within thirty days and setting a further hearing for May 8, 2008. Petitioner re-filed his motion within the time frame set forth by the court but, on May 5, 2008, the state court judge cancelled the May 8 hearing because the State had not yet responded to the corrected motion. On May 27, 2008, the State filed its response in which it opposed an evidentiary hearing. The judge handling Petitioner's state court case then retired, and a new judge was ultimately assigned, and a case management hearing was held on August 12, 2009. On October 8, 2009, the state circuit court denied Petitioner's Rule 3.851 motion without an evidentiary hearing, as the State had requested it do.

Within a year of the issuance of the mandate by the Florida Supreme Court, Petitioner moved to re-open federal proceedings on Monday, August 18, 2014 (DE:25). Petitioner calculated this deadline using the recognized anniversary method:⁶ one year from August 16, 2013, fell on August 16, 2014. However, August 16, 2014, was a Saturday and thus under applicable federal rules, the deadline fell on the next day the federal court was open for business, which was Monday, August 18, 2014. *See* Fed. R. Civ. P. 6 (a)(1)(C) (when a period is stated in days or a longer unit of time, the deadline is the last day of that period, “but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday”).⁷

On August 28, 2014, the district court lifted the stay (DE:17, 27), and on October 6, 2014, without objection, Petitioner amended his habeas petition with the

⁶ *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (AEDPA’s one year “limitations period shall be calculated according to the ‘anniversary method,’ under which the limitations period expires on the anniversary of the date it began to run.”) (citing *Ferreira v. Sec’y, Dep’t of Corr.*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)).

⁷ This deadline calculation proved to be one of those that the Eleventh Circuit panel got wrong when it found that Petitioner waited “until August 18, 2014—over a year later” to ask the district court to reopen the habeas case and to supplement his habeas petition with the Brown-related claims. *Mungin*, 89 F.4th at 1320. He did not wait “over a year later” but rather filed on time in accordance with the federal procedural rules. *Chin v. United States*, Case No. 2:19-cv-16, 2019 WL 3857898, at *2, n.5 (M.D. Fla. Aug. 16, 2019) (“Because the 365 days expired on Sunday, April 8, 2018, Chin had until the next business day to file a timely § 2255 motion”).

Brown-related *Brady*, *Giglio*, and *Strickland* claims (DE:30).⁸ Respondent responded (DE:31), and Petitioner replied (DE:35).

On August 13, 2015, this Court granted certiorari in *Hurst v. Florida*, 575 U.S. 902 (2015). The district court *sua sponte* stayed Petitioner's case (DE:36), and Petitioner filed a successive 3.851 motion in state court raising *Hurst* claims. Those claims were denied but, on appeal, the Florida Supreme Court imposed a further stay pending its decision.

In the meantime, with Petitioner's state and federal litigation stayed, Deputy Malcolm Gillette signed an affidavit dated September 24, 2016, recanting key inculpatory testimony he gave on behalf of the State at Petitioner's trial.⁹ Petitioner filed a successive 3.851 motion on September 25, 2017 (4PCR 1-26). This deadline, too, was calculated using the "anniversary method" in a manner consistent with

⁸ Perhaps to make it seem as if Petitioner had not raised any constitutional issue with regard to Brown aside from ineffective assistance of counsel, the panel below took an unreasonably parsimonious view of Petitioner's request to amend. He did not, as the panel erroneously wrote, request to supplement his habeas petition only with "the Brown-related ineffective assistance of counsel claim." *Mungin*, 89 F. 4th at 1320. In reality, Petitioner requested to supplement his habeas petition with now-exhausted allegations of violations of *Strickland*, *Brady*, and *Giglio* (DE:26 at 16).

⁹ At Petitioner's trial, Gillette had testified for the State that he inventoried a stolen car parked near the site of Petitioner's arrest and had it transferred to an impound lot. Gillette further testified that he saw two spent shell casings inside the car. *Mungin v. State*, 320 So. 3d 624, 625 (Fla. 2020) (Mungin VI). However, Gillette's subsequent affidavit confirmed that he had not seen any shell casings in the car and that he had failed to review his inventory paperwork prior to testifying at trial. *Id.* His affidavit was corroborated by the inventory and vehicle storage receipt, in which he had contemporaneously recorded that he saw nothing visible in the car. *Id.*

Florida's rules: the one-year anniversary date from September 24, 2016, was September 24, 2017. However, September 24, 2017, fell on a Sunday, and thus one year from the date of Gillette's affidavit was Monday, September 25, 2017, which was the date on which Petitioner filed his Rule 3.851 motion. *See* Fla. R. Jud. Admin. § 2.514(a)(1)(C) (when a deadline is stated in days and the "last day is a Saturday, Sunday, or legal holiday . . . the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday . . ."). The state raised no complaint in the state courts (or in the federal courts, for that matter) that the motion was filed beyond one year from the date of Gillette's affidavit (4PCR 32-44).

The state trial court denied, on its merits, the Gillette-related 3.851 motion following an evidentiary hearing (4PCR 82-89), and the Florida Supreme Court affirmed the denials of Petitioner's *Hurst* and Gillette-related appeals. *Mungin v. State*, 259 So. 3d 716 (Fla. 2018), *cert. denied*, 139 S. Ct. 2024 (2019); *Mungin v. State*, 320 So. 3d 624 (Fla. 2020), *cert. denied*, 142 S.Ct. 908 (2022).

In the meantime, the district court had again lifted the stay in Petitioner's habeas case and requested the parties' positions (DE:68). Petitioner advised of his intent to seek certiorari review in the Supreme Court, whereas Respondent urged the district court to lift the stay (DE:69, 70, 71). The district court continued the stay (DE:72).

After this Court's denial of certiorari in Petitioner's case on January 24, 2022, Respondent moved to re-open Petitioner's federal proceedings (DE:73). Petitioner conceded that exhaustion was complete but asserted the need to amend the petition

with the Gillette-related claims (DE:75). The district court lifted the stay (DE:76, 77).

On March 24, 2022, Petitioner sought leave to amend his petition to include the Gillette claims (DE:81). Respondent objected (DE:82), Petitioner replied (DE:88), and the district court denied the motion on futility grounds (DE:90). It subsequently denied Petitioner's second amended petition—including the merits of the Brown-related claims—but denied a COA (DE:91). Petitioner appealed (DE:96).

Petitioner sought the issuance of a COA in the Eleventh Circuit on a number of constitutional claims, including the *Strickland*, *Giglio*, and *Brady* aspects of the Brown-related claim (App. D). The Eleventh Circuit granted a COA but carefully excised several issues relating first to the Brown claim, limiting it to only the ineffectiveness component and removing the *Brady/Giglio* allegations, and second to the Gillette claim, limiting it to only the propriety of the district court's refusal to grant leave to amend with the Gillette ineffectiveness claim but not the Gillette-related *Brady* claim:

1. Did Appellant's trial counsel provide ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), by (a) failing to adequately impeach Ronald Kirkland; (b) failing to elicit testimony from Detective Christie Conn; and/or (c) *failing to investigate and present George Brown's testimony?*

2. Did the district court err in denying as futile Appellant's motion for leave to amend *to add an ineffective assistance of counsel claim* under *Strickland v. Washington*, 466 U.S. 668 (1984), related to Deputy Gillette?

(Order Granting COA, *Mungin v. Secretary*, No. 22-13616-P) (Mar. 14, 2023) (emphasis added) (App. C).

Following oral argument, the Eleventh Circuit panel affirmed the denial of relief. *Mungin v. Sec’y, Fla. Dep’t of Corr.*, 89 F.4th 1308 (11th Cir. 2024) (Attachment A). Contrary to the Florida Supreme Court’s and the district court’s merits resolution of Mungin’s Brown-related ineffectiveness claim—and outside the scope of the COA—the panel found the Brown ineffectiveness claim barred by AEDPA’s statute of limitations. *Id.* at 1319-21. No notice was afforded to Petitioner that his Brown-related claims were subject to dismissal on statute of limitations grounds.

The barring of the Brown ineffectiveness claim, the merits of which were the sole issue identified by COA, was premised on several “findings” and (wrong, as it turned out) mathematical computations. First, the panel found that “[t]here was no state impediment to bringing either of these claims.” *Id.* at 1320 (citing § 2244(d)(1)(B)). From that premise, the panel determined that, under §2254(d)(1)(D), the one-year clock on the Brown-related claims started to run on June 30, 2007, the date that Brown executed his affidavit, rather than on August 16, 2007, when Petitioner filed the 3.851 motion. Next, the panel concluded that Petitioner “waited until August 18, 2014” to return to district court, a date “over a year” after the Florida Supreme Court issued its mandate on August 16, 2013. *Id.* From these calculations, the panel concluded that Petitioner’s Brown-related ineffectiveness claim was barred by AEDPA’s statute of limitations and as such did not relate back to Petitioner’s original and timely habeas petition. *Id.* at 1815, 1820. In the panel’s view, “the district court was correct to dismiss this claim with prejudice.” *Id.* at 1823.

Without notice to Petitioner, the Eleventh Circuit panel likewise determined the AEDPA statute of limitations barred the Gillette claims even though this issue was also not identified in the COA (and therefore was not briefed). Likewise, the district court had not barred the Gillette claims on statute of limitations grounds. Specifically, the panel posited that the Gillette claims were “even more clearly untimely” than the Brown claims because Mungin filed out of time in state court: “Deputy Gillette signed his affidavit on September 24, 2016, but Mungin did not file his third successive postconviction motion in state court on this issue until more than a year later on September 25, 2017” and “did not try to amend his federal habeas petition until 2022.” *Id.* at 1321. Accordingly, the panel determined that the Gillette claims were barred by the statute of limitations and thus did not relate back notwithstanding its gross calculation error it failed to acknowledge, much less correct, on rehearing and its concomitant failure to afford Petitioner notice that the claims were subject to dismissal on statute of limitations grounds.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ADDRESS THE QUESTION WHETHER THE REQUIREMENT SET FORTH IN *DAY V. MCDONOUGH*—THAT A DISTRICT COURT MUST AFFORD A HABEAS PETITIONER WITH NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO DISMISSING A HABEAS PETITION (OR CLAIMS IN A HABEAS PETITION) ON STATUTE OF LIMITATIONS GROUNDS—APPLIES WITH EQUAL FORCE TO AN APPELLATE COURT WHICH DISMISSES CLAIMS IN A HABEAS PETITION ON STATUTE OF LIMITATIONS GROUNDS WITH NO NOTICE OR OPPORTUNITY TO BE HEARD AFFORDED TO THE PETITIONER.

Until 1996, there was no fixed statute of limitations for filing federal habeas corpus petitioner. *See Mayle v. Felix*, 545 U.S. 644, 654 (2005) (“In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction”). Prior to 1996, the only constraint upon the timing of the petition was a flexible “prejudicial delay” rule, akin to the equitable doctrine of laches. *See Day v. McDonough*, 547 U.S. 198, 202 n.1 (2006) (“Until AEDPA took effect in 1996, no statute of limitations applied to habeas petitions. . . . Courts invoked the doctrine of ‘prejudicial delay’ to screen out unreasonably late filings.”). However, the passage of AEDPA in 1996 ushered in a new federal habeas regime, including a statute of limitations of differing lengths depending on the case at hand; it provided for a 1-year statute of limitations for most federal habeas corpus petitions and all Section 2255 petitions, *see* 28 U.S.C. § 2244 (d), and a shorter 180-day limit on habeas corpus petitions filed by capital prisoners in States that have “opted in” to the AEDPA’s “Special Habeas Corpus Procedures in Capital Cases.” *See* 28 U.S.C. § 2263.

Petitioner’s case involves the statute of limitations found in 28 U.S.C. § 2244

(d). This statutory provision provides as follows with regard to the limitations period:

(2) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(E) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

- (F) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (G) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (H) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

As the Eleventh Circuit panel below correctly acknowledged, under § 2244(d)(1), “AEDPA’s one-year statute of limitations clock starts running at the latest of several dates.” *Mungin*, 89 F. 4th at 1320.¹⁰ In the Eleventh Circuit’s view, the only dates relevant in Petitioner’s case in terms of assessing the statute of limitations for the Brown and Gillette claims were (1) the finality of the state court conviction, *see* § 2244(d)(1)(C), and (2) “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence,” *see* § 2244(d)(1)(D). *Mungin*, 89 F. 4th at 1320. And given that “[n]o one disputes that Mungin’s initial habeas petition was filed . . . on the final day possible, July 18, 2006,” *id.*, the only relevant inquiry in Petitioner’s case, in the view of the Eleventh Circuit,

¹⁰ Under Eleventh Circuit law, which is consistent with other circuit precedent, AEDPA’s statute of limitations requires a claim-by-claim approach to determine each claim’s timeliness. *See Zack v. Tucker*, 704 F. 3d 917, 918 (11th Cir. 2013) (en banc) (“We conclude, based on the text and structure of the statute, Supreme Court precedent, decisions of our sister circuits, and Congressional intent, that the federal statute of limitations requires a claim-by-claim approach to determine timeliness”).

was whether Petitioner's Brown and Gillette claims were timely pursuant to § 2244(d)(1)(D).

Petitioner does not dispute that this is the appropriate analysis as a general rule. The problem in his case is that he never had any notice, prior to the issuance of the Eleventh Circuit's opinion, that two of his claims (the Brown-related claim and the Gillette-related claim) were untimely in the sense that there was a potential violation of AEDPA's statute of limitations either because he was late in filing the Brown claim in federal court or was late in filing the Gillette claim in state court. He most assuredly did *not*, as the Eleventh Circuit wrote, agree that "both the Brown and Gillette claims are barred by the statute of limitations unless they relate back to Mungin's initial, timely filed habeas petition." *Mungin*, 89 F. 4th at 1320. Given that no issue about the timeliness of Petitioner's state court filings was ever raised by Respondent in state or federal court, much less an argument concerning a potential violation of AEDPA's statute of limitations as to Petitioner's Brown and Gillette claims, there would have been no occasion for Petitioner to agree to such a notion, or at least not dispute it. No statute of limitations issue was raised by the Eleventh Circuit in its COA order nor did the Eleventh Circuit issue any requests for supplemental or letter briefing to alert the Petitioner to a looming statute of limitations problem. No statute of limitations issue was addressed by the district court either; in fact, the district court addressed the merits of Petitioner's Brown-related claim (as did the Florida Supreme Court),¹¹ In essence, Petitioner was

¹¹ See DE:91 at 39-40; 52-53.

blindsided by the Eleventh Circuit's dismissal of the Brown and Gillette claims on statute of limitations grounds. He had no notice.

In an unbroken line of cases issued by this and other federal appellate courts since this Court's decision in *Day v. McDonough*, 547 U.S. 198 (2006), the law has been clear that before "acting on its own initiative [and dismissing a habeas on statute of limitations grounds], a [federal] court *must* accord the parties fair notice and an opportunity to present their positions." *Id.* at 210 (emphasis added). *See also Wood v. Milyard*, 566 U.S. 463, 472 (2012) (habeas corpus petitioner must be "accorded a fair opportunity to present his position" before district court decides whether to invoke statute of limitations defense *sua sponte*"); *Wentzell v. Neven*, 674 F. 3d 1124, 1126 (9th Cir. 2012), *cert. denied*, 569 U.S. 989 (2013) (even if State is correct that "it was 'unmistakably clear from the facts alleged in the petition' that it was untimely and that no equitable tolling or other special circumstances applied," "Supreme Court's decision in *Day*" does not "authorize[] . . . an exception to the requirement that the court give a petitioner notice and an opportunity to respond" before *sua sponte* dismissing petition for failure to comply with statute of limitations). Additionally, a court must also "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue," *Day*, 547 U.S. at 210, and furthermore "determine . . . [that] the interests of justice would be better served" by "dismissing the petition as time barred" rather than "addressing the merits." *Id.* (quoting *Granberry v. Greer*, 481 U.S. 129, 136 (1987)). When a district court fails to heed *Day*'s holding, the remedy is to remand the case to the district court to fully brief

and litigate the limitations issue. *See, e.g. Bilal v. North Carolina*, 287 Fed. Appx. 241, 243 (4th Cir. 2008) (“On appeal, Bilal argues that he was not given sufficient notice and an opportunity to be heard prior to the dismissal as required by our precedent . . . On the specific facts before us, we agree. We therefore vacate and remand to the district court to allow Bilal to clarify or correct his response.”).

Although this Court’s decision in *Day* focused on a district court’s obligation to provide notice and an opportunity to be heard prior to dismissing a habeas petition—or a claim or claims in a habeas petition—there is no meaningful reason why the same rule should not apply to an appellate court that dismisses a habeas petition—or a claim or claims in a habeas petition—without affording the petitioner prior notice and an opportunity to be heard on the limitations issue. This is what happened in Petitioner’s case at bar, and the resulting imbroglio is evidence of why the rule of *Day* should apply with no less force to an appellate court. Had the Petitioner been given notice and an opportunity to be heard in the Eleventh Circuit, there is no question that he would have been successful in assuaging the court that both of his claims were in fact timely under AEDPA, as explained below.

1. Brown-related claims

On August 16, 2007, Petitioner filed a successive Rule 3.851 motion based on, *inter alia*, Brown’s June 30, 2007, affidavit and an August 3, 2007, affidavit executed by trial counsel. August 16, 2007, when Petitioner’s successive Rule 3.851 motion was *filed*, is the operative date when the AEDPA statute of limitations begins to run because it is the “pendency” of the motion which triggers the tolling provision. *See*

§2254(d)(2); *accord Holland v. Florida*, 560 U.S. 631, 636 (2010) (“filing [of Rule 3.850 motion] automatically stopped the running of the AEDPA limitations period”). While it is true that Brown signed his affidavit on June 30, 2007, a defendant—especially one represented by counsel—cannot simply run to court armed only with an affidavit in lieu of a proper motion. Florida rules require more, particularly for a successive motion. *See* Fla. R. Crim. P. 3.851 (e)(2)(A)-(C) (requiring a successive motion to include, *inter alia*, all of the pleading requirements of an initial motion, the disposition of all previous claims and the reasons why the claim or claims raised in the present motion were not previously raised, names and addresses “of all witnesses supporting the claim,” and evidentiary support for the allegations). In fact, the Respondent in state court acknowledged that “[t]he 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” (4PCR at 36). Because a properly filed successive 3.851 motion does not consist of merely filing an isolated affidavit, the Eleventh Circuit panel erred in determining that the statute of limitations on the Brown ineffectiveness claim began to run on June 30, 2007, rather than on August 16, 2007. Of course, Petitioner was not afforded an opportunity to be heard on this issue because the Eleventh Circuit reached a statute of limitations issue where none had been raised earlier.

The panel’s next calculation error concerns Petitioner’s return to federal court. The panel concluded that Petitioner “waited” until August 18, 2014, “over a year later,” to return to federal court after the Florida Supreme Court issued its mandate on August 16, 2013, and thus his claims were “untimely” brought to federal court.

Mungin, 89 F.4th at 1320. Using the anniversary method to calculate the deadline,¹² one year from August 16, 2013, would fall on August 16, 2014. **However, August 16, 2014, was a Saturday.** Under applicable federal rules, the deadline fell on the next day the federal court was open for business, which was Monday, August 18, 2014. *See* Fed. R. Civ. P. 6 (a)(1)(C) (when a period is stated in days or a longer unit of time, the deadline is the last day of that period, “but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday”).¹³ **Monday, August 18, 2014,** was the day that Petitioner sought to reopen his case and filed his supplemental Brown-based claims (DE:25, 26). Accordingly, the panel was incorrect in ascribing a calculation mistake to Petitioner. He did not wait “over a year later” to bring his Brown-related claim to federal court; he brought it on August 18, 2014, the properly calculated one-year anniversary date from the date of the FSC’s mandate. These critical miscalculations were dispositive to the panel’s determination that the Brown ineffectiveness claim was barred by AEDPA’s statute of limitations, but because the Eleventh Circuit did

¹² *See Downs v. McNeil*, 520 F.3d 1311, 1318 (11th Cir. 2008) (AEDPA’s one year “limitations period should be calculated according to the ‘anniversary method,’ under which the limitations period expires on the anniversary of the date it began to run.”) (citing *Ferreira v. Sec’y Dep’t of Corr.*, 494 F.3d 1286, 1289 n.1 (11th Cir. 2007)).

¹³ *Accord Chin v. United States*, 2019 WL 3857898, at *2, n.5 (M.D. Fla. Aug. 16, 2019) (“Because the 365 days expired on Sunday, April 8, 2018, Chin had until the next business day to file a timely § 2255 motion”); *Tennison v. Henry*, 2000 U.S. App. LEXIS 33705, at *4 (9th Cir. Dec. 14, 2000) (calculation of filing date is subject to Fed. R. Civ. P. 6(a), which provides that “when the last day of a period falls on a Saturday, the expiration date becomes the next court day”).

not heed this Court's ruling in *Day*, Petitioner was not afforded prior notice and an opportunity to be heard on this issue in the appellate court.

The panel further erred in concluding that Respondent had "objected to the 2014 Brown amendment on AEDPA statute of limitations grounds." *Mungin*, 89 F.4th at 1320. This generalization lacks important details. In responding to the Brown-related claims, the Respondent first made a generalized statement that "additions" in Petitioner's pleading "violate the letter and purpose of the AEDPA's one-year statute of limitations, 28 U.S.C. §2241 (d)(1)(A)" (DE:31 at 5). Without explaining its argument aside from a bald citation to the habeas statute, the Respondent argued that the "additions" consisted of, *inter alia*, the Brown ineffectiveness claim, which it argued was (1) beyond the scope of the district court's authorization when entering the stay, (2) undeveloped and procedurally barred in state court, and (3) procedurally defaulted (DE:31 at 5-6). No mention was made of a statute-of-limitations defense, much less any specific detail as to how or why the statute of limitations was allegedly violated (DE:31 at 45-46; 77-81). After arguing that the Brown-related ineffective assistance of counsel claim lacked merit, it added the following conclusory statement: "In addition, any attempt to raise an IAC claim now in federal court, almost a decade after the state conviction became final and over seven years after Mungin's amended federal habeas petition (Doc #6) would egregiously violate the letter and purpose of the AEDPA's one-year statute of limitations" (DE:31 at 81). As with its earlier bald conclusory reference to §2241(d)(1)(A), the Respondent provided no detail as to how or why the claim was barred by the statute of limitations.

Potential dismissal of Petitioner's Brown-related claims on statute of limitations grounds was also never addressed by the district court, as it should have been if there was an issue about the timeliness of the claim, see *Day*, 547 U.S. at 210 ("Of course, before acting on its own initiative [and dismissing a habeas on statute of limitations grounds], a court must accord the parties fair notice and an opportunity to present their positions"), and the Appellee did not seek any reconsideration by the district court nor did it cross-appeal the district court's order insofar as it addressed the merits of Petitioner's Brown-related ineffectiveness claim.

The Respondent's brief in the Eleventh Circuit was similarly bereft of specific allegations concerning any potential violation of AEDPA's statute of limitations except for the same generic, generalized, fact-free conclusory statement that Petitioner's Brown-related ineffectiveness claim is "barred by the AEDPA's statute of limitations" (Answer Br. at 38); even then, the Respondent never argued that Petitioner brought his claim too late in state court, or that he brought his claim too late to federal court. Appellee merely argued that Petitioner's initial and timely 2006 habeas petition did not mention Brown or his testimony at all (*Id.*). That is not a statute of limitations argument but rather an argument about whether Petitioner's Brown-related ineffectiveness claim related back, an issue not even addressed by the Respondent because it acknowledged that the district court "did not reject this claim

as barred by AEDPA's statute of limitations and permitted Mungin to amend with it." (Answer Br. at 38 n.11). ¹⁴

2. Gillette-related claims

The panel also determined there was a statute of limitations bar to Petitioner's Gillette-based claims, despite the fact that this issue was not identified in the COA issued by the Eleventh Circuit. Specifically, the panel noted that the Gillette-based claims were "even more clearly untimely" than the Brown claims because Petitioner filed out of time in state court: "Deputy Gillette signed his affidavit on September 24, 2016, but Mungin did not file his third successive postconviction motion in state court on this issue until more than a year later on September 25, 2017" and "did not try to amend his federal habeas petition until 2022." *Mungin*, 89 F.4th at 1321. Thus, the panel determined that the Gillette-based claims were barred by the statute of limitations and did not relate back. *Id.* at 1321, 1323.

Although the panel correctly identified the date when Gillette signed his affidavit (September 24, 2016) and when Petitioner filed his successive 3.851 motion (September 27, 2017), the calculation that the motion was filed "more than a year" after the affidavit was executed is inexcusably wrong. Under the anniversary method, discussed *supra*, one year from September 24, 2016, would fall on September 24, 2017. However, **September 24, 2017, fell on a Sunday**. Accordingly, in

¹⁴The district court did not, as the panel mistakenly wrote, "dismiss this claim with prejudice." 89 F.4th at 1323. The district court reached the merits of the Brown-related ineffectiveness claim (DE:81 at 54). This finding alone establishes the panel's reckless disregard for the details of Petitioner's case.

compliance with state deadline computation rules, the deadline was the next business day after Saturday, September 24, 2017, that was not a Saturday, Sunday, or legal holiday; that date was Monday, September 25, 2017, and that is the day that Mungin filed his Gillette-based 3.851 motion.¹⁵ For the reasons set forth in the discussion of the Brown claim, the Eleventh Circuit panel’s wrongly determined that the Gillette 3.851 motion was filed a day late in state court—an allegation that even the Respondent has **never** made. This panel’s incorrect calculation was dispositive and critical to its determination that Petitioner’s Gillette-based claims were barred by AEDPA’s statute of limitations and, for that reason, did not relate back.¹⁶ Unfortunately, as with the Brown claim, the Eleventh Circuit provided Petitioner with no notice or an opportunity to be heard before (improperly) dismissing the Gillette claim as time barred.

¹⁵Florida procedural rules, which are no different from the federal rules, provide that if a deadline falls on a weekend, the filing date is extended until the next day the court is open for business. *See* Fla. R. Jud. Admin. § 2.514(a)(1)(C) (when a deadline is stated in days and the “last day is a Saturday, Sunday, or legal holiday . . . **the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday . . .**”) (emphasis added); *accord Bank of America, N.A. v. Atkin*, 303 So. 3d 583, 587 (Fla. 3d DCA 2018) (where deadline for filing a motion fell on Saturday, August 18, 2018, “the filing of the motion on Monday, August 20, 2018, was timely because “the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday”).

¹⁶Additionally, the district court did not, as the panel concluded, rule that Mungin’s Gillette-based claims were barred by the statute of limitations because they were untimely in state court. *Mungin*, 89 F.4th at 1323. The district court found that amendment would be futile because the claims were procedurally barred, the Florida Supreme Court’s determination was based on an independent and adequate state procedural rule, and because the Gillette claims did not relate back to Petitioner’s initial petition, they were untimely (DE:90 at 18, 22). The timeliness issue addressed at the district court level was not based on anything having to do with what the appellate panel described: an out-of-time filing by one day in state court.

Finally, in the context of its timeliness discussion, the panel wrote that Petitioner “did not try to amend his federal habeas petition [with the Gillette claims] until 2022.” *Mungin*, 89 F.4th at 1321. Aside from the fact that this basis for finding of a violation of the statute of limitations was not raised by the Respondent in either the district court or in the appellate court, it is a truncated and misleading view of the procedural history, as Petitioner would have been able to explain had he been given notice and an opportunity to be heard. The Florida Supreme Court affirmed the denial of Petitioner’s Gillette-based 3.851 motion on February 13, 2020. *Mungin v. State*, 320 So. 3d 624 (Fla. 2020). Rehearing was denied on June 22, 2021, and certiorari denied by this Court on January 24, 2022. *Mungin v. Florida*, 142 S. Ct. 908 (2022). Petitioner’s federal case had been stayed during this period of time (DE:72), and the case reopened a week after denial of certiorari (DE:73, 75). Petitioner did not object to the reopening of the case and filed his request to amend with the Gillette-based claims shortly thereafter (DE:81). The dates involved here belie the notion that Petitioner “wait[ed] too long to bring this claim.” There was no “delay” that could conceivably contribute to a violation of the statute-of-limitations.

In conclusion, as the record in this case makes clear, Petitioner was given no notice that there was a potential statute-of-limitations issue regarding the Brown and/or Gillette claims in terms of the timeliness of the state court filings of the 3.851 motions raising those claims. The Respondent never claimed in state court, in the district court, or in the Eleventh Circuit, that the Brown 3.851 motion was filed beyond the 1-year deadline from the date of Brown’s affidavit, nor did it make any

such allegation regarding the Gillette 3.851 motion. It was not until the panel found a statute-of-limitations violation premised on allegedly late-filed 3.851 motions did any potential issue regarding the timeliness of those 3.851 motions arise. This contravenes *Day v. McDonough*, which requires that a court, “before acting on its own initiative [and dismissing a habeas on statute of limitations grounds], . . . must accord the parties fair notice and an opportunity to present their positions.” *Day*, 547 U.S. at 210.

Nor can it be said that the carefully worded COA granted by the Eleventh Circuit could reasonably have alerted Petitioner to any statute-of-limitations issue. The COA on the Brown claim was limited whether Mungin’s trial counsel was ineffective for “failing to investigate and present George Brown’s testimony?” Nothing in this question can conceivably be construed to include a potential statute-of-limitations question, particularly given the district court’s merits ruling. Further, while procedural aspects of the Gillette claim were appropriately within the scope of the COA regarding the district court’s denial of Petitioner’s request for leave to amend, Petitioner’s briefing addressed those issues. However, no inkling of a problem with the timing of the Gillette 3.851 motion in state court of the sort found by the panel (that it was allegedly filed one day late) could conceivably have been interpreted to be an issue for briefing as it was not part of the COA. The Respondent never raised this issue in the state courts or in the district court, and it was “not plainly and prominently rais[ed]” in the Eleventh Circuit. *See Cobb v. United States*, 2024 WL 470346 at *2 (11th Cir. Feb. 7, 2024). Yet the panel determined that the Gillette

claims were untimely because Petitioner allegedly filed them a year and a day after Gillette signed his affidavit. As noted earlier, this is not only a wrong calculation, but it was an issue that the panel addressed with no notice to Mungin.

“The scope of review in a habeas appeal is limited to the issues specified in the COA.” *Meyers v. Sec’y*, 2024 WL 470383 at *1 (11th Cir. Feb. 7, 2024) (citing *Murray v. United States*, 145 F.3d 1249 (11th Cir. 1998)). *Accord Gonzalez v. Superintendent Graterford SCI*, 655 F. App’x 96, 99 n.3 (3d Cir. 2016) (“Because our certificate of appealability concerned only the former inquiry and not the latter, the question of Gonzalez’s actual innocence does not enter into our analysis.”). The statute-of-limitations issues found by the panel as to both the Brown and Gillette claims were beyond the scope of the COA, never raised or briefed by Respondent, and should be deemed to have been abandoned. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F. 3d 678, 681 (11th Cir. 2014). At the very least, the Eleventh Circuit was required to afford Petitioner with notice and an opportunity to be heard in accord with *Day*. It did not do so, and certiorari review is warranted.

CONCLUSION

For the reasons set forth above, Petitioner Anthony Mungin respectfully prays that the Court will issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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