

**In The
Supreme Court of the United States**

ANTHONY MUNGIN,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET. AL.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT**

BRIEF IN OPPOSITION TO CERTIORARI

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CAPITAL CASE QUESTION PRESENTED

Anthony Mungin killed Betty Woods with a gunshot to the head at the end of a September 1990 crime-spree that included two other shootings. His 1993 first-degree murder conviction and death sentence have withstood over three decades of scrutiny in state and federal courts, with the Eleventh Circuit recently affirming the denial of 28 U.S.C. § 2254 relief. That affirmance included finding two of Mungin's claims untimely after the State affirmatively argued they were not timely and did not relate back to Mungin's timely petition under *Mayle v. Felix*, 545 U.S. 644, 648 (2005).

In agreeing with the State's timeliness arguments, the Eleventh Circuit analyzed timeliness under 28 U.S.C. § 2244(d)(1)(A) (finality of judgment)—which the State argued, and Mungin never disputed, was the correct triggering date—and timeliness under 28 U.S.C. § 2244(d)(1)(D) (newly discovered evidence). The Eleventh Circuit performed the 28 U.S.C. § 2244(d)(1)(D) analysis sua sponte.

In a final bid to prolong his eighteen-year stay in federal court, Mungin asks this Court to grant certiorari because the Eleventh Circuit performed the 28 U.S.C. § 2244(d)(1)(D) analysis that he had every opportunity to raise in his response to the State's timeliness arguments without his input. This Court should decline his invitation and deny certiorari review of the following question presented:

Are appellate courts required to give 28 U.S.C. § 2254 appellants notice before performing statutory timeliness calculations invoked by neither party when the appellant never argued his claims were timely, the district court dismissed one of the claims as untimely, the State argued the claims were untimely under a different statutory subsection, and the State and appellant both briefed whether the claims related back?

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OPINION BELOW

The Eleventh Circuit's decision petitioned for review appears as *Mungin v. Sec'y, Fla. Dep't of Corr.*, 89 F.4th 1308, 1313 (11th Cir. 2024).

JURISDICTION

This Court has certiorari jurisdiction over the Eleventh Circuit's decision affirming the denial of 28 U.S.C. § 2254 relief. 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d):

- (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.

STATEMENT OF THE CASE AND FACTS

Anthony Mungin shot and killed Betty Woods—a convenience store clerk—in Jacksonville, Florida, over thirty-three years ago. After obtaining a federally

sanctioned, **eighteen-year** reprieve from his capital sentence to litigate his 28 U.S.C. § 2254 petition, he now seeks certiorari review to obtain further delay.

A. Capital Trial and Penalty Phase

A grand jury indicted Mungin for the first-degree murder of Betty Jean Woods. (DAR1:7.) At Mungin's 1993 trial, the State of Florida tied him to the murder through: (1) two car thefts, a Ford Escort stolen a mile from Mungin's Georgia home and ditched in Jacksonville, and a Dodge Monaco stolen from Jacksonville and found abandoned less than a mile from Mungin's home; (2) two other robberies and nonfatal shootings of store clerks days before Woods' murder (Mungin left his fingerprints and used a Raven .25 automatic pistol); (3) the Raven .25 automatic pistol that was used in the robberies and Woods' murder and found hidden between towels in Mungin's room when he was arrested; and (4) testimony from Ronald Kirkland that he saw Mungin quickly exiting Woods' convenience store before Kirkland went inside and found Woods shot in the head. *See Mungin v. State*, 689 So. 2d 1026, 1028 (Fla. 1995) (*Mungin I*); (Direct Appeal Record Volumes 14 and 15).

A jury convicted Mungin as charged and recommended death by a 7-5 vote. *Mungin I*, 689 So. 2d at 1028. A judge sentenced Mungin to die after finding two aggravators: (1) prior violent felony and (2) murder committed during a robbery, attempted robbery, or for pecuniary gain. *Id.*

B. State Postconviction and District Court 28 U.S.C. § 2254 Proceedings

Mungin unsuccessfully challenged his conviction and sentence through an initial state postconviction motion. *See Mungin v. State*, 932 So. 2d 986, 990-1004

(Fla. 2006) (*Mungin II*). He then filed a just-on-time¹ 28 U.S.C. § 2254 petition in federal court on July 18, 2006. (See Dist.Ct.Doc.1.) This Petition did not raise any claims related to either George Brown or Deputy Gillette, did not mention Brown at all, and only mentioned Gillette in the recitation of the favorable, penalty-phase testimony he gave on Mungin's behalf. (See Dist.Ct.Doc.1.)

Brown-Related-Ineffectiveness Claim

Prior to trial in 1993, the State listed Brown as a potential witness with the address: "8465 Thor Street, Jacksonville, Florida." (DAR1:7). On July 24, 1992, Mungin's trial counsel filed a motion for a more definite address because he "could not locate" Brown "at" that "address." (DAR1:195.) The court confirmed that was the only address the State had and granted the motion with "the understanding" the State was required to provide a better address if it found one. (DAR12:290.)

Brown executed an affidavit on June 30, 2007, claiming Kirkland's trial testimony was false, and he was the first one to arrive at Woods' convenience store and find her murdered. (SC09-2018 ROAVolI:70-72.)

On August 16, 2007, over a year after filing his 28 U.S.C. § 2254 petition,

¹ Mungin's judgment finalized on October 6, 1997 when the this Court denied certiorari from his direct appeal. *See Mungin v. Florida*, 522 U.S. 833 (1997). That started the AEDPA's one-year clock to file a section 2254 petition. *See San Martin v. McNeil*, 633 F.3d 1257, 1266 (11th Cir. 2011). Mungin properly filed his initial state postconviction motion on September 17, 1998 and stopped the AEDPA clock with 19 days to spare. *See id.* at 1266. (PCRSupp1:3-44.) The FSC issued its mandate denying initial postconviction relief on June 29, 2006. The AEDPA's clock resumed running when the mandate issued, which means Mungin's petition was due on July 18, 2006. *See id.*

Mungin moved to stay his § 2254 proceedings so he could exhaust claims related to Brown's testimony. (Dist.Ct.Doc.10.) The State opposed the request, but the district court stayed the case to permit exhaustion. (Dist.Ct.Docs.11, 17.)

Mungin first filed this claim in state court on August 16, 2007, and his operative motion containing the claim on April 21, 2008. (SC09-2018 ROAVolI:1-103.) Mungin's operative motion mentioned his Brown-related-IAC claim exclusively in headings and a footnote. (SC09-2018 ROAVolI:84, 92, 94 n.10.) Mungin primarily argued that the State violated due process under *Brady*² for failing to disclose information from Brown and under *Giglio*³ for relying on Kirkland's allegedly false testimony. (SC09-2018 ROAVolI:84-100.). Mungin also provided an affidavit from counsel Cofer explaining he believed Brown would not have been helpful based on a police report he received that detailed Brown's statements the day of the murder. *See Mungin v. State*, 79 So. 3d 726, 732-33 (Fla. 2011) (*Mungin III*) (block quoting Cofer's affidavit).

The postconviction court summarily denied Mungin's motion. (SC09-2018 ROAVolI:130-39.) The court noted that, "Mentioned in one of the captions in Claim 1 of the motion, but not argued in the motion, is an alternative, unelaborated claim that 'trial counsel was ineffective.'" (SC09-2018 ROAVolI:138.) The court addressed this unelaborated claim "in an abundance of caution" and held Mungin suffered no

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

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

prejudice without addressing deficiency. (SC09-2018 ROAVolI:138.)

Mungin appealed to the Florida Supreme Court (“FSC”), and his brief mentioned his Brown-related-IAC claim the same way as Mungin’s motion. Initial Brief, *Mungin v. State*, 2010 WL 2156215 at 21, 40, 43 n.19 (Fla. May 17, 2010).

The FSC noted: “Mungin filed a successive motion for postconviction relief, asserting that the newly discovered evidence from Brown impeaches Kirkland and shows that the State violated *Brady* and *Giglio*.” *Mungin III*, 79 So. 3d at 730. The FSC understood Mungin’s arguments as that he was “entitled to relief under *Brady*, *Giglio*, or newly discovered evidence” and never mentioned Mungin’s alternative, footnote IAC argument. *Id.* at 733. The court noted Mungin only “raised three claims pertaining to the Brown affidavit: (1) the State violated *Brady* in failing to disclose the favorable evidence pertaining to Brown; (2) the State violated *Giglio* by knowingly presenting false evidence; and (3) Brown’s affidavit constitutes newly discovered evidence that mandates a new trial.” *Id.* at 734. No part of the FSC decision discussed, or even mentioned, Mungin’s undeveloped, alternative, footnote assertion that counsel ineffectively failed to find and present Brown. *Id.* at 730-39. The FSC remanded for an evidentiary hearing on Mungin’s *Brady* and *Giglio* claims, but not the newly discovered evidence claim or IAC claim. *Id.* The mandate for this decision issued November 21, 2011.

The postconviction court held an evidentiary hearing on the *Brady* and *Giglio* claims on February 3, 2012, and ultimately denied them. (SC12-877 ROAVolI:82-89, 94-200; SC12-877 ROAVolIII:201-256). Mungin unsuccessfully appealed the denial of

his *Brady* and *Giglio* claims to the FSC. *Mungin v. State*, 141 So. 3d 138, 142-47 (Fla. 2013) (*Mungin IV*). The mandate for that decision issued August 16, 2013.

On August 18, 2014, Mungin moved to reopen his federal case and filed a standalone supplement with his Brown-related claims. (Dist.Ct.Docs.25-26.) The district court granted the motion to reopen but struck the supplement and ordered Mungin to file a second amended petition instead. (Dist.Ct.Doc.27.)

Mungin filed a second amended petition raising his Brown-related claims on October 6, 2014. (Dist.Ct.Doc.30:63, 105-119.) He argued Florida's courts never addressed his Brown-related-IAC claim, and it should be reviewed de novo. (Dist.Ct.Doc.30:109.) Mungin gave a conclusory argument that counsel was ineffective for failing to discover/present Brown's testimony without identifying anything counsel could have done to find Brown. (Dist.Ct.Doc.30:118-119.)

The State's Answer opposed Mungin's Brown-related-IAC claim on timeliness grounds. The State's timeliness argument was first mentioned in the following heading: "IAC, Beyond the Scope of Authorization to Amend and Undeveloped and Procedurally Barred in State Court and *Untimely* and Procedurally Defaulted Here." (Dist.Ct.Doc.31:77) (emphases added). The final pre-conclusion sentence under this heading then argued, "*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^[4] *one-year statute of limitations. See 28 U.S.C. § 2244(d)(1)(A).*” (Dist.Ct.Doc.31:81) (emphasis added.) The State’s Answer also argued Mungin’s Brown-related-IAC was undeveloped in state court and objected to the district court’s consideration of it. (Dist.Ct.Doc.31:77-81.) Then, under a “Conclusion” heading, the State argued, “For each and all of the foregoing reasons this claim must be summarily denied.” (Dist.Ct.Doc.31:82.)

Mungin’s reply said *nothing* in response to the State’s timeliness arguments. (See Dist.Ct.Doc.35:21-29). But he did argue that the Brown-related-IAC claim was fully exhausted when the FSC, in 2011, “reversed for a hearing on only the *Brady* and *Giglio* aspects of the issue” because “there was nothing left for Mr. Mungin to do with the ineffectiveness part of the claim” which “was as exhausted as it could have been” at that point. (See Dist.Ct.Doc.35:24).

In denying Mungin’s Brown-related-IAC claim, the district court found no deficient-performance on de novo review, and that the state postconviction court’s no-prejudice holding was reasonable. *Mungin v. Sec’y, Fla. Dep’t of Corr.*, No. 3:06-CV-650-BJD-JBT, 2022 WL 3357672, at *20 (M.D. Fla. Aug. 15, 2022).

Gillette-Related-Ineffectiveness Claim

Gillette testified at trial that he saw shell casings inside the Dodge Monaco. (DAR15:824-828.) But, in an affidavit dated September 24, 2016, Gillette claimed that he was wrong and did not in fact see any shell casings in Monaco. *Mungin v.*

⁴ Antiterrorism and Effective Death Penalty Act of 1996.

State, 320 So. 3d 624, 625 (Fla. 2020) (*Mungin VI*).

On July 13, 2018, Mungin filed a status report requesting the district court extend a stay—originally granted due to *Hurst*⁵ litigation—to cover a successive postconviction motion raising claims pertaining to Gillette’s testimony. (Dist.Ct.Doc.54:4-7.) The State did not respond, and the district court obliged. (Dist.Ct.Doc.55.)

Mungin had filed that successive postconviction motion in state court just under a year earlier, on September 25, 2017, based in part on Gillette’s September 24, 2016 affidavit. *Mungin VI*, 320 So. 3d at 625. This motion raised *Brady*, *Giglio*, newly discovered evidence, and IAC claims. *Id.* For the IAC claim, Mungin argued counsel ineffectively failed to speak to/cross-examine Gillette about an inventory/vehicle-storage receipt where Gillette noted he saw “nothing visible” in the Monaco despite his trial testimony. *Id.* The postconviction court held an evidentiary hearing and denied this claim on the merits. *Id.* The FSC held all Mungin’s Gillette-related claims were untimely, in part, because “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. *Id.* at 626. The mandate for that decision issued July 8, 2021.

Mungin moved to amend his § 2254 petition with his Gillette-related claims on

⁵ *Hurst v. Florida*, 577 U.S. 92 (2016); *Hurst v. State*, 202 So.3d 40 (Fla. 2016).

March 24, 2022. (Dist.Ct.Doc.81.) The State objected and spent several pages of argument detailing why the claims were “conclusively time-barred by the” AEDPA’s “one-year statute of limitations” and did not relate back to Mungin’s timely petition. (Dist.Ct.Doc.81:1, 5, 8-11.) Mungin’s reply explicitly recognized: “Respondent also argues that any amendment here would be ‘futile’ as any claims relating to Gillette would be untimely and would not relate back to his” timely “initial petition or the previously allowed amendment thereto.” (Dist.Ct.Doc.88:10.) But, instead of arguing his claims were independently timely, Mungin simply argued they related back. (Dist.Ct.Doc.88:10-12.)

The district court denied Mungin’s motion to amend with the Gillette-related claims for two reasons: (1) futility based on Mungin’s procedural default and (2) the claims were untimely under AEDPA and did not relate back to Mungin’s timely July 2006 petition. (Doc.90:11-22.) The court began its timeliness discussion by noting the State’s argument “that the motion to amend should be denied as futile because the claims are conclusively time-barred pursuant to AEDPA.” (Dist.Ct.Doc.90:19.) The court agreed after finding the claims did not relate back to Mungin’s timely 2006 petition. (Dist.Ct.Doc.90:19-22.)

Thereafter, the district court denied Mungin’s 28 U.S.C. § 2254 petition sixteen years after it was filed and declined to issue a certificate of appealability.

C. Eleventh Circuit Briefing and Oral Argument

Mungin requested the Eleventh Circuit issue COA, and it did so on the following two relevant issues: (1) “Did Appellant’s trial counsel provide ineffective

assistance” by “failing investigate and present George Brown’s testimony?” and (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” related “to Deputy Gillette.” (11th.Cir.Ct.Doc.15.)

Mungin’s initial brief all but ignored the district court’s holding that his Gillette-related-IAC claim was untimely and did not relate back, despite recognizing the court “held that the proposed amendment ran afoul of AEDPA’s statute of limitations.” (11th.Cir.Ct.Doc.20:39-50.) He never argued his Gillette-related claim was independently timely under AEDPA’s statute of limitations. Instead, he only, in a footnote, argued: “that the Gillette claims did not violate AEDPA’s statute of limitations because they indeed relate back to” Mungin’s “earlier petition.” (11th.Cir.Ct.Doc.20:49-50n.38.)

The State’s Answer Brief asserted both the Brown-related and Gillette-related IAC claims were untimely under AEDPA. (11th.Cir.Ct.Doc.26:38, 43-44, 52-59.) The brief’s facts section noted the State had asserted (below) the Brown-related ineffectiveness claim was “untimely under the AEDPA’s one-year statute of limitations.” (11th.Cir.Ct.Doc.26:19-20) (citing Dist.Ct.Doc.31:79-81.).

The State’s Brown-related, untimeliness argument was offset by the following, italicized heading that appeared both in the body and table of contents: “Mungin’s Brown-Related-IAC Claim is Barred by the AEDPA’s Statute of Limitations and Does not Relate Back.” (11th.Cir.Ct.Doc.26:iv, 38.) The argument began with: “Mungin’s Brown-related-IAC claim is barred by the AEDPA’s statute of limitations for the

reasons more fully addressed in Issue II.” (11th.Cir.Ct.Doc.26:38.) The State then briefly argued Mungin’s timely petition did not mention Brown at all, and “therefore this untimely Brown-related-IAC claim does not arise out of the same common core of operative facts as his timely claims filed July 18, 2006.” (11th.Cir.Ct.Doc.26:38.).

The State’s Gillette-related timeliness argument, which it had incorporated by reference to cover Brown, was far more detailed. (11th.Cir.Ct.Doc.26:38, 43-44, 52-59.) The State affirmatively argued: “AEDPA (as relevant here) provides state prisoners one year to file their section 2254 petitions after their judgment becomes final. 28 U.S.C. § 2244(d)(1)(A).” (11th.Cir.Ct.Doc.26:54.) The State also argued the Gillette-related claim amendment: “was properly denied because it was untimely and did not relate back to Mungin’s timely section 2254 petition filed July 18, 2006.” (11th.Cir.Ct.Doc.26:53.) The State devoted the rest of its argument to explaining why Mungin’s claim did not relate back to his timely petition. (11th.Cir.Ct.Doc.26:52-59.)

Mungin’s reply did not argue either his Brown-related or Gillette-related IAC claims were timely under 28 U.S.C. § 2254(d)(1)(D). He advanced no timeliness argument at all for his Brown-related-IAC claim. (See 11th.Cir.Ct.Doc.30:10-19.) For the Gillette-related-IAC claim, he exclusively argued the claim related back. (11th.Cir.Ct.Doc.30:22-25.)

The Eleventh Circuit held oral argument on October 24, 2023. (11th.Cir.Ct.Doc.37.) The Court specifically asked Mungin’s counsel what he had to say about the State’s argument that the Brown-related-IAC claim was untimely and did not relate back. *See Oral Argument, Mungin v. Sec’y, Fla. Dep’t of Corr.*, 22-13616,

at 12:04–13:30 (Oct. 24, 2023). Mungin’s counsel essentially argued (incorrectly) the State did not raise untimeliness below. *Id.* The court also asked counsel about Gillette-related-timeliness arguments, and counsel only argued that the claim related back. *Id.* at 13:30–21:10.

In part of its oral argument, the State reiterated that it had, in fact, objected to the district court’s consideration of the Brown-related-ineffectiveness claim on timeliness grounds. *Id.* at 26:25–27:00. The court followed up and asked if there was “any difference between” the State’s relation-back argument “with respect to Brown and Gillette.” *Id.* at 29:40–29:54. The State responded that its arguments were “fundamentally” the same and expounded on why neither claim related back. *Id.* at 29:54–32:30.

In oral-argument rebuttal, counsel for Mungin addressed the Brown-related “statute of limitations” question and repeated his incorrect arguments that the State never raised the issue below. *Id.* at 54:39–55:26.

D. Eleventh Circuit Affirmance and Rehearing Phase

The Eleventh Circuit found Mungin’s Brown-related and Gillette-related ineffectiveness claims time-barred under AEDPA. *See Mungin v. Sec’y, Fla. Dep’t of Corr.*, 89 F.4th 1308, 1320 (11th Cir. 2024).⁶ The Court began its analysis by noting: “Mungin does not dispute that both the Brown and Gillette claims are barred by the

⁶ The Court also noted the State, had in fact, raised its Brown-related timeliness argument below. *Mungin*, 89 F.4th at 1315 (citing “Dist. Ct. Doc. 31 at 81.”).

statute of limitations unless they relate back to Mungin’s initial, timely filed habeas petition.” *Id.* Despite that, the Eleventh Circuit performed its own analysis of timeliness under both 28 U.S.C. § 2244(d)(1)(A) (judgment finality) and (d)(1)(D) (newly discovered evidence), and determined his claims were in fact untimely under either analysis. *Id.* at 1320-21.

The court’s analysis gave “Mungin the benefit of the doubt about when the statute began to run” for 28 U.S.C. § 2244(d)(1)(D) purposes and made several assumptions in his favor. *Mungin*, 89 F.4th at 1319-21. For the Brown-related-IAC claim, the court assumed the clock started running on June 30, 2007 when Brown executed his affidavit, stopped on August 16, 2007, when Mungin filed his state postconviction motion, resumed running on August 16, 2003, when the Florida Supreme Court issued its mandate denying the *Brady* and *Giglio* claims, and expired before Mungin tried to add this claim in federal court on August 18, 2014. *Id.* at 1320-21. Based on these calculations, the court concluded Mungin “waited approximately thirteen months and one week after his one-year AEDPA statute of limitations clock began running on this claim” under 28 U.S.C. § 2244(d)(1)(D) to file it. *Mungin*, 89 F.4th at 1320-22. It was therefore untimely as newly discovered evidence. *Id.*

For the Gillette-related-IAC claim, the court noted Deputy Gillette executed his affidavit on September 24, 2016, Mungin filed his state postconviction motion “more than a year later” on September 25, 2017, the Florida Supreme Court rejected the claim in 2020, and Mungin did not try to amend with this claim until 2022. *Id.* at 1321. Even “assuming Mungin could not have discovered this claim with the exercise

of due diligence until Deputy Gillette signed his affidavit, Mungin still waited too long to bring this claim” as newly discovered evidence. *Id.*

The Eleventh Circuit ultimately determined Mungin’s Brown-related and Gillette-related ineffectiveness claims were untimely and did not relate back to his timely petition. *Id.* at 1322-23.

Mungin moved for rehearing en banc arguing (in part) the Eleventh Circuit’s 28 U.S.C. § 2244(d)(1)(D) analysis was based on incorrect calculations and he had no notice of the issues it raised. (11th.Cir.Ct.Doc.45:6-16.) The Eleventh Circuit denied the motion on March 18, 2024. (11th.Cir.Ct.Doc.47.)

E. Certiorari Petition

Mungin timely petitioned for certiorari review of the Eleventh Circuit’s decision on July 16, 2024. He seeks review of the following 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?

Petition at i (alterations in original). This question—based on Mungin’s arguments—applies to both his Gillette-related and Brown-related ineffectiveness claims.

This is the State's⁷ Brief in Opposition. The State opposes Mungin's request to further delay proceedings on his capital sentence imposed over three decades ago by certiorari review. *Cf. Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

⁷ The Secretary of the Florida Department of Corrections will be referred to as the State in this brief.

REASONS FOR DENYING THE WRIT

Anthony Mungin would rather die in prison than give his victims long-deserved justice for the murder he committed in 1990. The following, reformulated, question presented is nothing more than his latest attempt at extending the over-eighteen-year delay he has achieved in federal court so far: is an appellate court required to give notice before performing timeliness calculations when the parties do not dispute the claims are untimely and the court's calculations merely confirm the claims are untimely?

This Court should deny certiorari for six independent and alternative reasons. **First**, Mungin cannot meet the normal certiorari standard. *See* Sup. Ct. R. 10. He points to no real lower-court conflict, or conflict between the lower court's decision and this Court, and barely suggests the questions he presents are important and unsettled. Certiorari is rarely warranted on questions like these.

The cases Mungin relies on (seemingly to establish conflict) are inapposite. *In Wood v. Milyard*, 566 U.S. 463, 474-75 (2012), this Court held the "Tenth Circuit abused its discretion" in finding a petitioner's claims untimely after the State knowingly and intentionally waived timeliness. In *Day v. McDonough*, 547 U.S. 198, 211 (2006), the State affirmatively conceded the claims were timely until the district court corrected its mistake. In *Bilal v. North Carolina*, 287 F. App'x 241, 249 (4th Cir. 2008) and *Wentzell v. Neven*, 674 F.3d 1124, 1126 (9th Cir. 2012), district courts dismissed pro se § 2254 petitions before the State raised the statute of limitations.

None of these events occurred here. Mungin's certiorari question, Petition, and

conflict cases ignore the fact that the State repeatedly argued, at every turn, Mungin's Brown-related and Gillette-related ineffectiveness claims were untimely under the AEDPA's statute of limitations in both the district and appellate courts below. The "conflict" Mungin attempts to establish is entirely illusory and unworthy of certiorari. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari is primarily used to resolve lower-court conflicts on federal law); *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987) (recognizing issues that have "divided neither the federal courts of appeals nor the state courts" rarely merit this Court's review). *See also California v. Carney*, 471 U.S. 386, 400-01 & n.11 (1985) (Stevens, J., dissenting with Brennan and Marshall, JJs.) (explaining conflict aids this Court in identifying "rules that will endure" on difficult questions of law).

Second, this Court should deny certiorari because of the delay Mungin has achieved so far. He was convicted and sentenced to death in 1993. The FSC affirmed his judgment and death sentence in September 1993 and the denial of initial postconviction relief in April 2006. *Mungin I*, 689 So. 2d at 1026; *Mungin II*, 932 So. 2d at 991. Since then, Mungin has won several rounds of judicial ping-pong that delayed resolution of his federal proceedings for nearly two more decades. *Mungin III*, 79 So. 3d at 734; *Mungin IV*, 141 So. 3d at 138; *Mungin V*, 259 So. 3d at 716; *Mungin VI*, 320 So. 3d 624 (Fla. 2020); *Mungin VII*, 2022 WL 3357672; *Mungin VIII*, 89 F.4th at 1308. The district court alone took "sixteen years" to decide his section 2254 petition. *Mungin VIII*, 89 F.4th at 1316.

This Court has bemoaned delays shorter than this one between sentence

imposition and *execution*, much less the mere completion of § 2254 litigation. *Bucklew*, 139 S. Ct. at 1133 (two-decade delay). It has recognized capital defendants have a special incentive to drag out their court proceedings. *Rhines v. Weber*, 544 U.S. 269, 276-78 (2005). And it has also recognized the difficulties attendant to retrials after such lengthy delays. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (unavailable/stale evidence, faulty memory, missing witnesses, and the pain of retrial on the victims). The eighteen-year, federal-court delay in this case so far can hardly be squared with Congress’s intent to expedite capital section 2254 litigation. *See Rhines*, 544 U.S. at 276-78 (recognizing one of AEDPA’s chief purposes was to reduce delays in capital cases); 28 U.S.C. § 1657(a) (requiring expedited section 2254 litigation). It is time for that delay to end.

This Court should deny certiorari and protect Mungin’s over-three-decade-long-settled judgment from further review. *Cf. Bucklew*, 139 S. Ct. at 1133-34 (encouraging federal courts to protect long-settled state judgments); *Brown v. Davenport*, 596 U.S. 118, 134 (2022) (even a petitioner “who prevails under AEDPA must still today persuade a federal habeas court that ‘law and justice require’ relief”) (quoting 28 U.S.C. § 2243). Since none of Mungin’s questions presented would preclude either his first-degree murder conviction or death sentence, the long delay in this case alone is an independent reason to deny certiorari. *Cf. Coleman v. Balkcom*, 451 U.S. 949, 958-59 (1981) (Rehnquist, J., dissenting from certiorari denial) (arguing that imposition of a capital sentence followed by “endlessly drawn out legal proceedings” makes a “mockery of our criminal justice system” and that

when “society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system”). This Court should deny certiorari simply because this capital case has dragged on so long.

Third, this case is a poor vehicle to resolve Mungin’s question presented because it is academic in his case. *See Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic). He had extensive notice that untimeliness was on the table and should have raised any counter-arguments—including 28 U.S.C. § 2244(d)(1)(D)—long before the Eleventh Circuit’s opinion issued. For the Brown-related-IAC claim, he could have raised 28 U.S.C. § 2244(d)(1)(D) (or any of the other subsections) in his reply to the State’s arguments that his Brown-related claims were time-barred under “28 U.S.C. § 2244(d)(1)(A).” (See Dist.Ct.Doc.31:81.) But he didn’t. He could have raised 28 U.S.C. § 2244(d)(1)(D) in response to the State’s appellate arguments (which incorporated its Gillette-related timeliness arguments by reference) that the Brown-related claim was untimely and did not relate back. (See 11th.Cir.Ct.Doc.26:19-20, 38, 43-44, 52-59.) But he didn’t. He could have raised 28 U.S.C. § 2244(d)(1)(D) at oral argument in response to the panel’s questions. But he didn’t. And he could have asked for supplemental briefing immediately after oral argument when the Eleventh Circuit made it clear that it was considering the possibility the Brown-related-IAC claim was untimely. But he didn’t do that either.

Likewise, for the Gillette-related-IAC claim, Mungin could have argued the claim was independently timely when the State objected to his motion to amend on timeliness grounds. (Dist.Ct.Doc.81:1, 5, 8-11.) But he didn't, despite explicitly recognizing the State's argument that his claims were "untimely." (Dist.Ct.Doc.88:10.) Although his arguments would have been unpreserved, he could have raised 28 U.S.C. § 2244(d)(1)(D) in his Initial Eleventh Circuit Brief. But he didn't. He could have countered the State's Answer Brief argument that the only trigger date that mattered was 28 U.S.C. § 2244(d)(1)(A) (finality of judgment) in his reply brief. (See 11th.Cir.Ct.Doc.26:54.) But he didn't.

Mungin had ample notice of the State's position that his Brown-related and Gillette-related ineffectiveness claims were untimely. He also had more than one opportunity to counter the State's arguments by invoking the other provisions of 28 U.S.C. § 2244(d)(1). It blinks reality to suggest Mungin had insufficient notice that untimeliness was on the table for both these claims. The Eleventh Circuit did him a favor by performing analysis he never asked for to determine whether he had missed a timeliness argument. He can hardly complain about the court's analysis when he had every opportunity and reason to argue his claims were timely long before the opinion issued. The extensive notice Mungin had makes this a poor vehicle to answer his proposed question presented.

Fourth, this Court's long-standing, existing caselaw already answers Mungin's question presented. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts

of appeals, to be exercised on the facts of individual cases.” *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). There “is no general rule” about how federal appellate courts may utilize this discretion, but one example of its proper exercise is when the “proper resolution is beyond any doubt.” *Id.* In *Singleton*, this Court held the appellate court abused its discretion in deciding a question without providing the petitioners “an opportunity to be heard” because of the question’s complexities. *Id.* The Court has refused to further cabin the discretion of federal appellate courts. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (“We have previously stopped short of stating a general principle to contain appellate courts’ discretion and we exercise the same restraint today.”) (Cleaned up.).⁸

Indeed, this Court has routinely decided issues without briefing from the parties. *E.g.*, *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 540 (1999) (“The Court has not always confined itself to the set of issues addressed by the parties.”); *United States v. Feola*, 420 U.S. 671, 697 (1975) (Stewart, J., dissenting) (noting the majority answered a question that “was not contained in the petition for certiorari in the present case, and has not been addressed in either the briefs or oral arguments. The parties have merely assumed the answer to the question, and directed their attention to” a “separate question”); *Stanley v. Illinois*, 405 U.S. 645, 660-62 (1972) (Burger, J.,

⁸ This Court has also held that even held sua sponte, district court dismissals may be permissible. *Link v. Wabash R. Co.*, 370 U.S. 626, 633 (1962) (holding “a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting” as long as doing so is not an abuse of discretion).

dissenting) (arguing “the Court holds sua sponte that the Due Process Clause requires” certain hearings when the due-process issue was never raised). It has even established the precedential value of decisions like these is lower than those issued with full briefing and oral argument. *Hohn v. United States*, 524 U.S. 236, 251 (1998).

This Court’s analysis in *Singleton* provides lower federal appellate courts with all the guidance they need before reaching out and addressing details the parties did not. The availability of rehearing, which Mungin availed himself of here, also vitiates any need for more clarity. See *Link*, 370 U.S. at 632. Since *Singleton* has already provided lower federal courts with a framework to consider whether to sua sponte address issues unraised by the parties, there is no need to answer that question again.

Fifth, resolving this question will not benefit Mungin other than to delay his case because both his Brown-related and Gillette-related ineffectiveness claims were in fact untimely. See *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (stating certiorari is the power “to correct wrong judgments, not to revise opinions”). While Mungin quibbles about days, the correct analysis makes it clear his claims are excessively untimely under 28 U.S.C. § 2244(d)(1)(D). The Eleventh Circuit’s resolution of the timeliness issue was, truly, “beyond any doubt” and suitable for determination without Mungin’s input—especially given the notice he had and rehearing he filed. See *Singleton*, 428 U.S. at 121; *Link*, 370 U.S. at 632.

28 U.S.C. § 2244(d)(1)(D) provides: “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 date on which

the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” Both Mungin’s Gillette-related and Brown-related ineffectiveness claims argue about steps counsel should have taken at his 1993 trial with people and documents that have been available for decades. It is difficult to see how claims like these could only have been discoverable “by due diligence” so long after trial. The whole basis for these claims is that counsel could have, and did not, take actions years ago with the information he had. Claims like that were discoverable “by due diligence” long ago and cannot be timely under 28 U.S.C. § 2244(d)(1)(D) decades after trial.

Setting that threshold aside, neither claim is timely under 28 U.S.C. § 2244(d)(1)(D). The “factual predicate” for Mungin’s Brown-related claims became discoverable by due diligence no later than when Brown actually executed his affidavit on June 30, 2007 (and probably before). His August 16, 2007, state postconviction motion would have stopped the clock with 318 days to spare.⁹ *See* 28 U.S.C. § 2244(d)(2). The clock would have resumed running—at the latest—when the FSC’s mandate issued on August 16, 2013. But Mungin did not try to add his Brown-related-ineffectiveness claim in federal court until August 18, 2014—367 days after

⁹ Mungin contorts 28 U.S.C. § 2244(d)(1)(D) into a triggering date that only begins when he filed his state postconviction motion. But his reading is contrary to the plain language of that provision. *See* 28 U.S.C. § 2244(d)(1)(D) (timing from “the date on which the factual predicate of the claim or claims presented *could have been discovered through the exercise of due diligence*” and not when they were filed in state court) (emphasis added.)

mandate and 49 days after the latest date the 28 U.S.C. § 2244(d)(1)(D) statute of limitations could have run. (See Dist.Ct.Docs.25-26.) Mungin's Brown-related-ineffectiveness claim was indisputably untimely.

The Gillette-related ineffectiveness claim is even more untimely. This claim was discoverable by due diligence under 28 U.S.C. § 2244(d)(1)(D) no later than when Gillette executed his September 24, 2016 affidavit. Mungin filed this claim in state court on September 25, 2017, which the State will assume was exactly one year from the date of Gillette's affidavit. The chief problem for Mungin is the FSC held Mungin's claims were untimely under state law. *Mungin VI*, 320 So. 3d at 625 -26. That means *none* of the state-court litigation tolled the one-year deadline to file this claim in federal court. See 28 U.S.C. § 2244(d)(2); *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (holding "that time limits, no matter their form, are 'filing' conditions. Because the state court rejected petitioner's" postconviction "petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2).") Mungin did not seek to add this claim in federal court until March 24, 2022—years after the un-tolled federal statute of limitations ran. (Dist.Ct.Doc.81.)

Indeed, even granting Mungin statutory tolling, his Gillette-related ineffectiveness claim was untimely under 28 U.S.C. § 2244(d)(1)(D). The FSC issued mandate on July 8, 2021, but Mungin did not seek to amend with this claim in federal court until over eight months later. Since he waited (at best for him) exactly a year after Gillette executed his claims to file his claim in state court, Mungin only had, at most, a day of tolled time remaining on the clock.

The Eleventh Circuit did not need briefing from the parties to resolve this rather straightforward statute of limitations question. The correct, factbound calculations prove that Mungin seeks this resolution of this question presented to grant him delay for delay's sake alone. That is an insufficient basis to grant certiorari, particularly given the factbound nature of the timeliness inquiry here. *See Cash v. Maxwell*, 565 U.S. 1138 (2012) (Sotomayor, J., statement respecting the denial of certiorari) (“disagreement with” a “highly factbound conclusion” is “an insufficient basis for granting certiorari”); *Saye v. Williams*, 452 U.S. 926, 930 (1981) (Rehnquist, J., dissenting from certiorari denial) (recognizing cases involving factual disputes are not “particularly attractive” candidates for review but arguing disputed facts were not integral to the legal issues); *Harry Needelman v. United States*, 362 U.S. 600, 601 (1960) (Frankfurter, J., dissenting from dismissal of certiorari as improvidently granted) (arguing, in part, the issues did not raise disputed factual matters and the Court should have retained the case).

Sixth and finally, setting aside untimeliness, Mungin's Brown-related and Gillette-related ineffectiveness claims are unworthy of 28 U.S.C. § 2254 relief and therefore also unworthy of certiorari review. The State adduced a wealth of overwhelming trial evidence that tied Mungin to a string of store robberies and car thefts beginning near his home in Georgia, leading to Woods' murder, and ending with the stolen Dodge Monaco abandoned near Mungin's home and the murder weapon hidden in his bedroom.

The state postconviction court found Mungin's Brown-related-IAC claim failed

on the prejudice prong. (SC09-2018 ROAVolI:138.) That decision is eminently reasonable under AEDPA—a reasonable judge could easily find Brown’s testimony did not create a just-under 51% chance of acquittal. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011) (explaining the difference between the prejudice prong of an ineffectiveness claim and a “more-probable-than-not standard is slight”).

The same is true of Mungin’s Gillette-related-IAC claim, which the lower state postconviction court denied “on the merits.” *Mungin VI*, 320 So. 3d at 625. A reasonable judge could easily conclude Mungin was not prejudiced by the failure to present testimony disputing whether Gillette saw bullet casings in the Dodge Monaco given there was no dispute: (1) Mungin committed the prior robberies leading up to Woods’ murder; (2) the stolen Dodge Monaco was abandoned near Mungin’s home; and (3) the gun used in Woods’ murder was found in Mungin’s room.

Indeed, even stripped of AEDPA deference, on de novo review, Mungin was simply not prejudiced by the failure to present either Brown’s or Gillette’s testimony given the evidence against him. That is reason enough to deny certiorari and put an end to the prolonged federal-court delay in this case.

CONCLUSION

This Court should deny certiorari and bring an end to the proper federal challenges to Mungin's over three-decades-old conviction and death sentence.

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