No. 24-5104

OCTOBER TERM 2023

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY MUNGIN,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

REPLY TO BRIEF IN OPPOSITION

CAPITAL CASE

TODD G. SCHER
Counsel of Record
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
1722 Sheridan Street, #346
Hollywood, Florida 33020
Tel. (754) 263-2349
tscher@msn.com

LEOR VELEANU
Fla. Bar No. 0139191
Capital Habeas Unit
Federal Public Defender
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Tel: 813-228-2715
Leor_veleanu@fd.org

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REPLY TO BRIEF IN OPPOSITION

Introduction

Before addressing the arguments advanced by Respondent in its Brief in Opposition [BIO],[1] Petitioner provides the Court some factual context as to the weakness of the prosecution's case at trial because the issues which the Eleventh Circuit found barred by AEDPA's statute of limitations, based on a statutory provision admittedly never invoked by the Respondent, go to the heart of the reliability of Petitioner's conviction for first-degree murder and his resulting death sentence, imposed by a judge over a jury recommendation rendered by a mere majority 7-5 vote. Anthony Mungin has always maintained his innocence of the killing of Ms. Woods, and by avoiding the actual issues presented in his petition, the Respondent hopes to distract the Court through emotional appeals and obfuscation. But as this Reply demonstrates, the Respondent's arguments provide no support for a denial of certiorari review. In fact, they highlight the Eleventh Circuit's mistakes and support this Court's intervention.

The prosecution's case for guilt rested primarily on two prongs: the putative "identification" of Petitioner by Ronald Kirkland, and ballistic evidence. Both of these key issues were the subject of the claims that the Eleventh Circuit barred from federal court review due to an unprecedented application of 28 U.S.C. § 2244(d)(1)(D) without

[1]In reality, Respondent avoids addressing the question presented by Petitioner, opting instead to rewrite it and then argue why certiorari is not appropriate to review a question that Petitioner has not presented. But, as explained *infra*, in doing so, Respondent actually agrees (at least tacitly) that the Eleventh Circuit in fact did violate the rule and spirit of *Day v. McDonough*, 547 U.S. 198 (2006), a case Respondent only fleetingly mentions (BIO at 16).

any prior notification to Petitioner and without any reasonable opportunity to be heard.

Identification Evidence

There was no eyewitness to the shooting of Ms. Woods. *See Mungin v. State,* 689 So. 2d 1026, 1028 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997) ("There were no eyewitnesses to the shooting"). On Sunday, September 16, 1990, between 1:30 and 2:00 p.m., Ronald Kirkland was on his way to his girlfriend's house when he stopped at a Lil' Champ store in Jacksonville, Florida, to get a Diet Coke and some breath mints (T663-64). There was a tan or cream-colored compact car parked in the lot (T676). Kirkland testified that as he went into the store, a black man coming out of the store carrying a brown bag almost knocked him over (T664, 671). Not really paying "that much attention" (T664), Kirkland testified that he caught only a brief "glimpse" of the back side of a man's head who was going quickly by him ("[h]e almost knocked me over" and "brushed up against me") (T664, 677-78). The man coming out of the store had long-ish hair done up in a "jeri curl," a growth of beard, weighed between 120 and 130 pounds, and was between 5'5" and 5'8" tall (T670-73; 680-81).[2] Kirkland made an in-court identification of Anthony Mungin (TT671).

[2] However, the State presented evidence that *just two days* before Ms. Woods was shot, Petitioner was in Tallahassee and Monticello committing crimes. Witnesses *that the State presented* described Petitioner—who did not dispute his involvement in the Tallahassee and Monticello crimes—as being 5'10" to 6' tall (T266, 738), a "clean-cut" young man in his mid-20s (T725-26), with a "clean-shaven head," a "close-cut" with no visible jeri-curls or other type of curly hair peeking out from his baseball cap (T720, 726, 738, 742). In other words, a description at total odds with Kirkland's description of the man he saw two days later and identified as Anthony Mungin.

Kirkland testified that he did not see anyone in the store when he entered;[3] he got a Diet Coke and waited for the clerk to return so he could pay (T664). A few minutes later, Kirkland noticed a woman lying on the floor behind the counter, near an open cash register (T664-65, 667). He removed two undissolved aspirins from the woman's mouth and attempted CPR; the woman started to cough blood, and Kirkland turned her on her side and noticed a wound on her head (T665). Another customer then came in and called 911 (T665). The woman, Ms. Woods, a store employee, was taken to a hospital where she died four days later of a single gunshot wound to her head (T639, 652, 659, 661, 689).

On September 16, 1990, the day he claimed to have found Ms. Woods, Kirkland told a detective (Christie Conn) he was not sure he would be able to recognize the man who had come out of the store as he went in (T682). Four days later, however, the same detective showed Kirkland six or seven photographs; Kirkland narrowed the pictures down to three, then picked out a photograph of Petitioner (T671-674, 683). In the photo, Petitioner had short hair and no beard (TT675; Ex. 7). Detective Conn did not testify at trial.

The weakness of Kirkland's identification of Petitioner is further enforced by the state court evidentiary hearing of George Brown, a lifelong resident of Jacksonville, who stopped at the Lil' Champ almost every day on his way to work to

[3] This assertion was later contradicted by George Brown, a witness presented by Petitioner in a successive state court postconviction motion. Petitioner's trial counsel never investigated the information Brown possessed and thus did not present him at trial. This ineffectiveness claim is one of those that the Eleventh Circuit determined was barred from federal review by AEDPA's statute of limitations.

purchase a drink or something to eat (3PCR102-03). The Eleventh Circuit ruled that Brown's testimony was barred from consideration by the federal courts under 28 U.S.C. § 2244(d)(1)(D) despite the fact that the state never previously invoked this provision and despite the Florida Supreme Court's finding that Brown's testimony "completely contradicts" Kirkland's trial testimony on a "material detail: whether Kirkland could have seen Mungin leaving the convenience store right after the murder." *Mungin v. State*, 79 So. 3d 726, 737 (Fla. 2011).

On September 16, 1990, Brown stopped at the store as was his custom (3PCR104). He explained his recollection of what occurred:

> Well, when I pulled up in the parking lot nobody was – **there was nobody in the parking lot so I went inside**. As I went inside somebody kind of passed by me, kind of bumped me, bumped into me, but it wasn't hard enough to make me look **so I went on in the store, got my Coke** and got a cake and I noticed the lady wasn't up there and she always made you feel bad because she watched you like a hawk, you know, thinking like you were going to steal something, no matter who it was, but she wasn't at the counter **so I set my drink and stuff down and stood there a little bit and waited and still nobody else in there but me.**
>
> So I went into the bathroom, to the customer's restroom, and yelled out, hollered in there. I said, you know, are you in there, is anybody in there and she didn't answer so I looked around the store and went back up front and they have a little storeroom kind of off to the side by there where the cash registers are and the door was opened up so I looked in there and didn't see her, so about that time I turned around and she was laying there in the floor with a spilled cup of water and she had a pill stuck to her lip so I thought she maybe had had a heart attack or something.
>
> **So I called 911 and about that time this guy came in. . . .**

(3PCR103-05) (emphasis added).

Brown could not describe the person he saw leaving the store but was 100% certain that when he arrived at the store there was no one else there aside from Ms.

Woods (3PCR105-07).[4] He observed one of the cash register drawers open and empty, but he did not touch anything (3PCR107).

Brown recalled speaking with a male officer and "might have" spoken with a female officer (3PCR108-09). Brown does not and did not know Anthony Mungin, nor did he know any of the people involved in the case (3PCR110-11). Brown has never been arrested or have any other legal problems (3PCR111). Since the time he talked with police, no one had ever contacted him about the case until Petitioner's investigator interviewed him about his present testimony (*Id.*).

Brown testified that the portion of the police report where it states that Kirkland and Brown entered the store at the same time was not true: "I was in there by myself" (3PCR114). Brown gave the police his name and address and explained that what he told the police officers at the scene was consistent with his affidavit (3PCR115).

On cross-examination, Brown confirmed having spoken with one male officer and he could not recall if he also spoke with a female officer (3PCR117). Brown told the officers that someone had brushed up against him as he entered the store, but it was not an event that caused him to pay much attention (3PCR120-21). After several questions by the prosecutor, Brown did acknowledge that he was so "nervous" about finding the victim that he may not have told the police about the person brushing up against him (3PCR125). He was, however, sure that the other man (Kirkland) came

[4]This contradicts Kirkland's trial testimony that he did not see anyone else in the store when he entered (T664).

in *after* he (Brown) did (3PCR129). He told the police what he was saying now (3PCR 129). "[E]verything that went on from when I went in the store until I called 911 I can remember just like I was standing there now" (3PCR133).

Ballistics Evidence

At Petitioner's trial, the State introduced two casings discovered in a Dodge Monaco that it claimed was driven by Petitioner to the Jacksonville crime scene and, later, back to Georgia (T877; Trial Ex. 21, 22). Not only did the State choose to introduce these two casings over defense objection (T898-99), it tied them to the Dodge Monaco that the State averred was the vehicle Petitioner used to leave the crime and to the weapon found when Mr. Mungin was arrested. In the State's view, the casings from the Dodge Monaco were crucial to its case as it argued to the jury during its closing argument (T985) ("And we know that car was involved because there is [sic] two shell casings recovered from that car. I'm sorry. From the scene of the Jacksonville homicide, and that matched having been fired from that gun."). *See also* T986 ("You have got that in Georgia, you have the other shootings, you have Jacksonville here, and you have got the car. All those pieces of evidence are linked in a trial of evidence that show this defendant was the person who did it."); T1000-01 ("You also have the car being recovered, that is, the Dodge Monaco, being recovered 75 to a hundred yards from where the defendant is arrested, and you happen to have two shell casings which are right here, which, again, are matched to this gun. That's the car that was used to get back to Georgia.").

The trial evidence about the two shell casings was provided by Deputy Gillette, a deputy sheriff in Camden County, Georgia, on September 18 and 19, 1990, who was

involved in Petitioner's arrest on September 18, 1990 (T824). After Petitioner was arrested, Gillette, on patrol, came across a 1978 white and beige Dodge Monaco at a closed-down gas station just north of Kingsland, Georgia (T826). When he found the car, Gillette called for a wrecker to retrieve the car; he did not unseal the car and did not open the car (T827). When asked by the prosecutor if he saw anything inside the car, Gillette responded "Yes, sir. I saw some cartridges, some pistol cartridges. . . . If memory serves me correct I saw two . . . located in the back behind the driver's seat" (T827-28).

However, Deputy Gillette has recanted his deposition and trial testimony that he observed shell casings on the floor of the back seat of the Dodge Monaco parked near the house where Petitioner was arrested. *Mungin v. State,* 320 So. 3d 624, 625 (Fla. 2020), *cert. denied*, 142 S.Ct. 908 (2022). According to Gillette, he saw no bullets or casings in the car. *Id.* This revelation was consistent with an Inventory and Vehicle Storage Receipt, which he filled out contemporaneously with his observations, which stated, "Nothing visible."

In sum, there was a substantial amount of information available yet never presented to Petitioner's jury, the singular and cumulative nature of which would have significantly undermined Kirkland's "identification" and the prosecution's ballistics case. Brown establishes that Kirkland's "identification" could not be true, or at least he significantly calls into question Kirkland's credibility. Gillette establishes the questionable provenance of the shell casings the prosecution introduced at trial and which it argued tied Petitioner to Ms. Woods's shooting, giving

rise to inferences of evidence tampering, compromising the evidence of a crime scene, and the lack of integrity of the investigation process as a whole. Despite the fact that the federal district court addressed Petitioner's Brown-related ineffective assistance claim on its merits, and despite the fact that there was never a hint of a belated state court filing or an expired federal court deadline as to the Gillette claim, the Eleventh Circuit imposed a statute of limitations bar under 28 U.S.C. § 2244(d)(1)(D) that had never been raised by the State in either the district or appellate court, without offering Petitioner any notice of such or any opportunity to brief that issue.

Respondent Acknowledges a Violation of *Day v. McDonough*

Petitioner presents to this Court a straightforward but vitally important question: whether the holding of *Day v. McDonough*, 547 U.S. 198 (2006), prohibiting a federal court from dismissing a federal habeas petition—or a claim in a federal habeas petition—on statute of limitations grounds without affording the petitioner notice and an opportunity to be heard on the issue, applies with equal force to a federal appeals court which dismisses a federal habeas petition—or claims in a federal habeas petition—without affording the petitioner notice and an opportunity to be heard, particularly where the federal district court did not address the statute of limitations question because it was not raised by the State. In its own reformulation of the question presented, the Respondent acknowledges that the Eleventh Circuit imposed a statute of limitations bar based on a statutory provision "***invoked by neither party***" (BIO at ii) (emphasis added); *see also id.* at ii (noting that, in federal district court, the state "argued the claims were untimely *under a different statutory subsection*" than the one relied on by the Eleventh Circuit) (emphasis

added).[5]

Contending that appellate courts often address issues "without briefing from the parties" (BIO at 21), the Respondent argues that the Eleventh Circuit did Petitioner "a favor" by barring two of his constitutional claims for relief without affording him notice and an opportunity to be heard, did him this "favor" without alerting him to the possibility of a looming statute of limitations issue in the Certificate of Appealability it granted on both the Brown and Gillette claims,[6] and in so bestowing this "favor" on him, relied on incorrect state court deadlines that it then wrongly claimed were missed. *See Mungin v. Sec'y, Fla. Dep't of Corr.*, 89 F.4th 1308, 1320-21 (11th Cir. 2024).[7] Adding to the "favors" the Eleventh Circuit extended to Petitioner was its perfunctory denial of rehearing when given an opportunity to

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[5] The Respondent writes that "that parties do not dispute the claims are untimely and the court's calculations merely confirm the claims are untimely" (BIO at 16). If not a typographical error, then this is false. Petitioner most assuredly disputes the Eleventh Circuit's determinations concerning the timeliness of the claims at issue and its calculations. *See* Pet. for Certiorari at 16 ("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").

[6] The Certificate of Appealability on the Brown-related claim (which was denied on its merits by the district court) was limited to the merits-based question of whether trial counsel was ineffective for "failing to investigate and present George Brown's testimony" (A-41). The Certificate of Appealability on the Gillette-related claim was limited to whether the district court erred "in denying as futile" Petitioner's Gillette-based ineffective assistance of counsel claim (*Id.*). Not a hint of a question about AEDPA's statute of limitations in general, or specifically about 28 U.S.C. § 2244(d)(1)(D)'s potential application to the Brown and/or Gillette claims, is found in the Certificate of Appealability that the Eleventh Circuit crafted.

[7] Respondent does not dispute Petitioner's arguments about the Eleventh Circuit's blatant mistakes concerning the state filing deadlines for the Brown and Gillette state court postconviction motions. *See* Pet. for Certiorari at 4-8, 16-22.

correct its mistakes and reconsider its decision to upend this Court's decision in *Day* by imposing a limitations bar based on a statutory provision never raised by the state and never briefed by the parties because it was not included in the Certificate of Appealability crafted by the Eleventh Circuit itself.

Respondent's attempt to distinguish *Day* actually reinforces the point that statute of limitations issues are properly first addressed in district courts, with notice to the petitioner, access to the record, and the benefit of briefing of the parties. *See* BIO at 16 (noting that in *Day*, "the State affirmatively conceded [in the district court, where the issue was properly raised and litigated, that] the claims were timely until the district court corrected its mistake"). As *Day* makes clear, the limitations questions in that case were litigated in both the district court and later in the appellate court, with full notice to the petitioner, opportunity to be heard, and a developed record. But not so in Petitioner's case due to the Eleventh Circuit's usurpation of basic principles of fairness and due process. "[A] federal court does not have *carte blanche* to depart from the principle of party presentation basis to our adversary system." *Wood v. Milyard*, 566 U.S. 463, 472 (2012). "When a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on the ground, the district court's labor is discounted and the appellate court acts not as a court of review but as one of first view." *Id.* at 474.

Petitioner is not contending that a federal appeals court cannot occasionally decide to address issues "without briefing from the parties" (BIO at 21); but the *Day* Court carved out an exception for statute of limitations questions, as its holding make

unmistakably clear: 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 (emphasis added) . Respondent cannot avoid *Day*'s holding while simultaneously acknowledging that the Eleventh Circuit imposed a statute of limitations bar based on a statutory provision "invoked by neither party."

Nothing in *Day* (or any other law cited in the BIO) supports the Respondent's position that Petitioner "could have" anticipatorily argued that § 2244(d)(1)(D) did not bar his Brown and/or his Gillette claims despite the fact that that statutory provision was never invoked by Respondent or by the district court. Respondent scours the record for nuggets of innocuous or irrelevant words it has used in the course of the district court and appellate briefing in this case to argue that Petitioner should have divined that the Eleventh Circuit might violate its own rules concerning Certificates of Appealability[8] and reach an issue—a statute of limitations bar under § 2244(d)(1)(D)—that the state never invoked and that was never included in the Certificate of Appealability. Nothing in *Day* "authorizes [an] exception to the

[8] Habeas counsel attempting to brief issues not contained within a Certificate of Appealability have been accused by the Eleventh Circuit of "cho[osing] to flout the clear COA order limiting the issues that could be briefed on the merits," or of taking unwarranted "license to do that." *Hodges v. Attorney General of Fla.*, 506 F. 3d 1337, 1341 (11th Cir. 2007). "It is one thing for an appellate court in an unusual case to be persuaded during its consideration of the merits of a granted issue to expand the COA to include a related issue and to request supplemental briefing on that previously excluded issue. It is another thing for an appellant to simply ignore the COA order and brief any issue he pleases. We recognize the former practice and condemn the latter." *Id.* at 1341-42.

requirement that the court give a petitioner notice and an opportunity to respond." *Wentzell v. Neven*, 674 F. 3d 1124, 1126 (9th Cir. 2012)

Recall, for example, the Respondent's concessions that the statute of limitations bars imposed by the Eleventh Circuit were based on timeliness calculations under a statutory provision "invoked by neither party" and that the state in fact invoked a statute of limitations defense in district court "under a *different* statutory subsection" (BIO at ii) (emphasis added). In order to get around the resulting clear violation of *Day*, Respondent argues that it somehow alerted Petitioner to a statute of limitations violation of the Brown claim under § 2244(d)(1)(D) by invoking § 2244(d)(1)(A). *See* BIO at ii, 7, 9. It goes without saying that these are independent statutory provisions, each providing a different statutory deadline and each requiring a different factual and legal analysis depending on the particular circumstances of a case. *See Gonzalez v. Thaler*, 565 U.S. 134, 148 (2012) ("AEDPA establishes a 1-year limitations period for state prisoners to file for federal habeas relief, which 'run[s] from the latest of' four specified dates") (footnote and citation omitted). Its bald statement that Petitioner "could have" responded to its invocation of § 2244(d)(1)(A) by divining that somehow Respondent might later argue (at its whimsy) a statute of limitations violation based on an entirely different statutory provision it explicitly did not cite, is ludicrous. No matter how hard it tries, Respondent cannot overcome the basic fact that it did not invoke § 2244(d)(1)(D) in the district court.[9] "[C]ounsel in a habeas case is entitled to the 'legitimate strategic

[9] Nor did the Respondent cite § 2244(d)(1)(D) in its Eleventh Circuit brief.

option of not pleading facts in anticipation of a statute of limitations defense and [instead] forcing the respondent to bear its own burden of identifying and raising potentially applicable affirmative defenses.'" *Bilal v. North Carolina*, 287 F. App'x 241, 246 (4th Cir. 2008) (quoting *McMillan v. Jarvis*, 332 F.3d 244, 249 (4th Cir. 2003)).

The same argument applies to Petitioner's Gillette-based claim. Respondent again argues that raising a generalized AEDPA's statute of limitations argument in the context of objecting to a motion for leave to amend a habeas petition should somehow have alerted Petitioner that it was raising a statute of limitations defense under § 2244(d)(1)(D) (BIO at 8-9). Respondent never invoked § 2244(d)(1)(D) when it objected to Petitioner's request for leave to amend his petition with the Gillette-based claim. *See* DE:82. Nor did the district court rule that the Gillette-based claim was barred under § 2244(d)(1)(D). See DE:90. Rather, it found amendment would be futile because the claim did not relate back to Petitioner's original habeas petition and was not filed within one year of state court finality. Not one mention of § 2244(d)(1)(D) is made in the district court's order denying leave to amend with the Gillette claim, nor is it cited in the Respondent's Eleventh Circuit brief.

As a last-gasp effort to foist some blame on Petitioner, the Respondent argues that matters addressed during the Eleventh Circuit oral argument somehow justify an otherwise unanticipated and unbriefed application of § 2244(d)(1)(D) to Petitioner's Brown and Gillette claims (BIO at 12). Of course, by then it is too late; this is not notice and an opportunity to be heard within the meaning of *Day*. Given

that the Respondent has acknowledged that the timeliness calculations ultimately relied on by the Eleventh Circuit in barring the Brown and Gillette claims under § 2244(d)(1)(D) were based on a statutory provision "invoked by neither party," it remains a mystery how anything said during an oral argument about an un-briefed statute of limitations argument that was not raised or addressed in the district court and not included in the Certificate of Appealability could remotely be germane to the Question Presented to this Court in Petitioner's case. Again, this is precisely why these issues should not the subject of ambush during an oral argument but rather are to be properly raised and briefed in the appropriate forum,[10] with a developed record on which to refer and rely, and with adequate notice and an opportunity to be heard.

Conclusion

The Eleventh Circuit was without authority to bar, on statute of limitations grounds not invoked by the State, the two claims in Petitioner's case without

[10] Respondent goes so far to contend that Petitioner's Eleventh Circuit briefing should have included an "unpreserved" rebuttal to a § 2244(d)(1)(D) argument that it never even raised and that was not included in the Certificate of Appealability (BIO at 20). However, the Eleventh Circuit has served "clear notice" that arguments in a brief not covered in the Certificate of Appealability "simply will not be reviewed." *Tompkins v. Moore*, 193 F.3d 1327, 1332 (11th Cir. 1999). Respondent also suggests that Petitioner could have asked the Eleventh Circuit for "supplemental briefing" after the oral argument (BIO at 19). Of course, this suggestion merely confirms that the statute of limitations issues in question were never previously raised or briefed; it also contravenes Eleventh Circuit law. *See United States v. Levy*, 379 F.3d 1241, 1242-43 (11th Cir. 2004) ("Similar to petitions for rehearing, and even before a decision on the merits of a direct appeal is issued, this Court repeatedly has denied motions to file supplemental briefs that seek to raise new issues not covered in an appellant's initial brief on appeal").

affording him any (much less adequate) notice and an opportunity to be heard. Respondent acknowledges that it failed to raise in the district court or in the Eleventh Circuit the statutory basis for the limitations dismissal that the Eleventh Circuit eventually imposed; and it does not dispute that Petitioner had no notice or opportunity to be heard before the Eleventh Circuit barred his claims. Respondent's suggestion that habeas petitioners should be soothsayers and anticipatorily "counter" arguments that the state has never made, or preemptively defend the timing of a filing based on "other provisions" of federal law that the state has willfully failed to invoke, finds no support in *Day* or any other caselaw. Certiorari review is warranted.

Respectfully submitted,

/s/ Todd G. Scher
Todd G. Scher
Fla. Bar No. 0899641
tscher@msn.com
Law Office of Todd G. Scher, P.L.
1722 Sheridan Street #346
Hollywood, FL 33020
Tel: 754-263-2349
Fax: 754-263-4147

/s/ Leor Veleanu
Leor Veleanu
Fla. Bar No. 0139191
Leor_veleanu@fd.org
Capital Habeas Unit
Office of the Federal Defender
400 N. Tampa Street, Suite 2700
Tampa, FL 33602
Tel: 813-228-2715

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