IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

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

> Betty Jean Woods, a convenience store clerk in Jacksonville, was shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.
>
> Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25-caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.
>
> Jurors also heard *Williams* rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.
>
> First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.
>
> Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.
>
> The judge instructed the jury on both premeditated murder and felony murder (with robbery or attempted robbery as the underlying felony), and the jury returned a general verdict of first-degree murder.

> In the penalty phase, several witnesses who knew Mungin while he was growing up testified that he was trustworthy, not violent, and earned passing grades in school. Mungin lived with his grandmother from the time he was five, but Mungin left when he was eighteen to live with an uncle in Jacksonville. An official from the prison where Mungin was serving a life sentence for the Tallahassee crime testified that Mungin did not have any disciplinary problems during the six months Mungin was under his supervision. Harry Krop, a forensic psychologist, testified that he found no evidence of any major mental illness or personality disorder, although Mungin had a history of drug and alcohol abuse. Krop said he thought Mungin could be rehabilitated because of his normal life before drugs, his average intelligence, and his clean record while in prison.
>
> The jury recommended death by a vote of seven to five. The trial judge followed the jury's recommendation and sentenced Mungin to death. In imposing the death penalty, the trial judge found two aggravating factors: (1) Mungin had previously been convicted of a felony involving the use or threat of violence to another person; and (2) Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. The trial judge found no statutory mitigation and gave minimal weight to the nonstatutory mitigation that Mungin could be rehabilitated and was not antisocial.

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

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

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

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

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

Id. at 993 n. 6.

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

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

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

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

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

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

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

SUMMARY OF THE TESTIMONY

Charles Cofer

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

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

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

Malcolm Gillette

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dale Gilbreath

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

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

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

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

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

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

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

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

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

Bernardo De La Rionda

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

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

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

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

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

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

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

RECORD CITATIONS

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

SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of the proceeding would have been different." *Wickham v. State*, 124 So. 3d 841, 851 (Fla. 2013) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* With regards to the second prong of *Brady*, "[t]here is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense either had the information or could have obtained it through the exercise of reasonable diligence." *Floyd v. State*, 18 So. 3d 432, 451 (Fla. 2009) (quoting *Provenzano v. State*, 616 So. 2d 428, 430 (Fla. 1993)).

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

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

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

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

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

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

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

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

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

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

In its order denying relief, the postconviction court found that Appellant failed to establish that the evidence was favorable. (Order at 8). The Court relied on the fact that, "when Deputy Gillette was pressed on the inconsistencies between what was documented in the inventory sheet verse his deposition and trial testimonies, Deputy Gillette was unable to offer any explanation, and stated he would never

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

The postconviction court noted that while Deputy Gillette testified that the evidence could have been tainted without his knowledge, "he also stated that to his knowledge no one tampered with the evidence or put anything in the car and if he had noticed such, he would have documented it." (Order at 10; Evid. Hrg. Trans. 116, 130). The postconviction court properly found that Mungin failed to prove that the State willfully or inadvertently suppressed that Deputy Gillette did not see the casings in the Monaco and that he failed to prove that the evidence was material. (Order at 10-11).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> This Court has found all of the claims of individual errors in the instant motion to be without merit. Because cumulative error claims are not gestalts, and because all of Defendant's ground for relief have been denied, Defendant's claim of cumulative error must be similarly rejected. *See Mansfield v. State*, 911 So. 2d 1160, 1168 n.6 (Fla. 2005) ("Because we find that none of Mansfield's other claims have merit, we reject Mansfield's cumulative-error argument.").

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

CONCLUSION

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

CERTIFICATE OF FONT COMPLIANCE

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

/s/ *Lisa A. Hopkins*
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