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IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN.,
Appellant,

vs. **Case Number SC18-635**

STATE OF FLORIDA,
Appellee.
_________________________/

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

REPLY BRIEF OF APPELLANT

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REPLY TO APPELLEE'S "SUMMARY OF THE TESTIMONY"

Beginning on page 5 of the Answer Brief [hereinafter AB], the Appellee sets out its "summary" of the evidentiary hearing testimony. The Appellee points to no fact as summarized by Mr. Mungin in his Initial Brief as wrong or inaccurate; instead, the Appellee provides its own version of the facts, taking out-of-context cherry-picked parts of the testimony and presenting them as "facts" while at the same time ignoring and/or misrepresenting the actual facts.

Most seriously, the Appellee **intentionally**[1] uses misleading words when referring to the inventory "receipt" filled out by Mr. Gillette, interchangeably calling it a "report" in order to falsely claim that the prosecution did not commit a *Brady*[2] violation because the defense possessed a "report" authored by Gillette. They are two different documents. This strategy of intentionally muddying the difference between the two documents is not limited to the "Summary of the

[1] There can be no doubt that the Appellee is intentionally misleading this Court through its knowing use of the terms inventory "receipt" versus "report." The difference between the two documents is one of the most important aspects of this case, and Mr. Mungin's Initial Brief devoted extensive discussion to the difference between Gillette's inventory "receipt" (which he filled out contemporaneously to the time when he made the observations he memorialized in that inventory "receipt") and a "report" he later filled out regarding his role in the case and which was discussed at his pretrial deposition. Mr. Mungin's Initial Brief also contained a detailed discussion of the factual errors made by the lower court in failing to recognize the difference between Gillette's inventory "receipt" and the "report" he later prepared. The difference between the inventory receipt versus Gillette's incident "report" is a crucial aspect of this case and the Appellee can hardly claim otherwise, making its whitewashing of the record all the more egregious.

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

Testimony" section of the Appellee's brief. It permeates it. But "the State cannot dictate reality by fiat," *Hardwick v. Sec'y, Fla. Dep't. of Corr.*, 803 F.3d 541, 555 (11th Cir. 2015), and the actual testimony reveals the falsity of many of the Appellee's "factual" statements.

<u>Difference between Gillette's inventory "receipt" and his "report"</u>

The State's strategy of misleading the Court as to certain facts is most on display in the portions of its "Summary of the Testimony" devoted to discussing the information contained in the actual document that Mr. Mungin alleged to have been suppressed by the State prior to trial: Gillette's inventory storage receipt.[3] For example, when "summarizing" the evidentiary hearing testimony of Charles Cofer, Mr. Mungin's trial counsel, the Appellee writes that Cofer was "confronted" with Gillette's pretrial deposition wherein "the State asked questions of Officer Gillette regarding his report and Cofer agreed that the questions were consistent with the vehicle storage receipt" (AB at 6). It is true that, at the evidentiary hearing, the State asked Cofer questions about Gillette's pretrial deposition. It is also true that during that deposition Gillette was asked about a "report" he prepared

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[3] Unfortunately, the Appellee was successful in the circuit court in muddying the facts to such an extent that the trial court itself was confused when it wrote that the prosecutor "specifically addressed the documents in Deputy Gillette's deposition" (4PC-R. 147). The prosecutor did no such thing during Gillette's deposition; he only referenced an incident report prepared by Gillette which made no mention whatsoever of bullets, or casings, or any observations Gillette made when he inspected the Dodge Monaco in the morning of September 19, 1990.

detailing his role in the case. But Cofer did not "agree" that the questions asked by the prosecutor to Gillette during Gillette's pretrial deposition "were consistent with the vehicle storage receipt" as written by the Appellee; the way this sentence is written implies (falsely) that the document being referred to by the prosecutor during Gillette's deposition was "the vehicle storage receipt." It was not.

In reality, what Cofer said at the evidentiary hearing was that the prosecutor's question to Gillette at Gillette's deposition "contains *facts which are consistent with this inventory of vehicle search, vehicle storage receipt, yes*" (4PC-R. 43) (emphasis added).[4] This is an accurate statement; as Gillette would later explain, although there is an overlap in some of the information contained in the inventory storage receipt he filled out immediately after his discovery of the Dodge Monaco in the early morning hours of September 19, 1990, and the incident report he later would prepare, they were *two separate documents*. For starters and most obviously, one was called an incident report and one was called an inventory receipt (4PC-R. 259). Both documents refer to the fact that Gillette found the car

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[4] When the prosecutor pressed Cofer at the evidentiary hearing about the "report" mentioned at Gillette's deposition and tried to get Cofer to agree that the "report" was the same as "the actual document, that is defense exhibit–the inventory" that was the document alleged by Mr. Mungin to have been withheld by the State prior to trial (4PC-R. 206), Cofer would not agree because he had no recollection "of whether or not [he] had that document" (4PC-R. 207). However, Cofer unequivocally testified that if he had a document suggesting that Gillette had observed "nothing visible" in the Dodge Monaco (which is what the inventory storage receipt said) when at trial he testified that he observed shell casings, he would have used it to impeach Gillette and confront him with the inconstency (4PC-R. 187-88).

and had it transported to the Sheriff's Office, and both contain general descriptive information such as the date and time he discovered the car, the type of car, etc. ***But there is nothing in the narrative section of the incident "report" that mentions bullets or casings at all*** (4PC-R. 290). Gillette did not believe he was referring to the inventory receipt when, during his pretrial deposition, he was being questioned about a "report" he had prepared (4PC-R. 264, 266). It was the inventory receipt–not the incident report–that made reference to the fact that there was "nothing visible" in the Dodge Monaco, as Gillette himself emphasized at the evidentiary hearing:

> I do not recall seeing bullets in the car. I wrote on here [the inventory receipt] that there was nothing visible. I stated in here [deposition and trial testimony] that I saw bullets. I have absolutely, unequivocally no understanding of why these two things are not consistent. I wish I had an answer for you but I don't.

(4PC-R. 268).

The inventory storage receipt filled out by Gillette is a separate and distinct document from the incident report he later prepared. They are two separate documents despite containing some overlapping information just as a driver's licence and a passport are separate documents containing some overlapping information. A driver's license and a passport both contain an individual's name and birth date. But a driver's licence also contains a driver's licence number, and

a passport contains a passport number. In other words, different information. A driver's license contains a person's status as an organ donor, whereas a passport does not. In other words, different information. A driver's license contains an individual's current address without identifying the individual's place of birth, whereas a passport does not contain an individual's current address but does state the individual's place of birth. In other words, different information. Just like the inventory storage receipt filled out by Gillette and Gillette's incident report. Two different documents despite containing certain overlapping information.

Testimony from Gillette about Affidavit

The Appellee also sets forth a truncated, oversimplified, and ultimately misleading "summary" about the testimony concerning Gillette and his interactions with Mr. Mungin's investigator, Rosalie Bolin, that led to Gillette himself writing and signing an affidavit on September 24, 2016 (AB at 8). For example, the Appellee writes that Bolin "spoke with" Gillette "about writing the affidavit" and immediately follows that sentence with a snippet of Gillette's testimony where he testified that he has had contact with Bolin "over the last probably 20 years on and off" (AB at 8) (citing pages 80-81 of the evidentiary hearing transcript).[5] The way

[5] The Appellee references the pagination of the original version of the evidentiary hearing transcript; pages 80 and 81 are found at 4-PCR. 243-44. The Appellee's brief never cites to the paginated record before this Court; rather, it merely refers to the pagination of the evidentiary hearing transcript or the original pagination of the trial court's order. Mr. Mungin will attempt as best he can to reconcile the pages cited by the Appellee with the proper page in the record.

that the Appellee has cherry-picked parts of the testimony is designed to give the reader (this Court) the (false) impression that the information provided by Gillette in the affidavit he himself wrote and signed was perhaps decades old.

The Appellee leaves out of its "summary" more facts than it includes. It is true that investigator Bolin had contacted Gillette many years ago about Mr. Mungin's case; after all, Gillette had been a trial and penalty phase witness and had personally known Mr. Mungin when they grew up together in Georgia (4PC-R. 244). Bolin's only motivation in persisting in her contact with Gillette was "to get to the truth" (4PC-R. 245). Although he could not testify under oath to the exact time line, Gillette denied that it had been "years" after he spoke with Bolin about the information contained in his affidavit that he wrote and signed the affidavit, despite the prosecutor's persistent attempts to get Gillette to testify otherwise:

> Q [by Mr. de la Rionda] Okay. And so she's contacted you. I am assuming you didn't know her before?
>
> A [by Mr. Gillette] I did not know her before this case.
>
> Q Okay. So she contacted you when specifically was the first time? You mentioned 20 years so would it have been like 1997 or there or 2007?
>
> A Sir, honestly I have – I have no idea.
>
> Q Okay. And the contacts that you had with Ms. Bolin, were those in person or by phone?

A Mostly by phone. We had met in person before.

Q So you talked to her by phone, correct?

A Yes, sir.

Q And she just call you out of the blue, I am helping to represent Anthony Mungin, I have some questions of you?

A Actually she said I am representing Mr. Mungin and we are just trying to get to the truth.

Q Sure.

A She says that all the time.

Q Sure. And did she tell you how she got your name?

A I don't recall that specifically. I remember her – no. Not concerning me. I remember us talking about someone that she said she got a name out of the file but I don't think she was referring to me.

Q All right. So she would have asked you about the – what you saw in the car I am assuming, correct?

A I don't – I don't know. She didn't ask me about what – everything I saw in the car. I do recall – I think I recall her asking me if I saw anything that stood out to me in the car.

Q Okay. *And that would have been years before you did this affidavit, correct, that she asked you that?*

A *I can't say that it was years before she asked me to fill the affidavit out that she asked me that question.*

Q *Well, was it at least a year or two before that*?

A I *can't – I can't testify.* I mean I can assume.

Q No. I don't want you to assume – I don't want you to assume or anything. I am just saying this affidavit came because you met with her and you filled this out, correct?

A Yes, sir.

Q So prior to filling this out, which you stated you prepared yourself, you had discussed this with Ms. Bolin, correct?

A Yes. That is correct.

Q And would it be fair that you discussed it with Ms. Bolin more than one time?

A The affidavit, yes, that would be fair. *I just don't know the time line, sir.* I doesn't seem to me – I am surprised that it's been almost two years since I typed the affidavit. I guess time just flies.

(4PC-R. 244-46) (emphasis added).

Under the prosecutor's persistent questioning, Gillette acknowledged that it could have been months (not years) between the time he discussed with Bolin the information he later wrote in his affidavit, and the day he signed the affidavit (September 24, 2016) (4PC-R. 84). The decision about what to put into the affidavit and when to sign it was entirely Gillette's; in fact, Gillette explained that Bolin "offered that they could send me something and I said, no, I don't want – I am going to write it in my – my language . . . " (4PC-R. 254). He emphasized that

the content and timing of the affidavit was his and his alone: "And I said I will fill it out. I will write it. I didn't want anyone to be a part of it. All I wanted to do was to make sure that this affidavit had what I knew to be true" (4PC-R. 247). He "wanted to make sure that there was no influence to anything that was not of my own accord" (4PC-R. 254).

Testimony from ASA de la Rionda about Inventory Storage Receipt

In "summarizing" the evidentiary hearing testimony of trial prosecutor de la Rionda, the Appellee persists in misleading the Court about the facts. Again cherry-picking parts of testimony and merging them together, the Appellee writes that de la Rionda "testified that he provided discovery reports, which *would have included the inventory property receipt*" (AB at 12) (citing page 184 of the evidentiary hearing transcript) (emphasis added). This is a misrepresentation of de la Rionda's testimony.

When explicitly asked about Gillette's inventory receipt and his recollection about that document, de la Rionda testified "*I don't know if I recalled specifically the specific paper*" (4PC-R. 347) (emphasis added). He went on to explain that he understood his obligations under *Brady* and *Giglio*,[6] and that the inventory storage receipt was the type of document that he "would provide" in discovery pursuant to

[6] *Giglio v. United States*, 450 U.S. 150 (1972).

those obligations, and that based on his "normal procedures" he did "to the best of my recollection" (4PC-R. 350).

But upon further exploration of Mr. de la Rionda's "recollection," he acknowledged that "in terms of precisely this thing [the inventory storage receipt] I don't have an independent memory right now of this thing" (4PC-R. 351). His assumption that he had disclosed the inventory receipt was based on his "normal procedures" as well as his reading of Gillette's deposition; but in the deposition de la Rionda only referred to the "incident report" prepared by Gillette (4PC-R. 351-52). The specific document de la Rionda was questioning Gillette about during the deposition was referred to as a "report" (4PC-R. 352).[7] Mr. de la Rionda acknowledged that the inventory storage receipt and the incident report were two different documents and both made reference to the date (09/19/90) and the time (0027) (4PC-R. 352). They both also indicated the name, type, model, and color of the car in question (*Id.*). **But the only document of the two that revealed anything about Gillette's observations about the Monaco and anything about "nothing visible" was the inventory storage receipt, not the incident report.**

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[7] Upon cross-examination by the State at the evidentiary hearing, de la Rionda reiterated that it was his recollection that Gillette was confronted with "*a report* that had the information pertaining to the Dodge Monaco during his deposition" (4PC-R. 361) (emphasis added). The "report," as de la Rionda's direct examination testimony had earlier established, only contained a narrative about the car being taken and later secured at the Camden County Sheriff's Office; it did not reflect the information written by Gillette on the inventory storage receipt: "nothing visible."

The narrative on the incident report "just talks about the car and taken to Camden County Sheriff's Office and then Keith Kelley's Wrecker Service secured it for processing" (4PC-R. 353).

ARGUMENT IN REPLY

MR. MUNGIN WAS DENIED AN ADVERSARIAL TESTING AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL DUE TO THE SINGULAR AND COMBINED EFFECTS OF THE DUE PROCESS VIOLATIONS THAT OCCURRED, THE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE, THE KNOWING PRESENTATION OF FALSE EVIDENCE, AND NEWLY DISCOVERED EVIDENCE. THE LOWER COURT'S ORDER IS GROUNDED ON FACTS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE AND REACHES LEGAL CONCLUSIONS THAT ARE CONTRARY TO PRECEDENT FROM THIS COURT AND FROM THE UNITED STATES SUPREME COURT. A NEW TRIAL AND/OR A RESENTENCING ARE WARRANTED.

A. Introduction.

The Appellee does not take issue with Mr. Mungin's brief insofar as it discusses the proper standards of review in this appeal of the denial of relief following an evidentiary hearing. In fact, the Appellee does not address the standard of review at all, an omission that is particularly glaring given that it is raising a procedural defense that was rejected (at least implicitly if not explicitly) by the lower court. The Appellee failed to cross-appeal the rejection of the procedural defense it now attempting to resurrect. For the reasons set forth below,

the Court should reject the State's attempt to urge a procedural bar. And, as to the merits of the issues, Mr. Mungin submits that nothing in the Appellee's brief undermines his position that he is entitled to a new trial or, at a minimum, a resentencing proceeding in light of the record as it now stands in this case.

B. Alleged Procedural Bar.

The State first argues that all of the issues raised by Mr. Mungin– those same issues on which the lower court determined that an evidentiary hearing was necessary–are procedurally barred for a variety of reasons (AB at 17). First and foremost, Mr. Mungin submits that by granting an evidentiary hearing on the merits of the claims raised by Mr. Mungin, the trial court at least implicitly rejected the procedural bar defense the State raised in its written response to Mr. Mungin's Rule3.851 motion. In failing to cross-appeal the lower court's rejection of its procedural defense and its granting of an evidentiary hearing, the State has waived any argument that Mr. Mungin's claims are procedurally barred. *See Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State").[8]

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[8] *Cannady* involved a capital appeal where the State attempted to argue that the defendant was deserving of the death penalty in light of an aggravator that had not been presented to the jury or the trial judge. This Court found that because "the State did not file a cross-appeal on this issue," it had "not been preserved for appeal." *Cannady*, 620 So.2d at 170

There was a case management hearing in this case, at which the parties were given the opportunity to argue their respective positions on the necessity of an evidentiary hearing (Supp. 4PC-R. 377-85). Mr. Mungin's counsel argued for the need for an evidentiary hearing (*Id*. at 381-82). Counsel also brought to the lower court's attention the fact that the State, in its written response, had argued that Mr. Mungin's motion was technically deficient for failing, in its view, to adequately allege certain details about the diligence underlying the claims; in response, Mr. Mungin's counsel argued that "if there is anything else that the Court determines is a pleading deficiency, . . . the proper recourse is for the Court to so order and allow an amendment so I can have the opportunity to correct any deficiency" (*Id*. at 382).

The State, at the case management hearing, advanced two reasons why the motion should be summarily denied. First, it argued that "this is time barred" because "Gillette testified at trial" and acknowledged that "he was testifying from his memory" (*Id.*). Second, the issue of the shell casings was, in the State's view, a "collateral issue" and that this Court did not mention the shell casings that were found in the vehicle (*Id*. at 382-83).[9]

[9] The State *did* certainly mention the shell casings at trial; it argued repeatedly to the jury that the casings from the Dodge Monaco were crucial to its case against Mr. Mungin. See T985 ("And we know the car was involved because there is two shell casings recovered from that car. So, here is the car. That happened to match the shell casing that is recovered from the gun. I'm sorry. From the scene of the Jacksonville homicide, and that matched having been fired from that gun"); 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 trail of evidence that show this

After hearing the parties' arguments, the trial court ruled:

> I have reviewed the motion and the response, as well as the law as it relates to the discovered evidence, I'm going to grant the motion for an evidentiary hearing. You'll receive an order and the order will outline any deadlines.

(Supp. 4PC-R. 383-84). The court subsequently entered a written order reiterating that "this Court will grant Defendant an opportunity to present evidence at an evidentiary hearing on issues raised" in his successive Rule 3.851 motion (4PC-R. 45). The court went on to detail those specific claims: a *Brady* claim, an ineffective assistance of counsel claim, a *Giglio* claim, and a newly discovered evidence claim (*Id.* at 45-46). At no time did the court mention any procedural bar; indeed, any such ruling would have rendered moot the need for an evidentiary hearing.

Following the evidentiary hearing, the court permitted the parties to file post-hearing memoranda. The State's memorandum included a section called "Time Barred" in which it argued, as it does now, that Mr. Mungin's Rule 3.851 motion was time barred (4PC-R. 64-66). In the court's order, however, it made no determination that Mr. Mungin's motion was untimely or otherwise procedurally barred or subject to dismissal or denial. To the contrary: the lower court "found all

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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").

of the claims of individual error . . . to be without merit" (4PC-R. 17). Despite the ability to ask the court to reconsider its merits ruling in its order, specifically noting that it had failed to address the State's time bar arguments, the State did not avail itself of that avenue either.

The Appellee has sat on its hands and has waived any argument now, on appeal, that Mr. Mungin's motion is time-barred or that there were evidentiary gaps that undermine his counsel's diligence. The lower court granted an evidentiary hearing on the 4 sub-claims identified by the court in its post-case management hearing order, Mr. Mungin presented his evidence, and the court ruled on the merits of those claims. The Appellee's attempt to belatedly argue that the lower court should have found Mr. Mungin's Rule 3.851 motion to be procedurally barred as untimely should be rejected. It offers no reason why the lower court was incorrect in determining at the case management hearing that an evidentiary hearing was warranted. *See Franqui v. State*, 59 So.3d 82, 95 (Fla. 2011) (postconviction court's decision to grant an evidentiary hearing is "ultimately based on written materials before the court" and is "tantamount to a pure question of law, subject to de novo review"). Based on the "materials before the court," the lower court determined that an evidentiary hearing was required, implicitly if not explicitly rejecting the State's invocation of a procedural bar. Certainly, if the

court had any concern that Mr. Mungin's motion may have been barred, it would have been obligated to allow him to amend the motion to correct the deficiencies argued by the State that went directly to the timeliness of the motion. It did not because it rejected the State's procedural bar arguments.

The Appellee's after-the-fact attempt to justify a procedural bar never found by the trial court turns appellate procedure upside down. If the Appellee wished to pursue its procedural bar defense on appeal, it could and should have filed a cross-appeal in the trial court, as allowed for and explained in the rules of appellate procedure. *See* Fla. R. App. P. 9.140 (c)(1) (explaining procedure for State cross-appeals in criminal and collateral proceedings). Or it could and should have filed an appeal from the circuit court's order granting Mr. Mungin an evidentiary hearing. The State is aware of these procedures because it has followed them in other cases.

For example, in *Waterhouse v. State*, 82 So.3d 84 (Fla. 2012), this Court addressed an appeal in a capital case from the denial of a successive Rule 3.851 motion; the motion had been summarily denied in part but the trial court had granted an evidentiary hearing on a newly-discovered evidence claim. The Court noted that the case was before it on an appeal by Waterhouse of the claims which were summarily denied by the trial court and on cross-appeal by the State

"challenging the postconviction court's determination that Waterhouse's second claim was timely filed pursuant to rule 3.851(d)(2)(A)." *Waterhouse*, 82 So.3d at 95.

The State has appealed or cross-appealed circuit court rulings in capital cases in a variety of contexts, either on an interlocutory basis or from a final order. In *State v. Sireci*, 502 So.2d 1221 (Fla. 1987), the Court addressed the State's appeal of the granting by the trial court of an evidentiary hearing on a successive Rule 3.850 motion in a capital case. The Court noted its precedent establishing that "the state may appeal from an adverse judgment in a 3.850 proceeding" and that such an appeal was within this Court's exclusive jurisdiction to hear appeals in capital cases. *Id*. at 1223. *Accord State v. White*, 470 So.2d 1377 (Fla. 1985); *State v. Fourth Dist. Court of Appeal*, 697 So.2d 70 (Fla. 1997). In *State v. Lewis*, 656 So.2d 1248 (Fla. 1994), the State sought interlocutory review by way of appeal from an order entered by the circuit court in a capital case allowing for limited discovery in a Rule 3.850 proceeding. And in *State v. Kokal*, 562 So.2d 324 (Fla. 1990), this Court, by way of a writ taken by the State, addressed an order by the circuit court ordering disclosure of the prosecutor's file in a capital Rule 3.850 proceeding.

Citing no case or other legal authority, the State argues that the date for the filing of Mr. Mungin's successive Rule 3851 motion did not begin to run on the date that Gillette signed the affidavit but rather when Gillette first told investigator Bolin of the information that later formed the basis of his affidavit–an affidavit which contained allegations and information that the lower court determined could not be conclusively refuted by the record (AB at 18). This is wrong, especially under the facts of this case. Although Gillette was unclear on the exact time-frame between when he and Bolin discussed the inventory storage receipt and when he wrote and signed the affidavit,[10] that ultimately is not the relevant question here; the question is whether Mr. Mungin filed his Rule 3.851 motion "within one year of the date upon which *the claim* became discoverable through due diligence" (AB at 18) (citing *Reed v. State*, 116 So.3d 260, 264 (Fla. 2013)) (emphasis added).

Mr. Mungin's case unquestionably filed his Rule 3.851 motion within one year of when Gillette signed the affidavit. There has been no suggestion otherwise. What is lost on the State is that Mr. Mungin did not have a "claim" to bring to court until Gillette signed the affidavit. The unrefuted testimony on this record reveals the following chronology. Gillette, after having been contacted by investigator Bolin about Mr. Mungin's case, took it upon himself to obtain records

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[10] So too was the circuit court. *See* 4PC-R. 152 ("this Court notes the time line of when Deputy Gillette was asked to write the affidavit and when it was executed is unclear").

from his former employer, the Camden County Sheriff's Department, and discovered the inventory storage receipt at issue (4PC-R. 271). He then had further discussions with Bolin, who at some point offered to provide him a draft affidavit for him to review so that a formal sworn statement could be obtained; Gillette refused the offer because he "wanted to make sure there was no influence to anything that was not of my own accord" (4PC-R. 254). In fact he insisted to Bolin that he was going to write out his own statement: "And I said I will fill it out, I will write it. I didn't want anyone to be a part of it. All I wanted to do was make sure that this affidavit had what I knew to be true" (4PC-R. 247). Gillette then, on his own and on his own time-line, wrote out an affidavit, signed it on September 24, 2016, and submitted it to Bolin (4PFC-R. 246). In other words, the content and timing of the sworn document giving rise to a claim in Mr. Mungin's case were solely within Gillette's control and outside of Mr. Mungin's control (especially after Gillette rebuffed Bolin's offer to have a draft statement prepared for his review). *Gillette alone decided the content of the affidavit; he alone decided that he was going to sign it; and he alone decided when he was going to sign it.*

The Appellee envisions a different set of criteria for capital defendants who may discover new evidence and bring a claim to a court. Rather than having a capital litigant's counsel conduct a competent and thorough investigation and, in

accordance with his ethical duties to the court and to his client, file a motion in a court of law raising a claim that has been investigated to the best of counsel's ability and supported by a sworn affidavit, the Appellee endorses a system whereby the minute a lawyer or investigator in a capital case is told by some person or persons about some new nugget of information that may or may not have a bearing on the case, the lawyer is required to file a claim in court within one year of that initial "discovery" of the information, no matter how unverified or even unreliable it might turn out to be.[11] This is a curious position given that the State's general disdain for piecemeal litigation. But this is the logical conclusion of the Appellee's position in Mr. Mungin's case. Yet were Mr. Mungin to have run into court before Gillette decided to write and sign an affidavit, the State would no doubt have complained that Mr. Mungin's allegations were unsupported and speculative. And the State would have been right. Without the signed affidavit, Mr. Mungin reasonably believed he had no claim sufficient to bring to court under the ethical standards required of counsel and the legal standards attendant to Rule

[11] Although not always, there are those cases in which it takes a long time to verify the accuracy of information that is provided by a witness to collateral counsel or his investigator, or even discern if there is any useful information at all. For example, in *Waterhouse, supra*, the Court noted that placing "the onus of verifying every aspect of an unambiguous police report" would "create a substantial amount of work in a capital case," especially where "collateral counsel's resources are [] not unlimited." *Waterhouse*, 82 So.3d at 103. In *Johnson v. State*, 44 So.3d 51 (Fla. 2010), this Court, in finding diligence in a capital case alleging newly discovered evidence of a *Giglio* violation, observed that it took years for collateral counsel to decipher handwritten notes by the trial prosecutor; counsel at one point had to send the notes to another part of the state to be deciphered by someone else. *Id.* at 72 n.18.

3.851 motions. Mr. Mungin filed the motion within a year of Gillette signing it. The motion was timely, and the lower court issued no ruling otherwise.

Just as the law finds no support for the Appellee's position, the Appellee's misrepresentations of the record provide no factual support for an after-the-fact determination of a procedural bar. As explained in detail in the introductory section of this Reply Brief, the inventory storage receipt was not the "report" that Gillette was asked about during his pretrial deposition. Nor did the prosecutor testify with any certainty that he provided the inventory storage receipt in discovery. The Appellee can repeat this falsehood as many times as it likes but it does not make it true.

Mr. Mungin's claims were brought in a timely fashion under the circumstances of his case. The lower court did not find to the contrary. The Appellee's arguments must be rejected.

C. Mr. Mungin's Constitutional Claims.

In his Initial Brief, Mr. Mungin detailed the facts and law underlying each of the asserted bases for relief on which the circuit court granted an evidentiary hearing: a *Brady* claim, a *Giglio* claim, a claim of ineffective assistance of counsel, and a claim of newly discovered evidence. The section of the Appellee's brief devoted to addressing Mr. Mungin's individual claims largely discusses the legal

standards for each of the claims. But the Appellee's brief comes up short when attempting to persuasively explain Mr. Mungin's disentitlement to relief in light of an accurate depiction of the evidence and the testimony adduced at the evidentiary hearing.

To the extent that the Appellee does address the facts, it merely regurgitates the same false and or/misleading facts that pervade its brief from beginning to end. Once again, muddling the difference between Gillette's inventory storage receipt and his incident report, the Appellee argues that "[h]is report was available to the defense at the time at trial" (AB at 23). Mr. Mungin does not disagree that Gillette's "incident report" was available to the defense trial; it was the "incident report" that was discussed at Gillette's deposition. But this has nothing to do with the *inventory storage receipt* on which Gillette wrote "nothing visible" with reference to his inspection of the Dodge Monaco. As to the inventory storage receipt and whether the State had disclosed it to defense counsel prior to trial, the Appellee merely repeats the same false information, asserting with unabashed certainty that prosecutor 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" (AB at 23). Mr. Mungin directs the Court to the introductory section of this Reply Brief where he establishes the

absolute falsity of these two propositions that the Appellee presents as true facts. Not even the trial court order, which was replete with factual errors as detailed in Mr. Mungin's Initial Brief, reached any definitive conclusion about the inventory storage receipt. It merely assumed it had been disclosed based on an incorrect interpretation of Gillette's deposition and the "report" mentioned therein–an interpretation peddled by the State below and again on appeal in this Court. There is simply no basis whatever–much less competent and substantial evidence–to support any finding that Gillette's inventory storage receipt was disclosed to the defense or that it was the "report" discussed during Gillette's deposition.

Despite its attempts to blur the truth, the Appellee ultimately acknowledges what even the trial court did not: that Gillette's statement that he noted "nothing visible" in his "report"[12] and his trial testimony "to seeing two cartridges in the vehicle *could be used as impeachment*" because the two statements are contradictory (AB at 23-24) (emphasis added).[13] The Appellee argues that this contradiction is not "material" because of the "overwhelming evidence of

[12] The Appellee's loose language notwithstanding, it never disputes that Gillette's "incident report" – the "report" that is discussed during his deposition and thus available to the parties – says **nothing, not one word**, about Gillette's observations of and in the Dodge Monaco. This is because the incident report is different from the inventory storage receipt.

[13] The trial court recognized the inconsistency (4PC-R. 145), but failed to acknowledge the impeaching nature of the contradiction because it did not fit in with the lower court's legal framework that required Mr. Mungin to "prove" that law enforcement "planted" evidence.

Mungin's guilt without the testimony of the cartridges in the vehicle" and the issue of the cartridges is a "collateral" one (AB at 21, 24), yet ignores the fact that the State chose to introduce the cartridges into evidence, present the jury with testimony about these cartridges, and argue their significance to the case during closing arguments. *See* T985; 986; 1000-01. The Appellee speaks of the "customer" (Kirkland) that identified Mungin as the person who left the store with a brown paper bag shortly before Ms. Woods was shot (AB at 21), yet ignores the fact that this Court has determined that the testimony of George Brown, who testified at a prior evidentiary hearing, "does call into question whether Kirkland could have seen Mungin leaving the store shortly after the shooting . . . " *Mungin v. State*, 141 So.3d 138, 146 (Fla. 2013). And this Court, on direct appeal, hardly defined the evidence against Mr. Mungin as "overwhelming" in determining that the trial judge had erred in not granting a judgment of acquittal on the charge of premeditated murder. *Mungin v. State*, 689 So.2d 1026 (Fla. 1995). Mr. Mungin also reminds the Court that the jury at the penalty phase returned a recommendation for death by the slimmest margin possible (7-5) under a statutory scheme that has since been found to be unconstitutional. The Appellee does not at all address Mr. Mungin's arguments as to the unreliability of his sentence given the new evidence presented below. *See* Initial Brief at 70-71.

To the extent that this Reply Brief does not address each and every factual or legal misstatement by the Appellee, Mr. Mungin is satisfied that his Initial Brief more than adequately sets forth an accurate statement of the facts and the legal standards attendant to his claims for relief. The Appellee's brief does not really challenge many of Mr. Mungin's arguments; indeed it is rather unresponsive to the Initial Brief. It certainly does not provide sufficient justification, legal or factual, to affirm the lower court's order. Mr. Mungin submits that he is entitled to a new trial; at a minimum, he is entitled to a resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was filed on this Court's electronic filing portal, which will serve all counsel of record in this matter, on this 31st day of October, 2018.

/s/ Todd G. Scher
TODD G. SCHER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210 (a)(2).

/s/ Todd G. Scher
TODD G. SCHER