

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC22-1787
LOWER COURT CASE NO. 1991-CF-1505

STEVEN EDWARD STEIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

Dawn B. Macready
Florida Bar No. 0542611
Drew A. Sena
Florida Bar No. 1023218
CCRC-North
1004 DeSoto Park Drive
Tallahassee, FL 32301
(850) 487-0922
Dawn.Macready@ccrc-north.org
Drew.Sena@ccrc-north.org

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

ARGUMENT IN REPLY 1

I. The Circuit Court erred in summarily denying Mr. Stein’s claim regarding the State’s withholding of material exculpatory evidence ... 1

 Timeliness 1

 Suppression by the State..... 11

 Material Evidence 11

II. The circuit court erred in denying Mr. Stein’s claim regarding the newly discovered evidence that the testimony of Kyle White, a critical State witness, was motivated by White’s belief that testifying against Mr. Stein would prevent White from being prosecuted in the same case ... 16

 Timeliness 16

 Due Diligence 17

 Likelihood of Different Outcome 19

CONCLUSION AND RELIEF SOUGHT 22

CERTIFICATE OF SERVICE 23

CERTIFICATE OF COMPLIANCE 23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Allen v. State</i> , 854 So. 2d 1255 (Fla. 2003).....	3
<i>Archer v. State</i> , 934 So. 2d 1187 (Fla. 2006).....	10
<i>Aron v. United States</i> , 291 F.3d 708 (11th Cir. 2002).....	18
<i>Banks v. Dretke</i> , 540 U.S. 668 (2004).....	9
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	<i>passim</i>
<i>Campbell v. Reed</i> , 594 F. 2d 4 (4th Cir. 1979).....	12
<i>Dailey v. State</i> , 283 So. 3d 782 (Fla. 2019)	<i>passim</i>
<i>Dillbeck v. State</i> , 304 So. 3d 286 (Fla. 2020).....	<i>passim</i>
<i>Giglio v. United States</i> , 405 U.S. 150 (1972).....	1
<i>Gorham v. State</i> , 597 So. 2d 782 (Fla. 1992).....	4
<i>Guzman v. Sec’y, Dept. of Corr.</i> , 663 F.3d 1336 (11th Cir. 2011)	4
<i>King v. State</i> , 146 So. 3d 505 (Fla. 1st DCA 2014).....	3
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	3
<i>McCleskey v. Zant</i> , 499 U.S. 467 (1991)	3
<i>Mungin v. State</i> , 320 So. 3d 624 (Fla. 2020).....	<i>passim</i>
<i>Pittman v. State</i> , 90 So. 3d 794 (Fla. 2011)	10
<i>Polk v. State</i> , 906 So. 2d 1212 (Fla. 1st DCA 2005)	3
<i>Porterfield v. State</i> , 472 So. 2d 882 (Fla. 1st DCA 1985).....	11

<i>Simpson v. State</i> , 47 Fla. L. Weekly S6 (Fla. Jan. 13, 2022)	4
<i>State v. Dougan</i> , 202 So. 3d 363 (Fla. 2016)	12, 13, 19
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	3, 9
<i>Tassin v. Cain</i> , 482 F. Supp. 2d 764 (E.D. La. 2007)	12
<i>Taylor v. State</i> , 62 So. 3d 1101 (Fla. 2011)	9
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	12
<i>Ward v. State</i> , 984 So. 2d 650 (Fla. 1st DCA 2008)	3
<i>Waterhouse v. State</i> , 82 So. 3d 84 (Fla. 2012)	17, 18
<i>Young v. State</i> , 739 So. 2d 553 (Fla. 1999)	3

ARGUMENT IN REPLY

- I. **The Circuit Court erred in summarily denying Mr. Stein's claim regarding the State's withholding of material exculpatory evidence.**

Timeliness

Although Appellee argues timeliness and the procedural bar separately, they are really the same issue here. (AB. 28; 31). Rules 3.851(d)(1) & (2)(A) provide that "any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final ... unless the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d)(1) & (2)(A). Additionally, Rule 3.851(e)(2)(C)(iv) requires that if a successive motion to vacate is based upon newly discovered evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 150 (1972), it must include a statement of the reason why the witness or document supporting the claim was not previously available. Fla. R. Crim. P. 3.851(e)(2)(C)(iv).

Sidas' statement and the information about White's expectation of a benefit from the State in exchange for White's testimony against Mr. Stein was obtained by defense counsel in July 2021. Mr. Stein's successive motion

to vacate was filed within a year of that date per Rule 3.851(d)(2)(A). As Mr. Stein alleges, this information was unknown to him or his counsel, and could not have been ascertained by the exercise of due diligence because White's expectation of a benefit was suppressed by the State.

To be clear, the suppressed *Brady* evidence is not Sidas' statement, it is White's expectation of a benefit in exchange for his testimony, and due to the State's suppression, Mr. Stein and his counsel could not have previously known about it through the use of due diligence. Indeed, it is only with Sidas' statement that counsel discovered it in 2021.

Appellee argues that: (1) Mr. Stein's *Brady* claim is procedurally barred because either "trial counsel could have obtained Sidas' statement before trial or postconviction counsel could have obtained Sidas' statement before the filing of the initial postconviction motion in 1995 or in the 2002 amendment..." (AB. 31); (2) Mr. Stein has failed to explain why this *Brady* claim was not raised in the initial postconviction litigation. (AB. 31-32); and (3) Mr. Stein did not exercise due diligence and therefore, his claim is untimely. (AB. 28).

(1) First, evidence that is intentionally suppressed by the State is not evidence that is readily obtainable by a defendant or his counsel. *Brady*

evidence, by its very nature, is evidence that is suppressed by the State, i.e., not otherwise discoverable by defense counsel.

In arguing that Mr. Stein should have spoken to Sidas years earlier and obtained this *Brady* evidence, Appellee attempts to obviate the prosecution's duty to disclose favorable evidence to the defense. See *Young v. State*, 739 So. 2d 553 (Fla. 1999) (“[t]he ultimate test in backward-looking [*Brady*] postconviction analysis is whether information which the State possessed and did not reveal ... is of such a nature and weight that confidence in the outcome of the trial is undermined”); *Strickler v. Greene*, 527 U.S. 263, 287-88 (1999) (“In the context of a *Brady* claim, a defendant cannot conduct the ‘reasonable and diligent investigation’ mandated by *McCleskey* to preclude a finding of procedural default when the evidence is in the hands of the State.” (citing *McCleskey v. Zant*, 499 U.S. 467, 498–99 (1991))).

Brady does not require that the defendant compel production of exculpatory and impeachment material, or even that a defendant remind the State of its obligations. A defendant has no duty to exercise due diligence to review *Brady* material until the state discloses its existence. *King v. State*, 146 So. 3d 505, 506-07 (Fla. 1st DCA 2014); *Ward v. State*, 984 So. 2d 650, 654-55 (Fla. 1st DCA 2008); *Polk v. State*, 906 So. 2d 1212, 1315-16 (Fla. 1st DCA 2005); *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003); *Kyles v.*

Whitley, 514 U.S. 419, 437 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.”). See also *Guzman v. Sec’y, Dept. of Corr.*, 663 F.3d 1336 (11th Cir. 2011); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Simpson v. State*, 47 Fla. L. Weekly S6 (Fla. Jan. 13, 2022).

As argued in Mr. Stein’s amended initial brief, at no time did the State ever disclose that it had made an agreement with White where he would avoid prosecution in exchange for his assistance in Mr. Stein’s case, or that White expected any benefit in exchange for his testimony against Mr. Stein. (IB. 25-26). That White told Sidas of his expectation of a benefit does not change the fact that exercise of defense counsel’s reasonable diligence would not have led to discovery of the suppressed evidence. Sidas was merely listed in a police report as White’s fiancée. She had no involvement in the case. There is no indication that police ever spoke with her about the case. She was never listed as a witness or mentioned in any further discovery. There was no reason to believe she would have any relevant

information related to Mr. Stein's case, much less any exculpatory evidence. (IB. 26). These facts must be taken as true, as they are not refuted by the record.

(2) Second, Appellee argues that Mr. Stein has failed to explain why this *Brady* claim was not raised in the initial postconviction litigation. As argued above and in Mr. Stein's circuit court filings and initial brief in this Court, this information was not known to Mr. Stein at the time of his initial postconviction motion because it was concealed by the State. There was no previous indication that Sidas had any exculpatory information about this case. There was no reason to think that White was offered a benefit from the State in exchange for testimony against Mr. Stein, and no reason to think that Sidas had information about White's dealings with the State. Not only was this information with White not disclosed by the State, but Sidas also stated that someone from the prosecutor's office called to ask her about White's relationship with Mr. Stein. This contact with Sidas was never disclosed to Mr. Stein. And, neither her statement nor her name were disclosed by the State as someone who had relevant information. Again, it is the State that has an affirmative duty to disclose favorable evidence to the defense.

Moreover, Appellee repeatedly states throughout its answer brief that Mr. Stein has failed to comply with Rule 3.851(e)(2)(C) requiring a statement as to why the witness was not previously available and alleges an abuse of the amendment process.¹ This statement is demonstrably false. Page 8, paragraph 8 of Mr. Stein's Amended Successive Motion to Vacate clearly states:

Pursuant to Fla. R. Crim. P. 3.851(e)(2)(C)(iv), Stein submits that at no time during or since the prosecution of Stein did the State reveal that it had made an agreement with White where he would avoid all prosecution in exchange for his assistance in Stein's case. Likewise, Sidas was never listed as a witness by the State and no one, including White, ever indicated that she had any exculpatory or relevant information. The information provided by Sidas was not previously available to Stein.

(PCR4. 60-61).

¹ "On March 20, 2022, CCRC-N filed an amended successive postconviction motion raising the same claim of newly discovered evidence of a *Brady* violation but the amended motion again failed to comply with the rule." (AB. 11); "The postconviction court gave CCRC-N 60 days to cure the deficiency. Opposing counsel, however, simply ignored the rule ... and failed to comply with the postconviction court's order." (AB. 19); "Opposing counsel on appeal simply ignores his failure to cure the deficiency in the amendment in violation of the rule and the trial court's order. CCRC-N attorneys are intentionally not following the rules ... for purposes of causing delay." (AB. 22); "The third successive postconviction motion offers no explanation as to why Sidas could not have been interviewed long ago." (AB. 29-30; 42); "At no point, in any court, has opposing counsel explained why the *Brady* claim was not raised in the initial postconviction litigation." (AB. 31).

Furthermore, the postconviction court accepted Mr. Stein's amended motion, and thereafter, issued its order summarily denying it. There was no mention in the court's final order indicating that Mr. Stein failed to comply with this rule, and therefore, it is not an issue in this appeal. Since Appellee failed to file any cross-appeal on this issue, any arguments made by Appellee regarding an "abuse of the amendment process" should not be considered by this Court.²

(3) Third, Appellee claims that Mr. Stein did not exercise due diligence and therefore, his *Brady* claim is untimely. Simply stated, there is no due diligence requirement in the *Brady* analysis. Appellee incorrectly asserts that Mr. Stein's *Brady* claim is untimely due to Mr. Stein's lack of diligence in speaking to Sidas (AB. 16), but ignores the underlying issue that it was the *State* that failed to fulfill its burden of disclosing White's expectation of a benefit.

² Appellee's improper argument titled "Abuse of the amendment process" encompasses approximately 7 pages of its answer brief. Mr. Stein recognizes that he could have filed a motion to strike any arguments made by Appellee that are not at issue in this appeal, but instead decided to address the matter in this Reply Brief, so as to not cause any unnecessary delay in this case.

Relying on this Court's holding in *Dillbeck*, Appellee argues that in order to be considered timely filed, a claim "is required to have been filed within one year of the date upon which the claim became discoverable through due diligence." *Dillbeck v. State*, 304 So. 3d 286, 288 (Fla. 2020)(citing Fla. R. Crim. P. 3.851(d)(2)(A)). Appellee's reliance on *Dillbeck* is misplaced. *Dillbeck*'s newly discovered evidence claim did not involve a *Brady* violation and the withholding of material evidence by the State.

Appellee relies on *Mungin* for its conclusion that "a successive motion raising a claim of newly discovered evidence was untimely because the new evidence was 'discoverable through due diligence more than a year before the motion was filed.'" (AB. 29); *Mungin v. State*, 320 So. 3d 624, 626. (Fla. 2020). In arguing that Mr. Stein's claim is untimely, Appellee places an emphasis on when the evidence from Sidas became "discoverable". (AB. 30). *Dillbeck*, 304 So. 3d at 288; *Mungin*, 320 So. 3d at 626.

Although *Mungin* involved a *Brady* violation, it can be easily distinguished from Mr. Stein's case. In *Mungin*, the police officer that was the subject of the *Brady* claim, testified at trial, was a close friend and wrestling partner of Mungin, visited Mungin in prison, wrote him letters, and had been in contact with the defense team on and off for twenty years. *Mungin*, 320 So. 3d at 626. In contrast, Mr. Stein has not been in contact with Sidas for

over thirty years, she did not testify at his trial, and he had no reason to think she may have relevant, much less exculpatory information about his case.

This claim is based on a *Brady* violation by the State, and must therefore, be analyzed under *Brady*, which requires the State to “disclose material information within its possession or control that is favorable to the defense.” *Dailey v. State*, 283 So. 3d 782, 789 (Fla. 2019) (citing *Taylor v. State*, 62 So. 3d 1101, 1114 (Fla. 2011)). To establish a violation under *Brady*, the defendant must show “(1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced.” *Strickler*, 527 U.S. at 281-82.

As noted here, due diligence is not an element that a defendant must prove in order to establish a meritorious *Brady* claim. “A rule [] declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process. ‘Ordinarily, we presume that public officials have properly discharged their official duties.’” *Banks v. Dretke*, 540 U.S. 668, 696 (2004). “The law lends no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.” *Id.* at 695.

This Court has previously emphasized in *Archer* that there is no due diligence requirement in the *Brady* test. See *Archer v. State*, 934 So. 2d 1187, 1203 (Fla. 2006) (holding the postconviction court erred in placing a due diligence requirement on Archer to discover evidence suppressed by the State); *Pittman v. State*, 90 So. 3d 794, 820 (Fla. 2011) (Pariente, J., concurring in result) (“As to the trial court’s misstatements of the law, the majority could be read to approve of a due diligence requirement in *Brady* when *Brady* has no such requirement.”).

Most recently in *Dailey*, this Court refrained from imposing a due diligence requirement in order to establish a meritorious *Brady* claim. In its analysis, this Court distinguished Dailey’s *Brady* claim from his newly discovered evidence claim, wherein due diligence is required. See *Dailey*, 283 So. 3d at 789 (Fla. 2019) (denying Dailey’s *Brady* claim because he failed to demonstrate the existence of exculpatory evidence that would have created a reasonable probability of a different verdict; and denying Dailey’s newly discovered evidence claim because he failed to explain why he could not have discovered the information previously).

Based on the above-cited cases, Appellee’s argument fails and Mr. Stein’s *Brady* claim is indeed timely, as there is no due diligence requirement under *Brady*.

Suppression by the State

Appellee argues that Sidas' statement was not suppressed because the prosecution did not possess Sidas' 2021 statement at the time of the trial in 1991, and that the prosecution cannot suppress what it does not have. (AB. 34-35). To be clear, Sidas' statement itself is not the evidence that was suppressed, it was the information contained in the statement -- that White had an agreement with the State whereby he would not be prosecuted in exchange for his testimony against Mr. Stein at trial. This evidence of an agreement between White and the State was known by the State since 1991, although it was concealed from Mr. Stein until he inadvertently learned of it in 2021 from Sidas.

Material Evidence

Appellee claims that this evidence is speculative and of marginal value. (AB. 32-33; 36-40). First, Appellee argues that it is not clear whether White told Sidas that he actually had a deal with the prosecution, or if he merely wanted to make a deal. (AB. 32-33). The proper analysis is whether White had any expectation of favorable treatment from the State in exchange for his testimony against Mr. Stein.

[T]he fact that the witness was unaware of the *exact* terms of the agreement only increased the significance, for the purpose of assessing his credibility, of his expectation of favorable treatment. *Porterfield v. State*, 472 So. 2d 882, 884 (Fla. 1st DCA

1985) (citing *Campbell v. Reed*, 594 F. 2d 4, 7 (4th Cir. 1979)). Essentially, [s]ince a tentative promise of leniency could be interpreted by the witness as being contingent on his testimony, there would be an even greater incentive for him to make his testimony pleasing to the prosecutor. *Id.*

State v. Dougan, 202 So. 3d 363, 381 (Fla. 2016) (internal quotations omitted); *See also Tassin v. Cain*, 482 F. Supp. 2d 764, 771–72 (E.D. La. 2007) (“It is more important for credibility determinations that a witness has been offered the possibility of leniency, but *not* promised it, such that leniency depends on the consistency of [their] testimony with the State's theory. Courts have long recognized this.”); *United States v. Bagley*, 473 U.S. 667, 683 (1985) (“Th[e] possibility of a reward gave [the Government's witnesses] a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction.”).

According to *Sidas*, White expected not to be charged with any crimes in exchange for his testimony against Mr. Stein. This expectation of favorable treatment by the State is what is material. White was a key witness for the State at trial. His testimony not only supported a conviction for premeditated first-degree murder in the guilty phase, but also supported at least two of the

aggravating factors found by the jury in the penalty phase. Because Mr. Stein's jury never heard about White's agreement with the State, they never had any reason to doubt the truthfulness of his testimony.

Appellee further argues that this evidence is speculative because "opposing counsel has never identified what crime White could be charged with committing, that the prosecution would forego as the basis of any deal." (AB. 33). Appellee points out that White was not present for the murders and "refused to be involved with any of the preliminary preparations for the robbery [], including refusing to allow Christmas to borrow his motorcycle to case the Pizza Hut before the actual robbery." (AB. 33-34). What Appellee fails to mention is that these facts came from White himself. It is not surprising that he would claim he had nothing to do with the crimes and that he refused to be involved in any way. The impeachment of White would show that he was expecting not to be charged with any crimes, i.e., he thought he could have been charged with some involvement in the crimes. This impeachment would have cast doubt on the trustworthiness of his testimony as it relates to both the guilt and penalty phases of Mr. Stein's trial. This impeachment evidence would have been important for jurors to consider in their assessment of his credibility, considering his expectation of favorable treatment. *See Dougan*, 202 So. 3d at 381.

As to the “marginal value” of this evidence, Appellee argues that because Mr. Stein gave a confession to a “robbery gone bad,” this essentially amounted to a confession to felony murder, and that any impeachment of White would not have persuaded the jury to find him not guilty of first-degree murder. (AB. 37-38). However, White’s testimony about Mr. Stein’s plan to rob the Pizza Hut and get rid of any witnesses, casts a much darker shadow on what occurred that night. Impeachment of White was critical, because otherwise, this was a “robbery gone bad”, and while that may meet the statutory requirements for felony murder, it is not unreasonable given Mr. Stein’s confession that jurors would find him guilty of something less than first-degree murder.

Likewise, Appellee argues that any impeachment of White would not be material to either the CCP aggravator or the avoid arrest aggravator. (AB. 38). Appellee concedes that “White’s testimony certainly helped establish both of those aggravators,” but that “the circumstances also established both of those aggravators.” (AB. 38). The circumstances, according to Appellee, being (1) that both Mr. Stein and Christmas were former or current employees of Pizza Hut and would be recognized, and (2) the manner of the killings. (AB. 38). Appellee also argues that two other aggravators -- the

felony murder aggravator and the prior violent felony aggravator -- did not depend in any manner on White's testimony.

As to the first circumstance that Mr. Stein and Christmas would be recognized by employees of Pizza Hut, this does not by itself support the avoid arrest aggravator.³ It was White's testimony -- that there was a plan in place to get rid of any witnesses -- that established this aggravator. The second circumstance given by Appellee was that the manner of the killings - - both victims ordered into the men's bathroom and seated on the floor before they were shot multiple times -- pointed to premeditated murder. (AB. 39). However, without White's testimony, these circumstances are not inconsistent with a robbery gone bad.

These arguments by Appellee also fail to consider that White's testimony contradicted Mr. Stein's statement that the robbery went badly. He portrayed the crimes in a much different light, and it was critical for the jury

³ Appellee states that "Stein and Christmas *acknowledged that they could be recognized by the other employees and agreed that there could be no witnesses.*" (AB. 2) (emphasis added). Although this is found in a section titled "Facts of the murders", there is curiously no citation is given for the source. (AB. 2). This was in fact part of White's testimony at trial. Additionally, Appellee states: "In 1990, Stein, White, and White's girlfriend, Sandra Sidas, moved from Phoenix, Arizona, to Jacksonville, Florida." Appellee also does not provide a cite for this statement, but presumably attributes it to the direct appeal decision in this case, since that it the citation after the next sentence. This information actually came from federal investigators after speaking to Sidas.

to know what White expected to receive in exchange for this testimony undermining Mr. Stein's version of events. This would have also impacted not only the existence but the balance of aggravating and mitigating circumstances, which is critical to the jury's decision-making process.

II. The circuit court erred in denying Mr. Stein's claim regarding the newly discovered evidence that the testimony of Kyle White, a critical State witness, was motivated by White's belief that testifying against Mr. Stein would prevent White from being prosecuted in the same case.

Timeliness

As in Issue I above, Appellee contends that Mr. Stein's newly discovered evidence claim of Sidas' statement is untimely and claims that Mr. Stein "offers no explanation as to why Sidas could not have been interviewed long ago." (AB. 42) (internal quotations omitted). This is untrue. Appellant did, in fact, offer an explanation as to why Sidas was not interviewed before now:

Mr. Stein's Amended Successive Motion to Vacate clearly states:

Pursuant to Fla. R. Crim. P. 3.851(e)(2)(C)(iv), Stein submits that at no time during or since the prosecution of Stein did the State reveal that it had made an agreement with White where he would avoid all prosecution in exchange for his assistance in Stein's case. Likewise, Sidas was never listed as a witness by the State and no one, including White, ever indicated that she had any exculpatory or relevant information. The information provided by Sidas was not previously available to Stein.

(PCR4. 60-61). Furthermore, Appellant's amended initial brief clearly states, in part:

Mr. Stein had no reason to believe that speaking with Sidas would be relevant to impeaching White's testimony with evidence that he had or was attempting to make a deal with the State by which he would testify in exchange for avoiding prosecution himself. There was no indication anywhere in pretrial or post-trial discover that White was concerned about being prosecuted related to these crimes. There was no indication that he expected a benefit from, or had entered into an agreement related to, his testimony against Mr. Stein...

(IB. 35).

Due Diligence

Appellee argues that Mr. Stein was not diligent because he knew Sidas at the time of trial, and that "a defense attorney or a postconviction attorney who receives a police report cannot just assume a person listed in the report has no relevant information without speaking to that person and be considered diligent." (AB. 56-57). Appellee further argues that Mr. Stein's reliance on *Waterhouse* is misplaced because *Waterhouse* involved a police report with incorrect information and in Mr. Stein's case, there is no misleading police report. (AB. 57-58). See *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012). In other words, the police reports in Mr. Stein's case contained omissions rather than inaccuracies.

This is a distinction without a difference. The question is whether Mr. Stein or his counsel would have had reason to think Sidas had information about the case. The single police report only mentioned Sidas once, as White’s fiancée, and there was no other mention of any possible involvement or information that she might have related to the case. “[R]equiring collateral counsel to verify every detail and contact every witness in a police report—even where the police report indicates that the witness has no useful information—would place an . . . onerous burden on collateral counsel, with little chance of discovering helpful or useful information.” *Waterhouse*, 82 So. 3d at 104.

“Due diligence” does not require a litigant “to exhaust every imaginable option, but rather to make reasonable efforts.” *Aron v. United States*, 291 F.3d 708, 712 (11th Cir. 2002). As a matter of law, a defendant, and his counsel, can presume that there is no material information outside of investigative reports until a witness comes forward disclosing more information that was not otherwise indicated in their prior statement. See *Waterhouse*, 82 So. 3d at 101–04; *Mungin*, 79 So. 3d at 737-38.

Likelihood of Different Outcome

Appellee argues that: (1) any deal would be “weak tea” impeachment of White; (2) Mr. Stein’s confession to an armed robbery amounts to a confession to felony murder; and (3) impeachment of White would not lead to a life sentence. (AB. 59-60).

(1) Appellee’s contention that any deal would be “weak tea” impeachment because “if White was impeached with a deal, the prosecutor could rehabilitate him with the fact that White could not be charged with any crime.” (AB. 59). First, it is the expectation of favorable treatment by the State that is important in assessing White’s credibility. *See State v. Dougan*, 202 So. 3d at 381. This means even if White *thought* that he could be charged with a crime and *expected* to receive favorable treatment in exchange for his testimony against Mr. Stein, this is important impeachment evidence because it goes to the credibility of his testimony. Given that there was no evidentiary hearing in this case, these allegations by Mr. Stein must be taken as true. If White did not believe he did anything wrong and could not be charged with any crime, then why would he tell Sidas that he was cooperating with the State so that he would not be charged. Appellee’s argument simply does not make logical sense.

(2) Mr. Stein's confession to an armed robbery does not amount to a confession to felony murder, as Appellee asserts. White's testimony, which went unrebutted at trial, essentially contradicted Mr. Stein's confession that it was a robbery gone bad. While from what was presented to Mr. Stein's jury, White seemingly had no motive to lie, Mr. Stein was obviously under arrest at the time of his confession and could have been seen to have a significant reason to downplay the crimes. White's testimony supported a case for premeditated first-degree murder, as he testified that it was the plan all along to get rid of any witnesses. Had the jury known that White expected leniency in exchange for his testimony against Mr. Stein, his credibility would have been diminished as would the likelihood of the jury discounting Mr. Stein's version of a robbery gone bad.

(3) Appellee argues that this impeachment of White as to any deal he made with the State would not lead to a life sentence. Appellee admits that "White's testimony certainly helped establish both the CCP and the avoid arrest aggravators," but claims that "there were strong reasonable inferences establishing both aggravators too." (AB. 60). These "strong reasonable inferences" included testimony from another employee, Burroughs, who stated that when he left the Pizza Hut for the night, there were only two customers remaining and identified them as Mr. Stein and Christmas.

Appellee uses Burroughs' testimony to conclude that Mr. Stein and Christmas could not have just robbed the Pizza Hut without being identified, i.e., they had to murder the victims. However, testimony that Mr. Stein and Christmas were simply the last customers at the Pizza Hut is by itself innocuous. Even taken with Mr. Stein's confession to a robbery gone bad, Burroughs' testimony does not refute Mr. Stein's statements about what occurred. It is only White's testimony that refutes Mr. Stein's version of events. Another "strong reasonable inference" pointed to by Appellee is evidence that the victims were ordered into the men's bathroom and were seated on the floor when they were shot multiple times. (AB. 61). But again, this evidence alone -- without White's testimony -- does not refute Mr. Stein's confession about a robbery gone bad. White's testimony not only "helped establish" these aggravators as asserted by Appellee, it was *the* evidence that established them.

Appellee also argues that the striking of the HAC aggravator and evidence of Christmas' sentence would not be admissible in a new penalty phase, as it is not mitigation. (AB. 46-52). These arguments were not raised below and were not considered by the postconviction court. Therefore, Appellee should not be permitted to raise them for the first time on appeal.

In referencing the evidence that would be admitted at a new trial, Appellee mentions the newly discovered evidence of guilt in the form of the rifle which had not been recovered at the time of Mr. Stein's trial. (AB. 54). Appellee claims that this is additional evidence of Mr. Stein's guilt, however, admits that "this new evidence is not of particular significance given the other ballistic evidence already presented at the first trial." (AB. 65). Mr. Stein agrees that this new evidence of the rifle is insignificant, especially when compared to the new evidence of White's agreement with the State in exchange for his testimony, and the total wealth of mitigation evidence including the mitigation that was presented at trial and the significant additional mitigation uncovered later in postconviction. Mr. Stein's newly discovered evidence when taken together with all of the evidence that could be introduced at a new trial certainly shifts the balance of aggravating and mitigating factors, which would lead to a life sentence.

CONCLUSION AND RELIEF SOUGHT

Based upon his arguments, Mr. Stein respectfully requests that this Court vacate his first-degree murder convictions and remand for a new trial; vacate his death sentence and remand for a new penalty phase; or remand this case to the lower court for a *Huff* hearing and subsequent evidentiary hearing.

Respectfully submitted,

/s/ Dawn B. Macready

Dawn B. Macready

Florida Bar No. 0542611

Drew A. Sena

Florida Bar No. 1023218

CCRC-North

1004 DeSoto Park Drive

Tallahassee, FL 32301

(850) 487-0922

Dawn.Macready@ccrc-north.org

Drew.Sena@ccrc-north.org

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished via electronic service to all counsel of record on this 26th day of June, 2023.

CERTIFICATE OF COMPLIANCE

I certify that the size and style of type used in this Reply Brief is Arial 14-point Font, and complies with the font, spacing, and page requirements under Fla. R. App. P. 9.210(a)(2)(D) and 9.045(b).

/s/ Dawn B. Macready

Dawn B. Macready