IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-877

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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TABLE OF CONTENTS

PAGE#

TABLE OF CONTENTS ii

TABLE OF CITATIONS v

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

Case Timeline... 2

Facts of the Murder... 5

This Court's 2011 Remand.................................... 9

The 2012 Evidentiary Hearing............................... 18

The Trial Court's 2012 Order............................... 19

SUMMARY OF ARGUMENT 19

ARGUMENT 20

ISSUE I: DID THE TRIAL COURT REVERSIBLY ERR IN FINDING THAT MUNGIN FAILED TO PROVE HIS BRADY AND GIGLIO CLAIMS? (IB 27-69, RESTATED) 20

A. The Trial Judge's Findings. 20

B. The Standard of Appellate Review. 23

C. The Trial Court's Order Merits Affirmance............... 23

1. BRADY CLAIM. 24

a. "While Mr. Brown testified that he was the first and only person on the scene until he called 911, Mr. Brown testified that he did not provide this information to the police. Mr. Brown specifically stated that he did not relay this information to the officers on the scene ...." (PCR3-I 86-87) 24

b. "At one point during the hearing, Mr. Brown testified that he did tell officers that he was nudged by someone when entering the store, however, he later clarified that he was not certain whether or not he told the officers of this and stated that he was so nervous from finding someone shot that he 'may not have said it.'"(PCR3-I 87) 25

c. "As Mr. Brown testified, this was a traumatic event for him." (PCR3-I 87) 26

d. Additionally, Officer Conn clearly testified that Mr. Brown never told her that he was the first and only person in the store, nor did he tell her that someone bumped into him when he entered the store." (PCR3-I 87) 26

e. "Mr. Brown's testimony may have impeached Mr. Kirkland's testimony. However, the Defendant has not established that this information was willfully or inadvertently suppressed by law enforcement or the State. To the contrary, the evidence indicates that the police and prosecutor were not aware of Mr. Brown's version of events. Thus, the Defendant's Brady claim is denied." (PCR3-I 87) 31

f. "Further,... arguendo ..., the Defendant could not meet the third prong of Brady. ... Mr. Kirkland's testimony was already significantly called into question, and the inconsistencies in his testimony were stressed during closing arguments." (PCR3-I 87) 33

g. "Additionally, defense counsel used Mr. Kirkland's testimony regarding the description of the individual leaving the store in support the defense theory that it could not have been the Defendant leaving the store." (PCR3-I 87) 33

h. "Further, ... the jury was presented with substantial evidence that the Defendant was in fact the person who committed the murder." (PCR3-I 87-88) 33

2. GIGLIO CLAIM. 36

a."[T]he Defendant has not shown that prosecutor presented or failed to correct false testimony, in that the Defendant has not shown that Mr. Kirkland's testimony was false. Instead, the Defendant has merely shown that Mr. Brown's version of events is inconsistent with Mr. Kirkland's version." (PCR3-I 88) 36

b. "[A]ssuming arguendo that Mr. Kirkland's testimony was false, the Defendant has not shown that the prosecutor knew the testimony was false. The evidence introduced at the hearing showed that neither the police, nor the prosecutor, knew of Mr. Brown's version of events. This Court finds Mr. de la Rionda's testimony that he never knew of Mr. Brown's version of events to be credible. Additionally, the testimony of Mr. Brown and Officer Conn corroborated Mr. de la Rionda's testimony." (PCR3-I 88) 36

D. Additional Support for the Trial Court's Denial....... 37
1. The Evidence... 37
2. Case Law... 42
E. Appellant's Erroneous Arguments....................... 46
ISSUE II: HAS MUNGIN DEMONSTRATED THAT THE TRIAL JUDGE WAS REQUIRED TO DISQUALIFY HIMSELF? (IB 69-72, RESTATED) 64
A. Incomplete record...................................... 65
B. Untimeliness... 65
C. Prior Adverse Ruling, Facially Insufficient........... 66
CONCLUSION 70
CERTIFICATE OF SERVICE 70
CERTIFICATE OF COMPLIANCE 70
APPENDIX

TABLE OF CITATIONS

CASES **PAGE#**

Ault v. State, 53 So.3d 175 (Fla. 2010).................... 66-67

Barwick v. State, 88 So.3d 85 (Fla. 2011)..................... 59

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).. passim

Breedlove v. State, 580 So.2d 605 (Fla. 1991)................. 44

Byrd v. State, 14 So.3d 921 (Fla. 2009)...................... 60

Cone v. Bell, 556 U.S. 449 -470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009)... 58

Darling v. State, 45 So.3d 444 (Fla.2010).................. 9, 10

Davis v. State, 26 So.3d 519 (Fla.2009)................... 16, 44

Dragovich v. State, 492 So.2d 350 (Fla. 1986)................ 68

Floyd v. State, 18 So.3d 432 (Fla. 2009)..................... 45

Franqui v. State, 59 So.3d 82 (Fla.2011)................. passim

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972) passim

Green v. State, 975 So.2d 1090 (Fla. 2008)..................... 2

Guzman v. State, 868 So.2d 498 (Fla. 2003).................... 16

Guzman v. State, 941 So.2d 1045 (Fla. 2006)................... 12

Hall v. Luebbers, 296 F.3d 685 (8th Cir. 2002)................ 60

Huff v. State, 622 So.2d 982 (Fla. 1993)..................... 10

Hurst v. State, 18 So.3d 975 (Fla.2009).......... 23, 42, 44, 56

Jackson v. State, 599 So.2d 103 (Fla. 1992).......... 66, 67, 69

Jones v. State, 446 So.2d 1059 (Fla. 1984).................... 68

Jones v. State, 709 So.2d 512 (Fla. 1998)............ 11, 16, 17

Jones v. State, 998 So.2d 573 (Fla. 2008)................. 43, 44

Kokal v. State, 901 So.2d 766 (Fla. 2005)..................... 68

Kyles v. Whitley, 514 U.S. 419 , 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)... 58, 59

Lowe v. State, 2 So.3d 21 (Fla.2008)...................... 23, 25

Mansfield v. State, 911 So.2d 1160 (Fla. 2005)............ 67, 68

Mendoza v. State, 87 So.3d 644 (Fla. 2011).................... 66

Middleton v. Roper, 455 F.3d 838 (8th Cir. 2006).............. 59

Mungin v. Florida, 522 U.S. 833 (1997)......................... 3

Mungin v. State, 689 So.2d 1026 (Fla. 1995).............. 1, 3, 6

Mungin v. State, 79 So.3d 726 (Fla. 2011)................. passim

Mungin v. State, 932 So.2d 986 (Fla. 2006)................ passim

Overton v. State, 976 So.2d 536 (Fla. 2007)................... 43

Phillips v. State, 608 So.2d 778 (Fla. 1992).................. 42

Ponticelli v. Secretary, Florida Dept. of Corrections, 2012 WL 3517146... 53

Rhodes v. State, 986 So.2d 501 (Fla. 2008)................ 16, 18

Rivera v. State, 717 So.2d 477 (Fla. 1998)................ 66, 67

Robertson v. State, 829 So.2d 901 (Fla. 2002)................. 65

Rodriguez v. State, 919 So.2d 1252 (Fla. 2005)................ 66

Scott v. Jones, 915 F.2d 1188 (8th Cir. 1990)................. 60

Smith v. Cain, 132 S.Ct. 627 (2012)................... 43, 57, 58

Sochor v. State, 883 So.2d 766 (Fla.2004)..................... 23

Spencer v. State, 615 So.2d 688 (Fla. 1993).................... 2

State v. Hankerson, 65 So.3d 502 (Fla. 2011).................. 65

Strickland v. Washington, 466 U.S. 668 (1984)............. passim

Strickler v. Greene, 527 U.S. 263 -82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)... 10

Suggs v. State, 923 So.2d 419 (Fla. 2005)..................... 42

U.S. v. Tellechea, 2012 WL 1939242 (11th Cir. 2012)........... 43

United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)................................ 10, 16, 18

United States v. Morrison, 449 U.S. 361-365, 101 S.Ct. 665, -668, 66 L.Ed.2d 564 (1981).................................. 56

United States v. Robinson, 301 F.3d 923 n. 3 (8th Cir. 2002).. 60

Ventura v. State, 2 So.3d 194 (Fla. 2009)..................... 10

Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996).......... 60

Way v. State, 760 So.2d 903 (Fla. 2000)............... 10, 16, 17

Wiggins v. Smith, 539 U.S. 510 (2003)......................... 59

Williams v. Taylor, 529 U.S 362 (2003)........................ 59

OTHER AUTHORITIES

Fla.R.Jud.Admin. 2.160/2.330, ... 65

Fla.R.App.P. 9.210(c)... 2

PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Mungin." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State. The following are examples of other references:

"R" and "T"	Record and trial transcript in the direct appeal, resulting in this Court's opinion at Mungin v. State, 689 So.2d 1026 (Fla. 1995) (Mungin I);
"PCR"	Record from the 1st round of postconviction proceedings, resulting in this Court's opinion at Mungin v. State, 932 So.2d 986 (Fla. 2006) (Mungin II).
"PCR2"	Record from a successive round of postconviction proceedings, resulting in this Court's opinion at Mungin v. State, 79 So.3d 726 Fla. 2011).
"PCR3"	The two-volume record for the appeal in this case, SC12-877.
"SE", "DE"	State's exhibit, defense exhibit, preceded by a symbol indicating in which proceeding it was referenced, e.g. "T-SE 11" references State's Exhibit #1 in the trial.

A Volume number and page number(s), if applicable, follow each symbol. "Supp" designates a supplemental record.

"IAC" is the acronym commonly indicating "ineffective assistance of counsel."

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within

quotations are underlined; other emphases are contained within the original quotations, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

Case Timeline.

The following timeline provides an overview of procedural events and an index to locations for those events in the record.

DATE	EVENT
9/16/1990	Victim, Betty Jean Woods, murdered by a gunshot wound to her head at a L'l Champ store in Jacksonville. (See, e.g., T-XIV 608, 624-25, 639, 663-64)
1/1993	Jury convicted Mungin of First degree Murder. (R-II 324, T-XVI 1056-58)
2/1993	Jury recommended the death sentence by a vote of seven to five. (R-II 382, T-XVII 1255-59)
2/1993	A Spencer-type[1] hearing. (See T-XVIII 1274-82)[2]
2/1993	Trial court sentenced Mungin to death and found

[1] Spencer v. State, 615 So.2d 688 (Fla. 1993), was decided March 18, 1993. See also, e.g., Green v. State, 975 So.2d 1090, 1110 n.4 and accompanying text (Fla. 2008)("the *Spencer*-type hearing"; "trial judge used a comparable procedure by having oral arguments on the aggravating and mitigating circumstances").

[2] At this hearing, there was also a reference to the parties' sentencing memoranda. (See T-XVIII 1274, 1276, 1279)

DATE	EVENT
	and gave great weight to aggravators of prior violent felony based on four prior convictions involving the use of violence; during commission of a robbery; and pecuniary gain (merged); and it gave minimal weight to nonstatutory mitigation, including rehabilitation and a diagnosis of not being anti-social. (R-II 395-400; T-XVIII 1283-92)
1995	Mungin v. State, 689 So.2d 1026 (Fla. 1995) (Mungin I), affirmed the conviction and death sentence.
1997	United States Supreme Court denied Mungin's petition for a writ of certiorari at Mungin v. Florida, 522 U.S. 833 (1997).
9/17/1998	Mungin filed a "shell" postconviction motion. (See PCRSupp-I 3-40).
9/14/2000	Mungin filed an amended postconviction motion (PCRSupp-I 163-85), to which the State subsequently responded (PCRSupp-I 188-96).
7/3/2001	Mungin filed another amended postconviction motion, entitled "Consolidated Amended Motion to vacate ...," raising 17 numbered claims (PCR-I 1-77), and the State subsequently responded in writing (PCR-I 79-105).
4/2002	After a Huff[3] hearing (PCRSupp-III 400-449), the trial court entered an order granting an evidentiary hearing on two numbered claims. (PCR-I 106-107, 108-109)
6/25/2002	Mungin filed a "supplemental" postconviction motion that alleged two more claims. (PCR-I 110-113)
6/25/2002 & 6/26/2002	Trial court conducted a postconviction evidentiary hearing. (PCR-II 218-400; PCR-III 401-542; see PCR-I 114-15)

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

DATE	EVENT
8/2002	The parties filed post-evidentiary-hearing memoranda arguing their respective positions on the postconviction motion. (PCR-I 116-202)
3/21/2003	Trial court entered an order denying postconviction relief. (PCR-II 203-209)
2006	Mungin v. State, 932 So.2d 986 (Fla. 2006) (Mungin II), "affirm[ed]the trial court's denial of Mungin's motion for postconviction relief and den[ied] Mungin's petition for a writ of habeas corpus."
2006	Mungin filed a petition and amended petition for writ of habeas corpus in the federal district court in 3:06-cv-00650-HLA-JRK; subsequently, the respondent answered the petition and the federal court stayed the proceedings there so that Mungin could exhaust claims in state court; the stay of the federal habeas proceeding still remains in effect.
8/16/2007 & 4/21/2008	Mungin filed a successive Rule 3.851 motion (PCR2-I 1-75) and a "Corrected" successive Rule 3.851 motion (PCR2-I 79-102, **on which these proceedings are based**. Subsequently, the State responded (PCR2-I 104-110).
10/8/2009	After another Huff hearing[4] (PCR2Supp-II 2-15; see also PCR2Supp-III 19-37), trial court summarily denied the 2007-2008 successive postconviction motion (PCR2-I 130-140).
10/27/2011	Mungin v. State, 79 So.3d 726 Fla. 2011) (Mungin III), reversed the trial court's 2009 summary denial of the corrected successive

[4] The Initial Brief notes (at IB n.13) a comment of the trial judge at the Huff hearing that is irrelevant to these proceedings and omits its context of the trial judge observing common practice and concluding, "I have to accept what they say." (PCR2-III 7-8)

DATE	EVENT
	postconviction motion and "remand[ed] the *Brady* and *Giglio* claims[5] to the postconviction court for an evidentiary hearing pertaining to Brown and the allegation that the police report was false," 79 So.3d at 738.
2/3/2012[6]	Evidentiary hearing pursuant to this Court's remand. (PCR3-I 94-PCR3-II 255)
3/21/2012	After the parties submitted written memoranda (PCR3-I 50-81), the trial court entered its order denying 2007-2008 "Corrected" successive Rule 3.851 motion (PCR3-I 82-89; attached in the Appendix). **This order is the subject of this appeal**.

Facts of the Murder.

The subject of this appeal concerns facts surrounding the murder. This Court's direct-appeal opinion summarized those basic-murder facts as follows:

> 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.[7] After

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[5] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972).

[6] Mungin mentions (IB 11 n.8 and accompanying text) a motion to disqualify that Mungin filed and was heard at a December 15, 2011, status conference; and Mungin targets the denial of the motion in CLAIM II, but apparently Mungin has failed to include that order as part of the record. Apparently, Mungin has also failed to include a transcript of the December 15, 2011, hearing in the record on appeal.

[7] The customer, Ronald Kirkland, testified, at that time, Mungin's beard "could have been" a couple of weeks old, and then

> 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 [in Jefferson County, at Monticello, T-XIV 714-16] 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.

Mungin, 689 So.2d at 1028 (footnote omitted).

At trial, the defense did not dispute that Mungin robbed and shot Mr. Rudd and Ms. Wang Tsai. (See T-XVI 1008-1009)

Additional guilt-phase trial detail included the following.

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he volunteered, "I really don't know about the growth of the beard. I can't give any time period about how old it is." (T-XIV 681)

On September 13, 1990, a 1983 two-door maroon Ford Escort, with an identification number of 2FABP0440DX182670, was stolen from a motel one mile from Mungin's residence in Kingsland, Georgia (T-XV 819-21, 836).

On September 14, 1990, Mungin, wearing a red baseball cap,[8] pulled up to the Jefferson County, Monticello convenience store in a "dark-colored Ford Escort," entered the store, asked for cigarettes, and shot the clerk in the back. (T-XIV 718-21) The clerk observed Mungin taking money from a cash box at the store. (T-XIV 722) Mungin's fingerprints were recovered from a cash box at the Monticello scene. (Compare T-XIV 732-33 with T-XIV 778-81).

On September 14, 1990, in Tallahassee, after Meihua Wang Tsai was shot in the hand and head with a single shot (T-XIV 760), Thomas Barlow saw her point towards a black male wearing a red cap[9] and getting into "an old red Escort, sort of faded paint," with a Georgia tag numbered JHR20. (T-XIV 737-40) Barlow identified the car as the same one stolen on September 13, 1990.

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[8] Thus, contrary to Mungin' suggestion (See IB 21), Mr. Rudd, when asked if he saw Mungin with any curly hair, responded, "No. Well, he had on a cap." (XIV 726)

[9] When asked if the person had "longish-like jeri curls coming from underneath the cap," Mr. Barlow responded, "No, sir, he didn't" but then clarified, because of the cap, that his conclusion was based upon seeing the back of his head, "He had sort of a clean-shaven head on the back." (T-XIV 742)

(T-SE M/11. Compare T-XIV 739 with T-XV 798-99) Mungin's fingerprints were recovered from a printed store receipt at the scene of the Tallahassee shooting. (Compare T-XIV 760-62 with T-XIV 781-85)

On September 18, 1990, the red Ford Escort was found stripped of its tires and abandoned in Jacksonville (T-XV 795-97) "approximately one and a half to two miles" from 610 Carlton Street" (T-XV 799). At 610 Carlton Street, between about 9:30am on September 15 or 16, 1990, and about 1pm on September 16, 1990, a Dodge Monaco was stolen. (T-XV 801-806) The Dodge was white with a tan/beige top. (T-XIV 802; T-XV 825-26) The victim in this case, Ms. Woods, was murdered on September 16, 1990, between about 1:30pm and 2pm. (T-XIV 663; see T-XIV 615).

The Dodge was recovered about two days later less than 100 yards from Mungin's residence at Kingsland, Ga. (T-XV 826-27) On September 18, 1990, Mungin was arrested in that residence. (T-XV 833-37) A "Raven .25 auto pistol" was recovered in the residence's bedroom hidden among some towels. (T-XV 837-40)

Two expended .25 caliber cartridge casings found in the Dodge (T-XV 827-28, 851-530) had been fired from the Raven .25 caliber semi-automatic pistol (T-XV 877-79, 886), recovered from the bedroom. In addition, as this Court's direct-appeal opinion discussed, shell casings, projectiles, and the "Raven" gun were interlinked among the three crimes. The shell casings in

Monticello and Tallahassee, plus the bullets recovered from the Tallahassee and Jacksonville victims, also matched the gun recovered in the bedroom of Mungin's residence. (See, e.g., T-XV 886)

This Court's 2011 Remand.

As timelined supra, Mungin III, 79 So.3d 726, remanded the case for an evidentiary hearing, which is the subject of this appeal. Mungin III, 79 So.3d at 730 (footnote omitted), introduced and framed its discussion of the claim:

> In the current proceeding, Mungin filed a successive motion for postconviction relief, asserting that the newly discovered evidence from Brown impeaches Kirkland and shows that the State violated *Brady* and *Giglio*. In support of this claim, Mungin presented ... [an] affidavit, which potentially calls Kirkland's testimony into question . . . .

Mungin III, 79 So.3d at 730-33, quoted from Brown's, as well as an affidavit from his trial defense counsel, Charles Cofer,

Mungin III, 79 So.3d at 733-38, analyzed the claim and held as follows:

> Based on the affidavits of Brown and Cofer, Mungin asserts that he is entitled to relief under Brady, Giglio, or newly discovered evidence. The trial court held a *Huff* [FN4] hearing to determine whether an evidentiary hearing was needed and then denied relief, finding that Mungin failed to demonstrate prejudice. Determining whether the trial court erred in denying an evidentiary hearing on a successive rule 3.851 motion is a question of law subject to de novo review. *Darling v. State*, 45 So.3d 444, 447 (Fla.2010). Because the circuit court denied Mungin's motion without an evidentiary hearing, this Court must accept all factual allegations in the motion as true to the

extent they are not conclusively refuted by the record. Id. The Court will affirm the ruling '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.' Id.; *see also* Fla. R.Crim. P. 3.851(f)(5)(B) (providing that a successive postconviction motion in a capital case may be denied without an evidentiary hearing if 'the motion, files, and records in the case conclusively show that the movant is entitled to no relief'). The Court will uphold the postconviction court's summary denial 'if the motion is legally insufficient or its allegations are conclusively refuted by the record.' *Darling*, 45 So.3d at 447 (*quoting Ventura v. State*, 2 So.3d 194, 198 (Fla.2009)).

FN4. *Huff v. State*, 622 So.2d 982 (Fla. 1993).

Here, Mungin has raised three claims pertaining to the Brown affidavit: (1) the State violated Brady in failing to disclose the favorable evidence pertaining to Brown; (2) the State violated Giglio by knowingly presenting false evidence; and (3) Brown's affidavit constitutes newly discovered evidence that mandates a new trial. In looking at the three different claims raised regarding Brown's testimony, we review the different legal standards involved, starting with Mungin's Brady claim.

The Fifth and Fourteenth Amendments to the United States Constitution require a prosecutor to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a Brady violation, the defendant must demonstrate that (1) 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 v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); *Way v. State*, 760 So.2d 903, 910 (Fla. 2000). To meet the materiality prong, the defendant must demonstrate 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' *Way*, 760 So.2d at 913 (*quoting Bagley*, 473 U.S. at 682, 105 S.Ct. 3375). A reasonable probability is a probability sufficient to undermine this Court's confidence in the outcome. Id.; *see also Strickler*, 527 U.S. at 290, 119 S.Ct. 1936. However, in making this determination, a court cannot 'simply discount[ ] the inculpatory evidence in light of the

undisclosed evidence and determin[e] if the remaining evidence is sufficient.' *Franqui v. State*, 59 So.3d 82, 102 (Fla.2011). 'It is the net effect of the evidence that must be assessed.' *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998).

In denying relief on the *Brady* claim, the postconviction court concluded that Mungin failed to show that the evidence was material. In its order, the postconviction court noted that there were three differences between what Brown alleged in his affidavit that he told the police officer at the scene of the crime and what was stated in the arrest report, concluding that none of these were material or would undermine confidence in the outcome. Specifically, the court found as follows:

> There appear to be three differences between what Mr. Brown alleges in his affidavit that he told the officer on the date of the murder, and what the arrest report indicates Brown told the officer. First, Brown alleges that he told the detective that Kirkland arrived after he, Brown, had discovered Ms. Woods and called 911, whereas the report indicated that Brown and Kirkland 'entered the store at the same time.' Second, Brown alleges that he did not touch the cash register, whereas the report indicates that he 'checked the registers.' Third, Brown alleges that someone had come out of the store as he was entering, but that he told the police that he could not describe the person, whereas the report indicates that he did not 'notice' anyone leaving the store as he entered. None of Brown's other allegations that conflict with Kirkland's testimony is alleged to have been shared with police.
>
> Even if it were assumed that the State erroneously withheld this information, Defendant suffered no prejudice from the failure to disclose. First, most of the allegedly withheld statements are not particularly material. The second and third discrepancies noted above constitute minor differences in the characterization of events. The only material discrepancy was Mr. Brown's allegation that he told the officer that he was the only person in the store and that Kirkland did not come into the store until after Brown called 911. While this discrepancy might have been used to impeach Kirkland's testimony, it does not create a reasonable probability of a different outcome given the importance of Kirkland's testimony compared to other trial evidence.

It is critical to recognize that the undersigned presided over Defendant's trial, and has a very vivid recollection of the trial evidence, which was overwhelming even without Kirkland's testimony.[FN5] Uncontroverted ballistics evidence was presented directly tying Defendant to the shooting of Ms. Woods. When Defendant was arrested, police found a .25-caliber semiautomatic pistol, bullets, and Defendant'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 Defendant's house. Moreover, the robbery/murder in this case was the third in a series of robberies and shootings, all of which were committed with the same gun, the gun found in Defendant's bedroom. Furthermore, Defendant was positively identified as the person who had committed the first two robbery/shootings, and the car he used in the first two robberies had been stolen from near his home and then abandoned not far from the scene of the instant robbery/murder. Another car stolen from that area ended up next to Defendant's home with two expended shells from the murder weapon in it. In short, Defendant used the murder weapon in two robbery/shootings not long before the instant robbery/murder, had possession of the murder weapon following the instant robbery/murder, and was directly connected to the two cars used in the three robbery/shootings.

> FN5. We caution that trial courts must decide these postconviction matters on an objective basis. *See, e.g.*, *Guzman v. State*, 941 So.2d 1045, 1051 n.4 (Fla. 2006) (recognizing that trial courts are to make an objective determination as to the effect of a *Giglio* error; it cannot be a subjective assessment). In this case, because the motion was denied without an evidentiary hearing, we must accept Mungin's allegations as true and determine prejudice by reviewing whether our confidence in the outcome is undermined.

George Brown's affidavit does not allege that a person other than Defendant robbed and killed Ms. Woods, or that Defendant could not have been the killer. Brown's allegation could only provide[ ] further impeachment of details of Kirkland's testimony and his identification of Defendant as the person he saw leaving the store. Even if Defendant's motion demonstrated that the State improperly withheld information from the defense, that information does not establish a reasonable probability

> of a different outcome sufficient to undermine confidence in the outcome of the trial. Evaluation of the [sic] all of the evidence introduced at trial demonstrates that it was overwhelming even if Kirkland's identification could have been called into doubt by Brown's testimony. As such, Defendant's claim of a *Brady* violation is conclusively refuted by the record.

In reviewing this claim, we examine Kirkland's trial testimony in even more detail. At trial, Kirkland testified that he was the first person to arrive at the location of the shooting. On his way to his girlfriend's house, he stopped by the Lil' Champ convenience store to pick up a diet coke and breath savers. As he was going into the store, a man who was carrying a brown paper bag almost knocked him down on his way out of the store. He described the man as being shorter than five feet, six inches and weighing about 130 pounds. Kirkland went into the store, picked up his items, and waited for the clerk, finally noticing that she was lying on the floor. He thought she might have had a seizure so he attempted CPR, and while he was performing CPR, another customer came in and called 911. Kirkland alleged that the other customer looked at the cash register and pulled the drawer open. An officer later came to his home and showed him six or seven pictures. Kirkland identified a picture of Mungin as the man who he saw leaving the store. He further identified Mungin in court as the man who he saw.

On cross-examination, defense counsel confronted Kirkland on a number of inconsistencies. For example, although Kirkland was able to identify Mungin as the person he met, he stated he had only a glimpse of him before they bumped into each other, and since Mungin was then traveling in a different direction away from him, Kirkland saw only the back of his head. However, Kirkland was unable to recall if Mungin wore a hat and could not describe whether he was wearing a light or dark shirt. Further, Kirkland stated that Mungin had long hair that appeared to be in a Jheri-curl style and had a 'good bit' of beard growth on him—a description that differed from Mungin's appearance at the time of the crime. When the police first asked Kirkland to identify the person leaving the crime scene, Kirkland stated that he was not sure if he could recognize the person again, but he would try. When he was shown the pictures, Kirkland reviewed the photographs for approximately fifteen minutes before he picked Mungin's photo as the person that he saw.

During closing argument, defense counsel stressed the following inconsistencies: at the time that Kirkland noticed the person rushing out of the convenience store, he did not realize it was a murder scene but was thinking about his upcoming date; Kirkland admitted that he saw only the back of the person's head and not his face; Kirkland admitted he saw only a glimpse as the person rushed away; Kirkland was unable to identify any of the clothing that the person was wearing; and most importantly, Kirkland described the person he saw as having a beard and hair that was 'kind of long' even though other eyewitnesses to the Tallahassee shooting (which occurred two days earlier) stated that Mungin's hair was so short that it looked like he was in the military. Thus, defense counsel asserted that Kirkland's testimony supported that the person he saw leaving the store could not have been Mungin because a person would be unable to make hair grow significantly in only two days.

During prior postconviction proceedings, this Court discussed the value of Kirkland's testimony as follows:

> Mungin's first subclaim is that trial counsel was ineffective for failing to sufficiently impeach the testimony of Ronald Kirkland. Specifically, Mungin argues that Cofer should have made the jury aware that Kirkland was on probation at the time of the trial and that warrants had been issued for Kirkland's arrest on violation of probation and subsequently recalled.
>
> Even if Cofer's performance was deficient because he failed to discover and use Kirkland's probationary status as impeachment evidence, Mungin has failed to establish prejudice. Cofer attacked Kirkland's identification of Mungin on cross-examination of Kirkland, and by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, whose descriptions of the perpetrator were different from Kirkland's. In closing argument, Cofer argued extensively that due to these inconsistencies, Kirkland's identification could not be believed beyond a reasonable doubt. Moreover, Kirkland testified that he did not tell anyone from the State Attorney's Office that he was on probation and that he did not have any deals with the State in exchange for his testimony at Mungin's trial. Mungin does not allege that any deals were made. As for trial counsel's failure to inform the jury of the recalled warrants for Kirkland's arrest, because the warrants were not

> recalled until after the trial it cannot be said that counsel's performance was deficient.
>
> ....
>
> Even assuming that counsel's performance was deficient in this regard, we conclude that Mungin has failed to establish prejudice. As noted above, trial counsel attacked Kirkland's identification of Mungin on cross-examination by bringing out the limited time he had to actually view the perpetrator and the fact that it took him fifteen to twenty minutes to pick Mungin out of the photo lineup. Cofer also brought Kirkland's identification into question by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, who gave different descriptions of the perpetrator than did Kirkland.

Mungin II, 932 So.2d at 998–99 (footnote omitted). We concluded that Mungin was not entitled to relief because our confidence in the outcome of Mungin's trial was not undermined.

However, Brown's testimony completely contradicts Kirkland on a material detail: whether Kirkland could have seen Mungin leaving the convenience store right after the murder. Kirkland, who testified at trial, claimed that he was the first person on the scene and identified Mungin as leaving the murder scene. Brown, in direct contradiction, asserts that he was first on the scene and that no other witnesses were present during the entire time he was searching for the missing clerk. Brown alleges that he found the victim and called 911. In referring to Kirkland, Brown swears in his affidavit that Kirkland came in and 'pretended that he had been there the whole time. The man was not there when I got there and he did not find the lady.' If, in fact, the trial judge upon remand determines Brown is being truthful, this would clearly mean that Kirkland was untruthful at trial, which might have been critical testimony for the jury. We are troubled by the possibility that a false police report was submitted and then relied on by defense counsel. Without an evidentiary hearing to explore this issue, we are left with mere speculation as to what in fact occurred, what the police knew, what the prosecutor knew, and whether Kirkland, a witness with an extensive criminal history, was lying when he testified at trial. In reviewing the *Brady* claim presented, accepting all allegations in the motion as true to the extent they are not conclusively refuted by the record, we cannot agree that the record at this point

conclusively shows that the evidence was not material (i.e., that there was not 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'). *Way*, 760 So.2d at 913 (*quoting Bagley*, 473 U.S. at 682, 105 S.Ct. 3375). Accordingly, we reverse and remand this claim to the postconviction court for an evidentiary hearing pertaining to Brown and the allegation that the police report was false.

Mungin also asserts that this evidence establishes a *Giglio* violation. Under *Giglio*, 'a defendant must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material.' *Rhodes v. State*, 986 So.2d 501, 508–09 (Fla. 2008). As to the knowledge prong, in *Guzman v. State*, 868 So.2d 498 (Fla. 2003), we have clarified that *Giglio* is satisfied where the lead detective testifies falsely at trial because the 'knowledge of the detective ... is imputed to the prosecutor who tried the case.' Id. at 505.

The materiality prong of *Giglio* is more defense-friendly than in a *Brady* claim. *See Davis v. State*, 26 So.3d 519, 532 (Fla.2009) ('[T]he standard applied under the third prong of the *Giglio* test is more defense friendly than the test ... applied to a violation under *Brady*.'), cert. denied, --- U.S. ----, 130 S.Ct. 3509, 177 L.Ed.2d 1097 (2010). While under *Brady*, evidence is material if a defendant can show 'a reasonable probability that ... the result ... would have been different,' *Way*, 760 So.2d at 913 (emphasis added), under *Giglio*, the evidence is considered material simply 'if there is any reasonable possibility that it could have affected the jury's verdict.' *Rhodes*, 986 So.2d at 509 (emphasis added). Accordingly, for the reasons addressed above, we likewise hold that after reviewing the *Giglio* claim presented and accepting all allegations in the motion as true to the extent they are not conclusively refuted by the record, we cannot agree that the record at this point conclusively shows that the evidence pertaining to Brown would not affect the jury's verdict. Accordingly, an evidentiary hearing is needed on this claim as well.

Our analysis is different, however, in considering Mungin's claim that based on this newly discovered evidence, he is entitled to relief under *Jones v. State*, 709 So.2d 512 (Fla.1998). In order to be considered newly discovered: (1) 'the evidence must have been unknown by the trial court, by

> the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence'; and (2) the evidence 'must be of such nature that it would probably produce an acquittal on retrial.' *Jones*, 709 So.2d at 521 (internal quotation marks and citation omitted). In making this determination, a trial court must 'consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.' Id. (internal quotation marks omitted). We deny this claim because the information provided by Brown is not of such a nature that it would probably produce an acquittal on retrial. The jury heard significant evidence during the trial that established Mungin as the killer, including testimony that Mungin stole a red Escort and was engaged in similar shootings a few days before the murder, the stolen car was later discovered in Jacksonville, and the shell casing and bullet left at the scene of the murder were identified as matching the gun found at Mungin's home.
>
> For the reasons addressed above, we reverse and remand the *Brady* and *Giglio* claims to the postconviction court for an evidentiary hearing pertaining to Brown and the allegation that the police report was false. We express no opinion on the merits of these claims.

Justice Polston and Chief justice Canady dissented. They explained that, at the trial, "Kirkland's testimony was already called into question." They continued by summarizing other trial testimony:

> In contrast to the questionable strength of Kirkland's testimony, the jury was presented with significant evidence that Mungin committed the murder. Specifically, the jury was presented with evidence that the murder weapon was found at Mungin's home days after the murder, that Mungin used this same gun to shoot two other store clerks just days before the murder, and that Mungin was linked to the stolen vehicles involved in the crime spree. Brown's affidavit does not call any of this evidence into question and does not provide any support that Mungin was not involved. Therefore, materiality cannot be established under either *Brady* or *Giglio*. *See Way v. State*, 760 So.2d 903, 913 (Fla. 2000) (explaining that the materiality prong

> under *Brady* is met if the defendant demonstrates 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different') (*quoting United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (plurality opinion)); *Rhodes v. State*, 986 So.2d 501, 509 (Fla. 2008) (explaining that evidence is material under Giglio 'if there is any reasonable possibility that it could have affected the jury's verdict').

Mungin III, 79 So. 3d at 739.

The 2012 Evidentiary Hearing.

On this Court's 2011 remand, the trial court conducted an evidentiary hearing on February 3, 2012. (See PCR3-I 94 et seq.)

The following testified at the evidentiary hearing:

> GEORGE BROWN, the person whose affidavit was the primary reason for the remand (PCR3-I 100-145);
>
> CHARLES COFER, Mungin's trial counsel (PCR3-I 145-80);
>
> CHARLES WELLS, officer, who had been at the robbery-murder scene within minutes prior to its occurring and went to robbery-murder scene shortly after the crime at 13:55 September 16, 1990 (PCR3-I 181-92);
>
> CHRISTIE CONN went to the robbery-murder scene and interviewed Brown and Kirkland (PCR3-I 181-PCR3-II 212);
>
> DALE GILBREATH was the lead detective for this robbery-murder, went to the robbery-murder scene, and testified he accurately incorporated Detective Conn's notes in his reports (PCR3-II 213-22); and,
>
> BERNARDO DE LA RIONDA, the lead prosecutor for the jury trial and preparation for it (PCR3-II 248-53).

The parties agreed that Mr. Kirkland was deceased (PCR3-II 241) at the time of postconviction evidentiary hearing.

The State will discuss pertinent details of the 2012 postconviction testimony under ISSUE I infra.

The Trial Court's 2012 Order.

After hearing the evidence, the trial court's eight-page order rejected Mungin's Brady and Giglio claims. (PCR3-I 82-89, attached as Appendix to this brief)

The order detailed the postconviction testimony of Brown (PCR3-I 83-85), Detective Conn (Id. at 85), and prosecutor de la Rionda (Id. at 85-86).

The order discussed applicable law concerning a Brady claim (PCR3-I 86) and applied that law (Id. at 86-88). It then discussed Giglio and applied it. (Id. at 86-88)

The order will be discussed in greater detail under ISSUE I infra.

SUMMARY OF ARGUMENT

ISSUE I unsuccessfully challenges the trial court's findings in which it did not accredit Mungin's postconviction evidence attempting to show Brady and Giglio claims. Instead, the trial court's record-grounded finding that law enforcement did not know about Mr. Brown's 2007 allegations until Mungin's 2007 postconviction motion merits affirmance, as does the trial court's prejudice-related findings.

ISSUE II presents a disqualification-of-judge claim for which Mungin has not presented a record on appeal, that was untimely presented to the trial court, and that was, and is,

insufficiently based upon a prior adverse ruling by the trial judge.

Neither of the appellate issues merit any relief.

ARGUMENT

ISSUE I: DID THE TRIAL COURT REVERSIBLY ERR IN FINDING THAT MUNGIN FAILED TO PROVE HIS BRADY AND GIGLIO CLAIMS? (IB 27-69, RESTATED)

A. The Trial Judge's Findings.

The State contends that the law and evidence support the trial court's order. The trial court found:

> **Brady claim**
>
> In order to establish a Brady violation, the Defendant must show that '(1) 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.' Mungin, 2011 WL 5082454, at *II (citations omitted). To establish materiality, the Defendant must demonstrate a reasonable probability that had the evidence been disclosed, a different result would have occurred. Id. A reasonable probability is one which undermines the court's confidence in the outcome of the proceeding. Id.
>
> In reversing the Brady claim, the Supreme Court of Florida pointed out that Mr. Brown's affidavit contradicts Mr. Kirkland's testimony on a material detail -whether Mr. Kirkland could have seen the Defendant leave the convenient store right after the murder. Mungin, 2011 WL 5082454, at *17. Mr. Kirkland testified that he was the first person on the scene and identified the Defendant as leaving the store, whereas, Mr. Brown, in his affidavit, asserted that he was the first person on the scene and that no one else was present while he searched for the store clerk. The court stated that if Mr. Brown's assertions were truthful, it would mean that Mr. Kirkland was untruthful during trial - a point that might have been critical to the jury. Id. The court was 'troubled by the possibility that a false police report was submitted and then relied on by defense

counsel.' Id. The court noted that it was 'left with mere speculation as to what in fact occurred, what the police knew, what the prosecutor knew, and whether Kirkland, a witness with an extensive criminal history, was lying when he testified at trial.' Mungin, 2011 WL 5082454, at *17-18. Thus, the matter was reversed for a hearing pertaining to Mr. Brown and the allegation that the police report was false.

Based on the testimony presented during the evidentiary hearing, this Court finds that the Defendant has not established a Brady violation. While Mr. Brown testified that he was the first and only person on the scene until he called 911, Mr. Brown testified that he did not provide this information to the police. Mr. Brown specifically stated that he did not relay this information to the officers on the scene, explaining that 'the other guy' took over. At one point during the hearing, Mr. Brown testified that he did tell officers that he was nudged by someone when entering the store, however, he later clarified that he was not certain whether or not he told the officers of this and stated that he was so nervous from finding someone shot that he 'may not have said it.' As Mr. Brown testified, this was a traumatic event for him. Additionally, Officer Conn clearly testified that Mr. Brown never told her that he was the first and only person in the store, nor did he tell her that someone bumped into him when he entered the store.

Mr. Brown's testimony may have impeached Mr. Kirkland's testimony. However, the Defendant has not established that this information was willfully or inadvertently suppressed by law enforcement or the State. To the contrary, the evidence indicates that the police and prosecutor were not aware of Mr. Brown's version of events. Thus, the Defendant's Brady claim is denied.

Further, assuming *arguendo* that the police and prosecutor were aware of Mr. Brown's version of events and either willfully or inadvertently suppressed this information, the Defendant could not meet the third prong of Brady. That is, the Defendant could not establish that because the evidence was material, he was prejudiced. To state another way, the Defendant cannot establish a reasonable probability that, had Mr. Brown's testimony been disclosed, a different result would have occurred. As pointed out by Justice Polston, in the dissenting portion of his opinion, Mr. Kirkland's testimony was already significantly called into question, and the inconsistencies in his testimony were

stressed during closing arguments. Mungin, 2011 WL 5082454, at *21 (Polston, J., dissenting in part concurring in part). Additionally, defense counsel used Mr. Kirkland's testimony regarding the description of the individual leaving the store in support the defense theory that it could not have been the Defendant leaving the store. ld. (Polston, J., dissenting in part concurring in part) '[I]t is unclear whether the jury put any weight in it [Mr. Kirkland's testimony] or whether it was even incriminating.' ld. (Polston, J., dissenting in part concurring in part). Further, as pointed out by both the majority (in reference to the newly discovered evidence claim) and dissenting opinion, the jury was presented with substantial evidence that the Defendant was in fact the person who committed the murder. Mungin, 2011 WL 5082454, at *20-22.

Giglio claim

To establish a Giglio violation, the Defendant 'must show that: (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material.' Mungin, 2011 WL 5082454, at *18 (citations omitted). The court noted that 'the materiality prong of Giglio is more defense friendly than in a Brady claim.' ld. Specifically, the evidence is deemed material if there is any reasonable possibility that it could have affected the jury's verdict. Mungin, 2011 WL 5082454, at *19 (citation omitted).

This Court finds that the Defendant has not established a Giglio violation. First, the Defendant has not shown that prosecutor presented or failed to correct false testimony, in that the Defendant has not shown that Mr. Kirkland's testimony was false. Instead, the Defendant has merely shown that Mr. Brown's version of events is inconsistent with Mr. Kirkland's version. It is not uncommon that two witnesses perceive events differently. Further, assuming arguendo that Mr. Kirkland's testimony was false, the Defendant has not shown that the prosecutor knew the testimony was false. The evidence introduced at the hearing showed that neither the police, nor the prosecutor, knew of Mr. Brown's version of events. This Court finds Mr. de la Rionda's testimony that he never knew of Mr. Brown's version of events to be credible. Additionally, the testimony of Mr. Brown and Officer Conn corroborated Mr. de la Rionda's testimony. Therefore, the Defendant's Giglio claim is denied.

(PCR3-I 86-88, bold and underline emphasis in original)

B. The Standard of Appellate Review.

The trial court properly summarized the burdens under Brady and Giglio.

The trial court also made several factual findings, which merit affirmance if supported by competent, substantial evidence. On appeal, this Court defers to the trial court's credibility and evidentiary weight. For example, Franqui v. State, 59 So.3d 82, 102 (Fla. 2011), summarized:

> Both *Giglio* and *Brady* claims present mixed questions of law and fact. *See Sochor v. State*, 883 So.2d 766, 785 (Fla.2004). Thus, as to findings of fact, we will defer to the lower court's findings if they are supported by competent, substantial evidence. *See id*. '[T]his Court will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.' *Hurst*,[10] 18 So.3d at 988 (*quoting Lowe v. State*, 2 So.3d 21, 30 (Fla.2008)). We review the trial court's application of the law to the facts de novo. *Hurst*, 18 So.3d at 988. It is within this framework that we now analyze Franqui's *Brady* and *Giglio* claims ....

C. The Trial Court's Order Merits Affirmance.

As detailed in the trial court's discussion of the postconviction testimony (PCR3-I 82-86), competent, substantial evidence supports the trial court' findings, thereby meriting

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[10] Hurst v. State, 18 So.3d 975 (Fla.2009).

affirmance. The State next excerpts parts of the trial court's findings and demonstrates the record supporting each finding.

1. BRADY CLAIM.

a. "While Mr. Brown testified that he was the first and only person on the scene until he called 911, Mr. Brown testified that he did not provide this information to the police. Mr. Brown specifically stated that he did not relay this information to the officers on the scene ...." (PCR3-I 86-87)

As the trial court found, Mr. Brown testified:

> Q. And did there come a point where you spoke with any police officers who arrived at the scene?
>
> A. Yes, sir.
>
> Q. And did you tell them what you testified to here today?
>
> A. No. I really didn't get a chance to. The other guy -- you know, there was news people and everything and the other guy was there.

(PCR3-I 108)

Subsequent to the day of the murder, Mr. Brown did not bring the contents of his postconviction affidavit to the attention of law enforcement. Instead, he testified in response to questioning by Mungin's postconviction counsel:

> Q. Now after the day that you spoke with the police at the store, has anybody else up until recently spoken with you about what you observed on that day?
>
> A. All of y'all.
>
> Q. Only people from my office?
>
> A. Yes, sir.

(PCR3-I 111) In response to the trial court's questions, Brown indicated that he "was trying to" tell the police about what was

later in his postconviction affidavit, (PCR3-I 115) but he did not indicate that he actually told anyone in law enforcement. No one in law enforcement contacted him after he left the scene. (PCR3-I 115-16)

Accordingly, while discussing Brown's testimony, Mungin admits (IB 47): "He also never told this information to the police."

Furthermore, as the trial court discussed in its summary of the evidentiary hearing and as discussed further infra, Mr. Brown's memory was vague.

b. "At one point during the hearing, Mr. Brown testified that he did tell officers that he was nudged by someone when entering the store, however, he later clarified that he was not certain whether or not he told the officers of this and stated that he was so nervous from finding someone shot that he 'may not have said it.'"(PCR3-I 87)

At one point Mr. Brown did testify that he told the officer that someone brushed against him as he entered the store. (PCR3-I 120) However, as the trial court pointed out, Mr. Brown later stated on cross-examination that he "thought" he told the officer about the person bumping into him, that he was "not sure," and that he might not have told the police:

> Q. All right. And you did not tell that to the police though, did you?
>
> A. Yeah.
>
> Q. You did?
>
> A. I think I did, yes, sir.

> Q. Isn't that -- so -- well, let's make sure. I don't want to put words in your mouth. You did or you didn't?
>
> ...
>
> Q. You're not sure. Thinking means you're not sure, right?
>
> A. Right. I'm not sure.
>
> Q. Okay. And the only reason is because that what you just read, that affidavit that you read, the attached report on it, the last line that defense counsel did not ask you about, it states that you stated he stated he did not notice anyone leaving the store as he entered. That's what the detectives put down that you told that detective.
>
> A Right. I was so nervous finding somebody shot I may not have said it.

(PCR3-I 124-25)

c. "As Mr. Brown testified, this was a traumatic event for him." (PCR3-I 87)

In addition to Mr. Brown discussing his "nervous[ness]," he acknowledged that seeing someone shot was a traumatic event. (PCR3-I 132)

d. Additionally, Officer Conn clearly testified that Mr. Brown never told her that he was the first and only person in the store, nor did he tell her that someone bumped into him when he entered the store." (PCR3-I 87)

Officer Conn, at the postconviction evidentiary hearing re-affirmed her pre-trial deposition testimony and testified that she interviewed Mr. Brown at the scene, that she took accurate notes that were placed in the police reports, and that Brown did not tell her that he was initially the only one in the store or that someone bumped into him as he entered the store:

> Q. Okay. And when you arrived, did you come into contact with a person by the name of Ronald Kirkland?

A. Yes, sir. I did.

Q. Did you interview him?

A. Yes, sir.

Q. Okay. Did you take notes of that interview?

A. Yes, sir, I did.

Q. And were those notes subsequently given to Detective Gilbreath to incorporate in a homicide report?

A. Yes, sir.

Q. And did you also interview a person by the name of George Brown?

A. Yes, sir.

Q. And were those -- did you make notes as you were interviewing him?

A. Yes, sir.

Q. Okay. And did you give those notes to Detective Gilbreath?

A. Yes, sir.

Q. Okay. And were those incorporated in the homicide report?

A. Yes, sir.[11]

...

Q. And, Detective Conn, were you also deposed by now Judge Cofer but at the time Charlie Cofer with the Public Defender's Office?

A. Yes, sir.

Q. Okay. And do you recall being deposed on September 30th, 1992?

---

[11] Accordingly, Detective Gilbreath testified that his reports were accurate and that they incorporated Detective Conn's notes. (PCR3-II 215)

A. Yes, sir.

Q. Okay. And do you recall being asked regarding your interview of George Brown?

A. Yes, sir.

Q. And specifically did Mr. Cofer ask you to refer to your notes and did you do that when you gave that deposition?

A. Yes, sir, I did.

Q. Okay. And did you document clearly what George Brown told you?

A. Yes, sir.

Q. Okay. George Brown told you that he had entered the -- he had entered the store **about the same time or the same time as Mr. Kirkland**, is that correct?

A. Yes, sir.

Q. Okay. He stated, that is George Brown stated he went into the store and took a bottle of Gatorade to the counter and then waited it and after a short time he looked around and saw the victim on the floor coughing and spitting up blood, is that correct?

MR. SCHER: Objection. Leading.

BY MR. DE LA RIONDA:

Q If you could just -- I apologize. Could you read regarding specifically what Mr. Brown told you and what you told Mr. Cofer in that deposition?

MR. SCHER: And if I could just -- what are you reading from?

THE WITNESS: The deposition.

THE COURT: Let's identify the page and all that.

BY MR. DE LA RIONDA:

Q. Page 44, I believe.

A. Yes, sir. It's page 44, line 17 of the deposition.

Q. Okay. Go ahead.

A. This deposition is from -- I'm sorry. It doesn't have the date on it.

Q. The very top corner, September 30th, 1992.

A I'm sorry, it does. September 30th, 1992.

Q. All right.

A. Line 17 it says:

"A He said he **pulled into the store behind Kirkland**, the other witness. He did not know Kirkland's name. He pointed him out because he was still standing around. Went to the drink box, got some Gatorade. Then he went to the counter and arrived **about the same time as Kirkland**.

He waited, looked around and saw Ms. Woods on the floor. He called 911 from the counter. The victim was having problems, spitting up blood. Kirkland and a white female started administering first aid and he checked the register."

And now on 45:

"A And the register he checked was the one close to the victim so apparently there's two registers in the store. I vaguely remember there being two at the counter."

"Q Do you know if the one close to the victim would have been the one closest to the wall or the one further away from the wall? What I'm speaking of -- my understanding is that this store has two registers, one real close to the exterior wall and where the gas pumps would be."

"A And there's one close to the door."

"Q And the one down toward the end, more toward the interior of the store?"

"A No."

"Q Okay."

"A I just -- the one closest to the victim."

"Q Okay."

BY MR. DE LA RIONDA:

Q. Okay. Let me interrupt you a second. So now you're going back to what Mr. Brown told you again. There was, I

believe, like four questions and answers in which Mr. Cofer is asking you questions.

A. Yes, sir. I'm still on Mr. Brown and Mr. Cofer.

Q. Okay. Okay. And now you're reading from page 45, question on line 15 and answer on line 16.

A. On line 16. Line 15:

"Q Okay."

Line 16:

"A It was empty of money and he said he started looking for numbers of people to call, phone numbers, and for the keys to the store so he could lock the store."

Line 19:

"Q Okay."

20:

"A **He did not notice anyone leaving as he came in the store**. He went directly to the drink box."

"Q Was there any indication from what he -- from him that he had seen the same car that Mr. Kirkland had described?"

"A None."

Q. Okay. Let me interrupt. So the bottom line is Mr. Kirkland **never told you that somebody bumped into him as he was going in the store**?

A. Correct.

Q. I'm sorry. Did I say -- I said -- Mr. Brown I meant to say, not Mr. Kirkland.

A. Mr. Kirkland. Correct, there was no indication.

Q. Okay. So **Mr. Brown never told you that he was the only one that went inside the store**?

A. No, sir.

Q. Okay.

THE COURT: So you obviously identified yourself as a police officer. I mean all this conversation they knew you were a police officer?

THE WITNESS: Yes, sir.

THE COURT: Okay.

BY MR. DE LA RIONDA:

Q. And as for the record you had a gun on you and you had a badge and you were telling them that you were investigating this case, is that correct?

A Yes, sir.

...

Q Just to make sure the record is clear, **<u>your notes that you read from in your deposition which you read to Mr. Cofer, they accurately reflect what you were told at the crime scene by Mr. Brown</u>**, is that correct?

A. Yes, sir.

Q. And it's unequivocally -- it's crystal clear that **<u>Mr. Brown told you what you documented there</u>**?

A. Yes, sir.

Q. Okay. **<u>Mr. Brown never told you that somebody bumped into him as he was leaving the store or brushed against him</u>**?

A. No, sir. He did not.

Q. And he **<u>never told you</u>** that he was the first one and **<u>that Mr. Kirkland was not there when he got there</u>**?

A. Correct. He did not.

(PCR3-I 195-PCR3-II 203)

e. "Mr. Brown's testimony may have impeached Mr. Kirkland's testimony. However, the Defendant has not established that this information was willfully or inadvertently suppressed by law enforcement or the State. To the contrary, the evidence indicates that the police and prosecutor were not aware of Mr. Brown's version of events. Thus, the Defendant's <u>Brady</u> claim is denied." (PCR3-I 87)

This finding flows from, and is grounded on, the foregoing discussion. Accordingly, Bernie de la Rionda, the lead prosecutor, testified:

Q. When you were getting ready for this trial during the pretrial and during the trial itself, did you know about George Brown's post-conviction version of the following ... facts that concern the Supreme Court: One, that he says now that he was **alone in the store** with Ms. Woods until after he called 911?

A. I was not.

Q. During the pretrial or trial you were not aware of that fact?

A. That is correct.

Q. Are you aware of any law enforcement that was aware of that fact?

A. I am not.

Q. When you were getting ready for trial and during the trial, were you aware of his current version that he **encountered someone going out of the store** as he was entering the store?

A. I was not aware of that.

Q. Are you aware or have you ever been aware until post-conviction of any law enforcement --

A. No, sir.

Q. -- that knew that?

A. The first I heard about it was when motions were filed regarding post-conviction matters.

...

Q. Since the trial has Mr. Brown ever contacted you?

A. No. Nor has he contacted anybody in the State Attorney's Office that I am aware of.

Q. Are you aware of him contacting any law enforcement regarding what he testified to in his affidavit in this hearing today?

A. I am not aware of any.

(PCR3-II 249-51)

f. "Further,... arguendo ..., the Defendant could not meet the third prong of Brady. ... Mr. Kirkland's testimony was already significantly called into question, and the inconsistencies in his testimony were stressed during closing arguments." (PCR3-I 87)

Indeed, Mr. Brown's vague and equivocal postconviction testimony pales compared with trial defense counsel's challenge of Kirkland during the trial (See T-XIV 675-86) and emphasizing it during closing argument (See T-XVI 1010-1016, 1020, 1023-24, 1025-26, 1027, 1028-29).

g. "Additionally, defense counsel used Mr. Kirkland's testimony regarding the description of the individual leaving the store in support the defense theory that it could not have been the Defendant leaving the store." (PCR3-I 87)

Trial defense counsel, in fact, did argue this matter to the jury, as the trial court indicated. (See T-XVI 1011-1016, 1027-28)

h. "Further, ... the jury was presented with substantial evidence that the Defendant was in fact the person who committed the murder." (PCR3-I 87-88)

Not only was Mungin's postconviction evidence weak, Mr. Kirkland's trial testimony does not stand alone. As the trial court found, there was additional "substantial" evidence incriminating Mungin. The incriminating evidence is summarized in "Facts of the Murder," supra. Thus, Mungin v. State, 932 So.2d 986, 1000 (Fla. 2006), concluded:

> Mungin was linked to the crime by the ballistics evidence that identified the gun used in the Tallahassee and Monticello shootings, and found in Mungin's room the night he was arrested, as the same gun that was used to shoot the victim in this case. The State also presented the

> eyewitness testimony of Ronald Kirkland, who identified Mungin as the man he saw leaving the store.

Similarly, Mungin, 79 So.3d at 738, highlighted this other evidence in rejecting Mungin's newly discovered evidence claim:

> We deny this claim because the information provided by Brown is not of such a nature that it would probably produce an acquittal on retrial. The jury heard significant evidence during the trial that established Mungin as the killer, including testimony that Mungin stole a red Escort and was engaged in similar shootings a few days before the murder, the stolen car was later discovered in Jacksonville, and the shell casing and bullet left at the scene of the murder were identified as matching the gun found at Mungin's home.

Not only was the gun recovered in Mungin's bedroom identified as the weapon that murdered Ms. Woods in this case and that was used in other convenience store robberies and shootings, it was also identified as the gun that fired rounds reflected in the casings (See T-XV 827-28, 851-530; T-XV 877-79, 886) located in the tan-over-white[12] Dodge vehicle (T-XIV 802; T-XV 825-26) recovered less than 100 yards from Mungin's residence at Kingsland, Ga. (T-XV 826-27).

The tan-over-white Dodge was stolen within hours of the robbery-murder of Ms. Woods and in Jacksonville less than two miles from where a red Ford Escort was found abandoned. (T-XV 795-99, 801-806) On September 14, 1990, within a couple of

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[12] Kirkland's trial testimony described the murderer's car as tan or cream-colored. (T-XIV 676)

days of the murder of Ms. Woods, Mungin had used the red Ford Escort in his robbery-shootings in Monticello and in Tallahassee. (T-XIV 718-21; T-XIV 737-40)

Therefore, in essence, within a few days, the Dodge was recovered in a different city than where it was stolen and recovered less than 100 yards from Mungin's Georgia residence with casings in it matching Mungin's gun. This gun was the murder weapon and also the weapon used in the Ford-Escort-perpetrated robbery-shootings. Mungin used the stolen Ford Escort to rob and shoot victims in Monticello and Tallahassee, and the Escort was dumped in Jacksonville near where the Dodge was stolen.

Multiple aspects of firearms identification, as well as, stolen vehicles tied Mungin to this murder: The firearms-identification evidence linked the pistol found in Mungin's home to the bullet recovered from Ms. Woods; Mungin's two other robberies and shootings involved the same gun; the Ford Escort used in the other two robbery-shootings that had been stolen from near Mungin's Georgia home and then abandoned in Jacksonville; and, the Dodge stolen in Jacksonville from near where the Ford had been abandoned and recovered next to Mungin's home with two expended casings from the murder weapon in it.

In sum, as the trial court found, "substantial evidence" proving that "the Defendant was in fact the person who committed

the murder." The totality of the trial evidence proved that Mungin was the perpetrator of this murder and negates any prejudice-related prong that Mungin bore the burden of proving.

2. GIGLIO CLAIM.

Competent, substantial evidence also supports the trial court's findings concerning the Giglio claim, thereby meriting affirmance.

> **a."[T]he Defendant has not shown that prosecutor presented or failed to correct false testimony, in that the Defendant has not shown that Mr. Kirkland's testimony was false. Instead, the Defendant has merely shown that Mr. Brown's version of events is inconsistent with Mr. Kirkland's version." (PCR3-I 88)**

At most, as the trial court ruled, Mungin put on some evidence that Brown disagreed with Kirkland's version. One witness disagreeing with another witness does not prove that "the prosecutor presented or failed to correct false testimony," Mungin III, 79 So.3d at 738.

> **b. "[A]ssuming arguendo that Mr. Kirkland's testimony was false, the Defendant has not shown that the prosecutor knew the testimony was false. The evidence introduced at the hearing showed that neither the police, nor the prosecutor, knew of Mr. Brown's version of events. This Court finds Mr. de la Rionda's testimony that he never knew of Mr. Brown's version of events to be credible. Additionally, the testimony of Mr. Brown and Officer Conn corroborated Mr. de la Rionda's testimony." (PCR3-I 88)**

As detailed under the Brady-subsections supra, neither the police nor the prosecutor knew about the content of Mr. Brown's postconviction affidavit until Mungin disclosed it to the

prosecutor in his successive postconviction motion. Exercising its proper role in evaluating credibility, the trial court accredited the testimony from the police and the prosecutor on the matter. Trial court credibility determinations, including those here, are entitled to this Court's deference. Moreover, the compelling evidence of Mungin's guilt negates even Giglio prejudice.

D. Additional Support for the Trial Court's Denial.

1. The Evidence.

Additional aspects of the record support the trial court's rejection of the Brady and Giglio claims.

As reflected in the timeline, this robbery-murder of Ms. Woods occurred in **1990**, and Mungin was convicted of it in **1993**. Mr. Brown waited until Mungin's postconviction team[13] approached him in **2007** to come forward with this "information." (PCR3-I 142-43; see also PCR3-I 136-43) Even though Brown lived in the store's neighborhood (PCR3-I 102, 126, 139), even though he frequented the store after the murder (PCR3-I 116-17, 126-27, 139; see also PCR3-I 103), and even though he kept up with the case by reading about it in the paper (PCR3-I 127),[14] Brown

[13] Mungin's postconviction team taped Mr. Brown (PCT 44-45), but they have destroyed the tape (PCT 139-40).

[14] He appears to have subsequently contradicted himself. He testified that, when he found out the victim "passed away then I

waited about **17 years after the robbery-murder and about 14 years after the trial** to attempt insert himself as a key witness. Thus, he acknowledged that after the day of the murder, he never contacted the police to tell them about the person he testified bumped him as he entered the store. (PCR3-I 125)

Mungin might respond that Brown knew he had told the police on the day of the murder of the matters in his affidavit. However, such an argument is negated by the trial court's record-grounded findings that --

- Brown conceded he did not relay the information to the officers on the scene (See Brady sub-section "a" supra);
- Brown clarified that he was not certain whether he told the officers about part of the information and might not have informed the police (See Brady sub-section "b" supra); and,
- Officers and the prosecutor testified that Brown did not inform them of the matters (See Brady sub-sections "d" & "e" supra).

Moreover, the evidence shows that Brown actually did not recall as much as Mungin might otherwise submit. Brown testified

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didn't really think about that any more, tried not to." (PCR3-I 127) He claimed that he did not know someone had been arrested in this case (PCR3-I 112) and did not know what happened with this case until Mungin's postconviction team approached him in 2007 (See PCR3-I 111).

that he remembered talking to a male police officer, but that he did not remember the officer's name. (PCR3-I 108-109) Brown could not remember speaking to a female police officer; Mr. Brown stated that he might have, but he could not say. (PCR3-I 109, 131; see also Id. at 115, 133) Thus, at one juncture, when asked whether there was a female police officer at the scene at some point in time, he responded, "I can't remember." (PCR3-I 109) Brown did not recognize the female police officer (Officer Christie Conn) at the evidentiary hearing. (PCR3-I 132; see Id. at 99) Officer Conn was a female officer and testified that, at the murder scene, she was wearing a gun and a badge (PCR3-II 201; see PCR3-I 194). Officer Conn identified herself as a police officer to the witnesses. (PCR3-II 201) Officer Conn did speak with Brown at the crime scene. (PCR3-I 197-200; PCR3-II 201-206)

Mr. Brown qualified his testimony concerning his 2007 affidavit with "guess," "believe," unsure, and he hedged again with "as far as I can remember" (PCR3-I 133-34).

He did not know the sex or race or height or weight of the person who he said bumped or nudged him as he entered the store. (PCR3-I 105-106, 121-23)

He was vague concerning whether he touched the cash drawer and then changed his mind to indicate that he was "almost positive":

> Q. There was also in your affidavit something about you touching the drawer. Did you touch the drawer or not?
>
> A. No, sir. **Not that I can remember** I didn't. **If I did** I don't know why.
>
> Q. So you may have touched the drawer?
>
> A. No, sir. I'm almost positive I didn't touch that drawer. It was open and empty and I told the police officer when he came in that.

(PCR3-I 136)

Brown emphatically stated that "this guy" came in the store "about" the time he called 911, (PCR3-I 105) then he testified that the guy came in the store "after" he called 911 (PCR3-I 106) or as he was on the phone with 911 (PCT 15), then he admitted that he actually did not even see the guy come in the store, but, instead, he looked up and saw the guy after he had entered:

> Q. Mr. Brown, just to make sure, I maybe misunderstood what you were asked again. You stated you went in and you were the only person inside, correct? That's what you're saying at this time?
>
> A. Yes, until I called the 911.
>
> Q. And then another man came in?
>
> A. Yes, sir.
>
> Q. So you saw that man come in?
>
> A. Yes, sir.
>
> Q. **You actually saw him coming in the door?**
>
> A. **Not come through the door. I mean when he came up behind me he was asking me what was going on**.

(PCR3-I 144)

Even though he did not actually see when Mr. Kirkland entered the store, Brown was emphatic and "positive" that no one else was in the store (PCR3-I 106, 114), but he admitted that he "went to the bathroom ... and hollered in there" and "looked in" a little storage room (PCR3-I 104-105), thereby indicating that someone may have been in another area of the store while Brown was checking these places.

He admitted that two women "may have" come into the store; "[t]hat part I don't remember." (PCR3-I 127-28)

When asked whether the other guy (apparently Kirkland) described the man to the police, he responded he "believed so," but then he corrected himself, "No, he didn't describe -- when I heard him he wasn't describing the man." (PCR3-I 130)

Even though Brown concluded that he could remember "everything" as if he were standing there at the crime scene now (PCR3-I 133), he demonstrated that could not, and he "guess[ed]" that his memory regarding talking with a female officer was vague (PCR3-I 133).

Mr. Brown's vague testimony riddled with guesses and equivocation failed to prove any prong of either Brady or Giglio. Indeed, the claims were also explicitly rebutted by police and prosecutor testimony that the trial court accredited, as discussed in section "C" supra.

2. Case Law.

As discussed further infra, apparently Mungin believes his mere allegations, inferences, and speculations entitle him to relief. To the contrary, he bore the burden of proving his allegations by admissible, competent, and probative evidence. See, e.g., Suggs v. State, 923 So.2d 419, 428 (Fla. 2005)(postconviction hearsay and assumption-based testimony did not constitute "factual evidence in support of these [Giglio and IAC] claims"); Phillips v. State, 608 So.2d 778, 781 (Fla. 1992)("Ambiguous testimony does not constitute false testimony for the purposes of *Giglio*"). Mungin failed to meet his burdens.

Indeed, it is axiomatic that it was the trial court's proper role to resolve evidentiary conflicts and related evidentiary matters. This is precisely what the trial court did here -- against Mungin. See, e.g., Franqui, 59 So.3d at 102.

Further, as the trial court found, the postconviction claims are juxtaposed to what the jury actually heard in terms of the strength of the evidence and the defense counsel's actions at trial that render the postconviction evidence inconsequential. See, e.g., Hurst v. State, 18 So.3d 975, 1002, 1007 (Fla. 2009)("postconviction court denied the claim without another hearing and held that a *Brady* violation was not demonstrated regarding Williams' statements that Hurst needed to get his car fixed, because that testimony was cumulative to a number of

other witnesses who testified to that same fact and would not have had any material effect on the outcome"; "Even without Griffin's testimony, ample evidence remained upon which the jury could find Hurst guilty"); Overton v. State, 976 So.2d 536, 563 (Fla. 2007)("the challenges presented by Overton's counsel to Pope during trial were significant"); U.S. v. Tellechea, 2012 WL 1939242, *2-3 (11th Cir. 2012)(unpublished; Brady claim; "After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we conclude that the district court did not abuse its discretion in finding there is no reasonable probability that the cumulative impeachment evidence would have led to a different result").

In Jones v. State, 998 So.2d 573, 581 (Fla. 2008), as well as here, the impeachment that the jury heard and the strength of the other evidence negated Brady's prejudice-related prong.

By way of contrast in Smith v. Cain, 132 S.Ct. 627, 630 (2012), "Boatner told the jury that he had '[n]o doubt' that Smith was the gunman he stood 'face to face' with on the night of the crime, but Ronquillo's notes show Boatner saying that he 'could not ID anyone because [he] couldn't see faces' and 'would not know them if [he] saw them.' App. 196, 200, 308. Boatner's undisclosed statements were plainly material." Here, these matters are clearly not material, and, here, the police were not told anything conflicting.

Moreover, the ability of a defendant to find testimony that he argues conflicts with trial evidence[15] does not demonstrate a Brady violation or a Giglio violation. Instead, those theories' elements include a component of law enforcement knowledge. See Davis v. State, 26 So.3d 519, 531-532 (Fla. 2009)("no indication that Davis has any evidence to support the *Giglio* claim beyond the unsworn assertion of Kearney that her testimony was prompted by threats from an unknown party. Without further evidence to demonstrate that the State knowingly presented false testimony, Davis is unable to satisfy the first two prongs of the *Giglio* test"); Hurst v. State, 18 So.3d 975, 1003 (Fla. 2009)("State's failure to disclose the notes regarding Hess ... [not] a *Giglio* violation, because it does not indicate that the State presented, or failed to correct, any false testimony at trial").

To illustrate the principle, even when one arm of state law enforcement knows something, it is not per se attributable to another arm of law enforcement. Jones v. State, 998 So.2d 573, 581 (Fla. 2008)(citing Breedlove v. State, 580 So.2d 605, 607 (Fla.1991) (rejecting the defendant's *Brady* claim because the detectives' knowledge of the witnesses' criminal activities was

[15] This might establish a newly-discovered evidence claim if all of its components are satisfied, but Mungin III, 79 So.3d at 738, "denied ... [that] claim because the information provided by Brown is not of such a nature that it would probably produce an acquittal on retrial."

not readily available to the prosecution)), held that it was "unreasonable to expect the prosecutor in this case, having no knowledge of Prim's illegal activity, to become informed of and disclose such information in the less than twenty-four-hour period between Prim's arrest and Jones's sentencing hearing." Jones' premise is that law-enforcement knowledge is a necessary condition (albeit not a sufficient condition) for even a Brady claim. Moreover, the first elements of Giglio are more demanding than Brady in that its elements include actual prosecutor knowledge, as well as actual prosecutor misrepresentation or failure to correct it.

Franqui v. State, 59 So.3d 82, 105-106 (Fla. 2011), is illustrative. There, as here, "competent, substantial evidence supports the court's finding that the prosecutor did not knowingly present false, material testimony ...." There, and here, any arguable "inconsistencies" in witness(es)' testimony, alone, do not prove a Giglio -- or, for that matter, a Brady -- claim. See also, e.g., Floyd v. State, 18 So.3d 432, 451 (Fla. 2009)("Floyd has not established that Lamb's trial testimony was false or, equally significant, that the prosecutor knew it was false. Hence, Floyd has failed to demonstrate that a *Giglio* violation occurred").

Here, the case was remanded to afford Mungin the opportunity to prove his Brady and Giglio claims. He failed on both.

E. Appellant's Erroneous Arguments.

Mungin's Initial Brief is riddled with his self-serving assumptions, speculations, and inferences, contrary to his burdens of proof and the standard of review that defers to the trial court's factual determinations.

Perhaps most significantly, Mungin improperly overlooks or slights a crucial aspect of the postconviction proceedings: To reiterate and re-phrase, even if Brown's 2007 affidavit were otherwise accepted at face value, Mungin ignores the trial court's dispositive finding that Brown did not inform law enforcement of its content. This alone is dispositive of Mungin's Brady and Giglio claims. Mungin failed to prove that law enforcement knew of favorable information and failed to disclose it, which were part of Mungin's Brady burdens, and failed to prove that the prosecution knew of false testimony and presented it or failed to correct it, which were part of the Giglio burdens. Indeed, as the trial court found, law enforcement did not know of the supposed information and the prosecution did not know of any supposed falsity at all.

The following are among Mungin's other errors.

Mungin improperly recites some of Brown's testimony (IB 29-32), while ignoring Brown's equivocations, errors, and guesses and the trial court's findings, as discussed supra. When Brown's

entire postconviction testimony is examined, Brown was not "100% certain" of anything approaching any certainty whatsoever.

Mungin may be suggesting (IB 31 n.17) that Officer Conn wearing plain clothes was somehow significant. However, as discussed supra, she was wearing a gun and a badge, and she testified that she announced her posture as an officer. (PCR3-II 201)

Mungin's discussions (IB 32-33, 41-42) of Officer Wells suggests that he simply did not "recall" whether Brown told him he (Brown) was the only person in the store. Actually, Wells used "recall" in the following context: "I do not recall that, no, sir" (PCR3-I 185), which may mean that his recollection was that Brown did not tell him.

Thus, Mungin overlooks that Officer Wells also testified that Kirkland indicated that, as he came into the store with Brown, a possible suspect was leaving the store (PCR3-I 181-82, that he (Kirkland) entered the store with Brown (Id. at 188-89), and that Brown did not provide any additional information, but rather, Brown agreed with Kirkland: "**Mr. Brown didn't tell me anything. He just agreed with Mr. Kirkland**." (PCR3-I 190) Therefore, Officer Wells' testimony is consistent with the trial court's findings, which do merit deference on appeal, contrary to Mungin's suggestion (at IB 42).

Mungin seems to be suggesting (E.g., IB 34, 45) that he proved his claims because there was a lot of "activity" at the crime scene. However, "activity" proves nothing of Brady or Giglio elements. Without record support, he also states (IB 51) that the police interviews were "[h]urried." To the contrary, Detective Conn testified: "I do not feel the interview at the scene was distracted." (PCR3-I 206) Indeed, there can be "activity" at various places within the general crime scene and at various times without the "activity" interfering with interviews at other places within the crime scene and at other times. And, even though "hurried" fails to demonstrate either Brady or Giglio, also, here there is no evidence that proves that the police truncated their interviews intentionally or even unintentionally. Perhaps most importantly, arguendo, "hurried" interviews are not Brady or Giglio material.

Mungin references (IB 35-36) the prosecutor's understanding of his Brady obligations to disclose information, but the prosecutor still possessed no undisclosed favorable information.

Mungin mentions (IB 37-38) Kirkland as a "key" witness, but he overlooks that additional evidence amassed against him, as discussed in "Facts of the Murder" and in C.1.h, supra.

Mungin mentions (IB 39) Brown's 2007 affidavit, but when Mungin was afforded a full and fair 2012 hearing **to prove** the elements of Brady and Giglio, Mungin failed. No contradictions

were proved, and no knowledge of anything significant under Brady or Giglio was attributable to law enforcement or the prosecutor.

Mungin attempts (IB 40-51) to dispute the trial court's findings by cherry-picking, and taking out of context, aspects of the record and self-servingly making inferences, but, as detailed supra, the trial court's findings are properly grounded in the evidence. For example, Mungin contends (IB 41, 42 n.32) that Brown testified that he told the police what was in his affidavit. In addition to the record-based dispositive findings of the trial court to the contrary, See section C. supra, Brown clarified he did not inform the police of the contents of his affidavit; instead, Brown claimed that he "**tri[ed]**" to tell the police about matters in his affidavit, but the "other guy" talked over him. (PCR3-I 115)

Mungin suggests (IB 41) that, at the 2012 postconviction evidentiary hearing, Brown had a clear memory of the 1990 events. As detailed further in D.1. supra, this is incorrect. In any event, the trial court found that no Brady/Giglio material was attributable to the State.

Mungin erroneously suggests (IB 42-43 n.23 and accompanying text) that, under Brady or Giglio, the police are responsible for whatever information that a defendant finds in postconviction, regardless of whether the defendant proves Brady

or Giglio elements. Mungin's argument overlooks his failures of proof of Brady and Giglio elements when afforded a full and fair evidentiary hearing.

Furthermore, Mungin improperly infers (IB 42-43 n.23) that Detective Conn "dodged" a question and improperly suggests that, in light of the entire record and the trial court's findings, it matters. The context for Detective Conn's testimony indicates some confusion and ultimately Detective Conn flatly reiterated that Brown said that he and Kirkland entered the store at about the same time and ultimately Mungin's counsel did not pursue the matter further:

> Q. Okay. Now you had testified that **Mr. Brown** never told you that he was the first one to arrive at the store, correct?
>
> A. Correct.
>
> Q. Did you ever ask him?
>
> A. **They arrived at the same time or about the same time**.
>
> Q. That's what who told you? Kirkland, correct?
>
> A. Kirkland, correct.
>
> MR. DE LA RIONDA: No. I apologize. He's confusing question. He said Mr. Brown and then he said Kirkland.
>
> MR. SCHER: Right.
>
> MR. DE LA RIONDA: Which one?
>
> MR. SCHER: I think she understands my question. She doesn't --
>
> THE COURT: You don't know what she understands. She can tell you what she understands.
>
> BY MR. SCHER:

Q. Did you understand the question?

A. Say it again because now the two of you got me confused.

Q. I understand.

THE COURT: All three of us.

MR. SCHER: Actually if the court reporter could read it back. I want to make sure the question is correct.

(**The question was read back**.)

BY MR. SCHER:

Q. That they both came into the store together?

A. George Brown, the other white male, who entered the store about the same time as Kirkland.

THE COURT: Kirkland is the one that told you I think is the question.

THE WITNESS: Okay. George Brown, the other white male, who entered the same time. **I interviewed George Brown who said he entered the store about the same time as Kirkland, about the same time**. Now as to who pulled into the parking lot, I don't know who pulled into the parking lot at the same time. I don't know. I didn't ask who pulled into the parking lot. I'm concerned what happened in the store.

...

BY MR. SCHER:

Q. And you had also indicated that Mr. Brown never told you that he -- strike that.

A. I'm sorry. Mr. Brown never told me --

Q. I'm sorry. Strike.

A. Strike? Okay.

Q. Now in your deposition on page 44 you indicate after you're asked who's the next person you interviewed, George Brown, okay, and then you say, quote, he said he pulled into the store behind Kirkland, the other witnesses. You know what other witnesses you're talking about? ...

(PCR3-II 206-208)

Mungin's discussion continues with speculation and inference that the record does not support. He (IB 43) conjectures about who was present precisely when during the interviews. He (IB 44) speculates and leaps to inferences about a diet coke and a Gatorade. Without any record citation, he asserts what was checked for latent prints and the results and then speculates, without support, on the supposed significance. (IB 44-45)

Mungin (IB 45-46) speculates about the meaning and scope of "scene" and its interrelation to Dawn Mitchell and Jonah Miller and then improperly attempts to harness his speculation for his argument. In contrast with Mungin's self-serving speculation, the "scene" can include arriving in the parking lot of the store. (See PCR3-II 209)[16] In any event, this is an

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[16] Defense counsel Cofer testified that his recollection was that Detective Conn's report concerning her interview of Dawn Mitchell was that Conn said that Mitchell told her (Conn) that she (Mitchell) arrived "apparently at the time the other two witnesses found the victim . . . ." (PCR3-I 174) Cofer did not "confirm[]" (IB 45-46); instead he guessed: "my sense was that they arrived . . . " (PCR3-I 174-75). Although compound hearsay and speculation, Cofer's testimony does illustrate that the use of "scene" in this case can indicate various locations inside and outside of the store where the victim was murdered. If Mungin thought that the precise timing of Miller and Mitchell's arrival at specific locations was important, he should have called them as witnesses at the evidentiary hearing. In any event, the issue here is not the split-second timing of when other witnesses told the police that they arrived at a part of the "scene"; instead, the main issue is whether Mungin proved that Brown told law enforcement that, initially, he was alone in the store and how he knew that he was alone in the store. Mungin

inconsequential matter, especially given the totality of evidence showing that clearly did not prove Mungin's claims and indeed, even disproved them, as the trial court found. See also Ponticelli v. Secretary, Florida Dept. of Corrections, 2012 WL 3517146, *21, *22 (11th Cir. (Fla. (11th Cir. 2012)("With respect to evidence about Ponticelli's use of cocaine on the night of the murders and attendance at the cocaine party on Thanksgiving night, the Supreme Court of Florida deferred to the finding of the trial court that the state did not knowingly suppress this evidence"; trial court found and the state supreme court affirmed that the prosecution did not knowingly present false testimony").

Without any basis, Mungin (IB 47) accuses the State of trying to confuse Brown. To the contrary, Brown was vague and inconsistent with himself. The State's cross-examination was proper, and, therefore, Mungin's counsel did not interpose an objection based on alleged confusion. (See PCR3-I 116-40, 144)

Mungin (IB 46-47, 48) claims that Brown had no reason to lie. Regardless of whether Brown intentionally lied, it is clear that his memory was vague, spotty, and uncertain, as discussed in sub-section D.1., supra.[17] Moreover, the evidence does provide a

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failed his burden of proof.

[17] At the evidentiary hearing, Brown indicated that he knew

basis for questioning Brown's veracity. In addition to waiting 14-17 years to come forward even though he frequented the store, lived in the area, and read newspaper accounts of the case (See D.1. supra), he was willing to conclude that no one other than he and the victim were in the store even though Kirkland could have been present in the store while Brown said he was he was checking bathrooms and a closet (See D.1. supra); while Brown denied touching the cash register, he apparently got close enough to it to observe that it was "empty" (PCR3-I 107); and, perhaps most importantly, **Brown did not indicate that he corrected Kirkland when Kirkland told the police that "we found the lady there ... shot and called 911"** (See PCR3-I 130).

Mungin (IB 47-48) incorrectly faults the trial court's citation to Justice Polston's dissenting opinion. As discussed in C.1.f.,g.,h. supra, the trial court's weighing of trial defense counsel's attacks on Kirkland during trial and weighing the substantial evidence of Mungin's guilt were grounded on the record, and as discussed in section D.2. supra, this was proper, as a matter of law. Here, having the benefit of seeing what Mungin could prove and not prove in an evidentiary hearing and its weight, the trial court was able to view it with the

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that Kirkland was deceased. (PCR3-I 136-37)

totality of trial evidence that Justice Polston's opinion referenced. This was not error.

Mungin (IB 50-51) asserts that the police reports were "false and/or misleading" and that Brown's testimony would have "impugn[ed] the integrity of the entire investigation," but Mungin overlooks that he failed to prove his claim; that Brown's postconviction testimony was weak, unconvincing, and downright non-probative; Mungin overlooks the attack defense counsel already made on Kirkland at trial; and, Mugin overlooks the compelling other evidence against him at trial. There is no accredited evidence, nor is there any evidence worthy of accrediting, that any police reports were incorrect in any material way. The investigation and incriminating evidence showed that Mungin was, and is, in fact, guilty.

Mungin's discussion (IB 51-52) of Giglio relies on his discussion of Brady. As discussed in C.2. supra, as well as in D. supra, the trial court's ruling that Mungin failed to prove his Giglio claim merits affirmance. He proved neither his Giglio claim nor the Brady claim.

Finally, Mungin (IB 48 n.26) initiates his "cumulative" argument, which he continues at length (IB 52-69). The most obvious answer to Mungin's discussion is that the 2012 evidentiary hearing revealed that there is no viable Brady or Giglio claim to accumulate with anything. See, e.g., Ponticelli,

L 3517146, *21-22 (11th Cir. 2012)(the only way to evaluate the cumulative effect is to first examine each piece standing alone; presumption that state courts conducted proper analysis).

Moreover, as a matter of law, although there is some non-United States Supreme Court case law to the contrary,[18] the State respectfully submits that evidence related to other claims or theories, such as IAC, or prior cases, should not be mixed and matched with a Brady or a Giglio claim.

Thus, Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), explained the test for IAC prejudice focuses on the effect of counsel's deficiency:

> [T]he defendant must show that **the deficient performance** prejudiced the defense. This requires showing that **counsel's errors** were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 691-92, continued:

> **An error by counsel**, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. United States v. Morrison, 449 U.S. 361, 364–365, 101 S.Ct. 665, 667–668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has **the assistance necessary** to justify reliance on the outcome of the proceeding. Accordingly, **any deficiencies in counsel's performance** must be prejudicial

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[18] See, e.g., Hurst v. State, 18 So.3d 975, 1015 (Fla. 2009)(evidentiary errors and IAC).

> to the defense in order to constitute ineffective assistance under the Constitution.

In contrast, any Brady or Giglio violation would be, by its very nature, not a "deficienc[y] in counsel's performance." Both Brady and Giglio focus on law enforcement violating some sort of duty, whereas Strickland IAC focuses on trial defense counsel violating a duty of a certain level of performance. They are "apples and oranges" and should not be mixed. Accordingly, any supposed trial errors should not be "mixed and matched" with any errors that are proved on postconviction.

Thus, Brady v. Maryland, 373 U.S. at 87, explained that the prejudice for Brady material focuses on the effect of the particular **Brady** material:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where **the evidence** is material either to guilt or to punishment ....

Brady's discussion, Id., continued by making it clear that the analysis of Brady-prejudice is tied to the prosecutor's duty, not to any trial defense counsel's IAC: Witholding exculpatory or penalty-reducing evidence "casts **the prosecutor** in the role of an architect of a proceeding that does not comport with standards of justice."

Accordingly, Smith v. Cain, 132 S.Ct. 627, 630 (2012), recently explained:

> We have explained that 'evidence is "material" within the meaning of *Brady* when there is a reasonable probability

> that, had **the evidence** been disclosed, the result of the proceeding would have been different.' *Cone v. Bell*, 556 U.S. 449, 469-470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with **the evidence**,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.' *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotation marks omitted).

While Kyles v. Whitley did discuss the cumulative effect of Brady material with other Brady material, its rationale limited cumulative analysis to Brady evidence:

> The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.
>
> ...
>
> But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached.

Kyles v. Whitley, 514 U.S. 419, 436-37, 115 S.Ct. 1555, 1567 (1995). Given the Kyles' rationale, Mungin's argument that the prosecutor is responsible for evaluating a possible IAC claim would be absurd; in many instances, such an evaluation would require the prosecutor, **at the pre-trial phase**, to improperly access defense counsel's file, including defense counsel's notes of communications with the defendant.

Indeed, even within the same legal theory (Brady), Smith v. Cain, 132 S.Ct. 627, 631 (2012), did not consider arguments that

the other undisclosed evidence also requires reversal under Brady:

> The police files that Smith obtained in state postconviction proceedings contain other evidence that Smith contends is both favorable to him and material to the verdict. Because we hold that Boatner's undisclosed statements alone suffice to undermine confidence in Smith's conviction, we have no need to consider his arguments that the other undisclosed evidence also requires reversal under *Brady*.

Moreover, for any violation to accumulate, it must first be determined to be a violation independent of other alleged violations. As Kyles, 514 U.S. at 437 n.10:

> We evaluate the tendency and force of the undisclosed evidence **item by item**; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion . . . .

Accord Barwick v. State, 88 So.3d 85, 105 (Fla. 2011)("where allegations of individual error are without merit, a cumulative error argument based thereupon must also fail").

Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), explained:

> We reject Middleton's argument for two reasons. First, Middleton advances an erroneous interpretation of Supreme Court precedent. Neither *Wiggins* nor *Williams* stand for the proposition courts should accumulate the prejudice from separate ineffective assistance claims in determining whether to grant habeas relief. Rather, both decisions involved only a single claim of ineffective assistance of counsel-namely, trial counsel's failure to investigate and present mitigating evidence during the trial's penalty phase. *See Wiggins*, 539 U.S. at 514, 123 S.Ct. 2527; *Williams*, 529 U.S. at 390, 120 S.Ct. 1495.
>
> Second, Middleton's argument contradicts Eighth Circuit precedent. We repeatedly have recognized 'a habeas petitioner cannot build a showing of prejudice on a series

> of errors, none of which would by itself meet the prejudice test.' *Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002) (citation omitted); *see, e.g.*, *United States v. Robinson*, 301 F.3d 923, 925 n. 3 (8th Cir. 2002) (recognizing 'the numerosity of the alleged deficiencies does not demonstrate by itself the necessity for habeas relief,' and noting the Eighth Circuit's rejection of cumulative error doctrine); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ('**Errors that are not unconstitutional individually cannot be added together to create a constitutional violation**.' (citation omitted)); *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990) (holding 'cumulative error does not call for habeas relief, as **each habeas claim must stand or fall on its own**' (citation omitted)). Therefore, we have no hesitancy in rejecting Middleton's argument and concluding the cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief.

Mindful that, in these postconviction proceedings, Mungin has failed to prove any Brady or Giglio violation to accumulate with anything, his discussion of his prior allegations are tantamount to **grossly untimely motions for rehearing** on matters in which the parties, in years past, litigated and briefed (See, e.g., Answer brief in SC03-780) years ago and that this Court has long ago settled the issues as the **law of the case**. See also, e.g., Byrd v. State, 14 So.3d 921, 926 (Fla. 2009)("Appellant first claims that the State failed to correct testimony at trial regarding when Sullivan first offered to provide information against Byrd"; barred because "he raised this claim under *Brady* and *Giglio* in his prior postconviction motion and that this Court affirmed the denial of relief"; "Finally, because he previously raised a claim of ineffective assistance of counsel

regarding use of the document, any such claim here is barred as well").

Arguendo, the State notes that Kirkland's misdemeanor worthless-checks probationary status[19] (See IB 48 n.26, 52-55) still pales compared with the job that Mungin's counsel did at trial and compared with the compelling evidence of Mungin's guilt.[20] Moreover, concerning any arguably related Brady claim, Mungin, 932 So.2d at 998-99 n.10, pointed to the untimeliness of the claim and alternatively held that Mungin failed to prove any such claim.

Mungin's prior allegation concerning Kirkland's identification of Mungin to Detective Conn (See IB 55-56) remains a reasonable tactical decision, as a matter of law-of-the-case. See Mungin, 932 So.2d at 999. Also, as a matter of law of the case, Mungin failed to prove Strickland's prejudice prong regarding the identification claim. See Mungin, 932 So.2d at 999.

Concerning the identification, Mungin did not even call Detective Conn at the 2002 evidentiary hearing to prove what she would have testified to at trial. (See PCR-II 220) Again, this

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[19] Defense Exhibit #4 in the 2002 evidentiary hearing shows that Kirkland had received 90 days probation concurrent for each of three misdemeanor worthless check cases.

[20] Mungin, 932 So.2d at 998-99, did not reach the deficiency prong of IAC.

illustrates that Mungin is improperly attempting, piecemeal, to re-raise matters that have been long-settled as law of the case.

Regarding the alibi claim, as a matter of law of the case, Mungin also failed to prove Strickland's prejudice prong, See Mungin, 932 So.2d at 1000. Further, Mungin infers (IB 58, 59) that Mungin, 932 So.2d at 1000, found Strickland deficiency due to the comment that "it appears that counsel was confused about the details of Mungin's alibi defense." Contrary to Mungin's inference, there was no such finding, and the bottomline is that Mungin did not prove deficiency because, in spite of postconviction hindsight and the postconviction opportunity to pursue alibi for years prior to the 2002 evidentiary hearing, he failed to prove a viable alibi defense. Defense counsel cannot be Strickland deficient for failing to find an alibi defense that did not even exist through admissible evidence. Mungin's inadmissible **hearsay** statements to the police (See IB 59-61, 67-68) do not prove his alibi. Indeed, Mungin did not testify to his alibi at the 2002 evidentiary hearing -- he did not testify at all (See PCR-II 220). The discussion of Strickland prejudice in Mungin, 932 So.2d at 1000, also pertains to Strickland deficiency:

> Mungin presented no evidence at the evidentiary hearing that trial counsel would have been able to locate 'Ice' or

> any evidence connecting 'Ice' to the gun. Although Edward Kimbrough[21] and Jesse Sanders testified that they knew an individual who went by the name 'Ice,' Kimbrough had not seen 'Ice' since the early or mid-1990s and Saunders had not seen him since 1987. Neither witness testified that he could have helped Cofer find 'Ice' in 1992, and neither witness directly supported Mungin's claim that he gave 'Ice' the gun.

Moreover, Mungin, 932 So.2d at 1000, explained that "Mungin's other alibi witnesses do not establish that Mungin could not have committed the murder on the afternoon of September 16, 1990." And, perhaps even more important, Mungin, Id., continued:

> The testimony of Brian Washington [at the 2002 evidentiary hearing], who was sure that the date he drove Mungin to Jacksonville was September 16, 1990, placed Mungin in Jacksonville on the day of the shooting.

(See PCR-III 417-18) Thus, this aspect of the 2002 postconviction hearing not only showed that there was no viable alibi defense that any reasonable attorney would have pursued, the 2002 evidence would have actually strengthened the State's

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[21] In Mungin's improper attempt to re-litigate the quality of Sanders' 2002 testimony he overlooks, for example, that Kimbrough admitted that "Ice" always had a gun on him and therefore would not need Mungin's gun (PCR-II 385); admitted that he never saw Mungin with a gun (PCR-II 386) even though it is not disputed that Mungin used a gun in the other two robberies; even though he had never seen Mungin with "Ice" (PCR_II 389); and even though Kimbrough said he was "doing crack cocaine" from around 1986 to 1998 (PCR-II 388). When Sanders testified in 2002, he was serving 15 years, with a 10 mandatory, in prison (PCR-II 391); had gotten out of prison in 1992 and went back to prison in 1994 (PCR-II 400); contrary to Kimbrough, described an event when he was with "Ice" and Kimbrough (PCR-II 396-97); and had "no idea" whether he committed this murder or the two other shootings (PCR-II 403).

case against Mungin, thereby further negating Strickland prejudice.

Mungin (IB 66-67, 69) also attempts to resurrect this Court's direct-appeal holding that the evidence proved felony murder but not premeditated murder and also attempts to untimely interject the penalty phase. This discussion is not only untimely and conclusory, but also overlooks that the postconviction claims at issue concern identity, not Mungin's mental state at the time he shot the victim nor the penalty phase.

For each and all of the foregoing reasons, as well as those in the trial court's order, ISSUE I should be rejected.

ISSUE II: HAS MUNGIN DEMONSTRATED THAT THE TRIAL JUDGE WAS REQUIRED TO DISQUALIFY HIMSELF? (IB 69-72, RESTATED)

ISSUE II contends that Judge Southwood should have granted Mungin's December 15, 2011, Motion to Disqualify (PCR3-I 29-34) in which he claimed that the judge showed subjectivity in an order filed October 2009 (PCR2-I 130-40). There are multiple reasons supporting the rejection of ISSUE II. See also Mungin v. State, 932 So.2d 986, 993-994 (Fla. 2006)("Mungin had specific knowledge of the alleged grounds for disqualification but failed to file a motion to disqualify"; "claim is both procedurally barred and without merit").

A. Incomplete record.

Mungin is the appellant, the non-prevailing party below. He bears the burden of producing a record on appeal that supports his claim. He has failed to present this court with the order he contests or the transcript of the hearing at which he presented and argued it to the trial judge.

However, for the following two reasons, the State respectfully submits that ISSUE II should be rejected with or without the order or transcript as part of the record. See State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011)("trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment"); Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review).

Here, on the face of the motion, it clearly was untimely, and it insufficiently alleged a prior adverse ruling.

B. Untimeliness.

Rule 2.160, now 2.330, Fla.R.Jud.Admin., requires that motions to disqualify be filed "within a reasonable time **not to exceed 10 days** after discovery of the facts constituting the grounds for the motion."

The Motion alleged, as the basis for disqualification, Judge Southwood's Order that summarily denied the claims here. The

Order was rendered October 8, 2009 (PCR2-I 130); the Motion was not filed until December 15, 2011, 798 days later. Even if the "clock" for filing the Motion began ticking when this Court released its opinion in Mungin III, 79 So.3d 726, on October 27, 2011, Mungin still did not file his motion until 49 days later. Regardless of how the "clock" is viewed, the motion was, on its face, untimely. Pursuant to Rule 2.330, this claim should be rejected. See Rodriguez v. State, 919 So.2d 1252, 1274 (Fla. 2005)(alleged basis for disqualification arose September 15 and "counsel did not file a motion to disqualify the judge on this basis until November 1996"; "Rodriguez's motion was not timely filed, and any claim relating to this is procedurally barred").

C. Prior Adverse Ruling, Facially Insufficient.

The sole basis for disqualification is that Mungin III held that the trial judge's summary denial of Mungin's 2007 successive postconviction motion was error. An adverse ruling is a facially insufficient reason for disqualification. See Mendoza v. State, 87 So.3d 644, 664 (Fla. 2011)("adverse rulings by a judge are generally considered legally insufficient to warrant a judge's disqualification").

Ault v. State, 53 So.3d 175, 205 (Fla. 2010)(citing Rivera v. State, 717 So.2d 477 (Fla. 1998); Jackson v. State, 599 So.2d 103, 107 (Fla. 1992)), alternatively held that allegations of "two adverse rulings ... [that] the judge had discussed

potentially negative information with defense counsel" were insufficient.

Rivera v. State, 717 So.2d 477, 481 (Fla. 1998), rejected a disqualification claim based upon "Judge Ferris ... simply responding to a query from the Parole Commission in expressing his views about Rivera's sentence."

Mungin's allegations are at least as insufficient as those in Jackson v. State, 599 So.2d 103, 107 (Fla. 1992), where the defendant alleged that --

> the judge was prejudiced due to the fact that he had heard the case no less than five times, including the two trials of Jackson's codefendant. The motion further alleged that the defendant's fear of prejudice was well founded in light of certain comments allegedly made by the trial judge which 'seem to infer a predisposition by [the judge] as to the facts that are expected to be presented at his new trial.'

In Mansfield v. State, 911 So.2d 1160, 1168-69 (Fla. 2005), "Mansfield claims that the judge in the postconviction proceeding, who also served as the trial judge, should have been disqualified at the postconviction hearing ...." There, the Judge's comments included his opinion that the State Attorney's Office "outstanding"; "at this time and point, I do not see any errors. And if there are any errors, I don't see any reversible errors"; " I don't see any proof problems." Mansfield, 911 So.2d at 1171, held that "the motion failed to provide a basis for disqualification of the trial judge on the ground that Mansfield had a well-founded fear that he would not receive a fair trial."

Clearly, the judge in Mansfield was relying on his recollection of what had been happening in the case.

Dragovich v. State, 492 So.2d 350, 352 (Fla. 1986), upheld the rejection of disqualification where the motion to disqualify was --

> premised on the fact that the judge at appellant's trial had previously presided over the trial of Echols and had therefore heard all of the evidence against appellant and concluded that this was a contract murder procured by appellant. As further grounds supporting disqualification, the motion recited that this judge had sentenced Echols to death in spite of the jury's recommendation of a life sentence and the judge would feel compelled, in the spirit of uniformity, to also sentence appellant to death.

Accordingly, Dragovich discussed Jones v. State, 446 So.2d 1059 (Fla. 1984):

> There, the trial judge had complimented appellant's counsel on the 'remarkable job' he had done at trial, and was the same judge who was to hear appellant's ineffective assistance of counsel claim, pursuant to Rule 3.850, Florida Rules of Criminal Procedure. It was the trial judge's denial of the motion to disqualify himself from hearing the rule 3.850 claim that was presented to this Court. Recognizing that 'justice should be administered without fear of prejudice or partiality,' id. at 1061, we, however, found the fact that merely because the judge had previously heard the evidence (i.e. counsel's performance at trial) and was to be the final arbiter on the rule 3.850 motion, were not, of themselves, legally sufficient facts requiring disqualification.

Dragovich and Jones clearly indicate that a memory of prior proceedings and even previously formulating an opinion based on those prior proceedings are not sufficient for disqualification.

While Kokal v. State, 901 So.2d 766, 774-75 (Fla. 2005), concerned a motion to disqualify a successive judge, its

rationale applies to an initial motion to disqualify. There, the defendant complained, as an alleged basis for disqualification, that the postconviction judge would be required in his case to determine the credibility of individuals whose credibility that judge had previously reviewed in another case. Kokal explained:

> In Jackson, the defendant argued that the trial judge should be recused because he had heard the case no less than five times, including two trials of Jackson's codefendant. *See Jackson*, 599 So.2d at 107. Based upon the less stringent standard applied to initial motions for disqualification, the trial court denied the motion, finding it legally insufficient. *See* id. We agreed. *See* id. Likewise, here, Kokal's motion was properly denied because his asserted justification for the motion was legally insufficient. The fact that Judge Carithers had previously determined that O'Kelly was being truthful in the Kight action is not a legally sufficient ground for disqualification. **Kokal's asserted grounds for disqualification do not satisfy the less stringent standard of legal sufficiency applied to an initial motion for disqualification**. Therefore, as he does not satisfy the lower standard, he certainly does not satisfy the more stringent standard applied to a successive motion. The trial court did not err in denying Kokal's motion to disqualify Judge Carithers.

Here Mungin III, 79 So.3d at 738-739, "express[ed] no opinion on the merits of these claims" and simply "reverse[d] and remand[ed] the Brady and Giglio claims to the postconviction court" for an "expedited" evidentiary hearing, which is precisely what the postconviction court did.

ISSUE II should be rejected for each and all of the foregoing reasons.

CONCLUSION

Based on the foregoing discussions and the trial court's reasoning in its order, the State respectfully requests this Honorable Court affirm the trial court's denial of Mungin's successive postconviction motion, as heard on remand.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Todd G. Scher at TScher@msn.com by e-mail on September 4, 2012.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. SC12-877

APPENDIX

Order Denying Defendant's Brady and Giglio Claims (PCR3-I 82-89)

AG#: L12-2-1159