No. 20-5086

In The

Supreme Court of the United States

JOHNNY MACK SKETO CALHOUN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

This Court lacks certiorari jurisdiction over the nonfinal decision below in this non-capital, postconviction case. The postconviction court vacated Petitioner's death sentence while denying relief on his guilt-phase claims. The Florida Supreme Court denied appellate and habeas relief. The State then filed a timely motion to recall the mandate, urging the supreme court to reinstate Petitioner's death sentence under a new Florida Supreme Court decision. The Florida Supreme Court stayed the decision below along with all Petitioner's state court proceedings pending the outcome of two other cases. The decision below is not final. Therefore, this Court lacks jurisdiction.

Even if the petition was not premature, this Court should decline to exercise certiorari jurisdiction over the following two questions presented:

I. Whether the Florida Supreme Court correctly rejected Petitioner's *Strickland* claims where: (1) counsel failed to discover inadmissible hearsay evidence and evidence refuting an alibi never presented to the jury; (2) counsel failed to object to properly admitted evidence; (3) witnesses Petitioner contends should have been impeached by counsel did not testify at the postconviction hearing and were never confronted with impeachment; (4) counsel failed to adduce evidence the Victim's job closed early before her last known sighting; (5) counsel failed to clarify a statement from Petitioner that needed no clarification; (6) counsel strategically chose to adduce evidence to make it look like Petitioner was being framed.

II. Whether this Court should impose a cumulative-error requirement that combines prejudice from any *Brady*, *Giglio*, and/or *Strickland* claims where: (1) this issue was never presented to the Florida Supreme Court for consideration; (2) the Florida Supreme Court conducts the cumulative-prejudice analysis Petitioner urges when properly raised; and (3) the Florida Supreme Court rejected Petitioner's *Brady* and *Giglio* claims on grounds other than lack of prejudice.

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The Florida Supreme Court's decision petitioned for review appears as *Calhoun v. State*, Nos. SC18-340 & SC18-1174, 2019 WL 6204937 (Fla. Nov. 21, 2019) (*Calhoun II*), *reh'g denied*, Nos. SC18-340 & SC18-1174, 2020 WL 710270 (Fla. Feb. 12, 2020).

JURISDICTION

This Court lacks jurisdiction over the Florida Supreme Court's nonfinal decision below.[1] *See Limtiaco v. Camacho*, 549 U.S. 483, 487 (2007) (recognizing party and lower-court actions may "suspend the finality of a judgment and thereby reset the 90–day" certiorari-petition clock); *Hibbs v. Winn*, 542 U.S. 88, 97–99 (2004) (lower-court decision to recall the mandate and order briefing "suspended the judgment's finality"). Since a "genuinely final judgment" is critical to this Court's jurisdiction, the ninety-day time limit under 28 United States Code Section 2101(c)[2] may "be reset by an order that [leaves] unresolved whether the court would modify its judgment." *Hibbs*, 542 U.S. at 98–99. "So long as that question remains open, 'there is no "judgment" to be reviewed.'" *Limtiaco*, 549 U.S. at 487 (quoting *Hibbs*,

[1] This Court has jurisdiction to review the Florida Supreme Court's final judgments by certiorari petition filed within ninety days of the judgment. *See* 28 U.S.C. §§ 1257, 2101(d); Sup. Ct. R. 13(1).

[2] While *Hibbs* dealt with jurisdiction and timeliness under section 2101(c), and the present petition invokes this Court's jurisdiction under section 2101(d), there is no relevant distinction between the two provisions. In section 2101(d), Congress delegated its ability to establish the jurisdiction clock for certiorari petitions in criminal cases to this Court, which adopted the same ninety-day limit applicable to section 2101(c) by rule. *See* 28 U.S.C. §2101(c)–(d); Sup. Ct. R. 13(1).

542 U.S. at 98). Premature certiorari petitions should be dismissed. *Craig v. United States*, 298 U.S. 637, 637 (1936).

The decision below is not final. Genuine questions remain "whether the court will modify the judgment and alter the parties' rights." *See Hibbs*, 542 U.S. at 98. Below, the state postconviction court vacated Petitioner's death sentence while denying relief on his guilt-phase claims. Resp. App'x at 1–54; *Calhoun II*, 2019 WL 6204937, at *2. Petitioner pursued his guilt-phase claims on appeal and through a habeas petition. *Calhoun II*, 2019 WL 6204937, at *1–20. After the Florida Supreme Court decided the case below against Petitioner, denied rehearing, and issued the mandate, the State filed a timely motion to recall the mandate. The State argued granting the motion would "allow [the Florida Supreme Court] to revise its decision so it can accord with law and justice" by permitting reinstatement of Petitioner's death sentence. Resp. App'x at 313–18. Reinstatement was warranted since the postconviction court had vacated Petitioner's death sentence under wrongly decided caselaw that the Florida Supreme Court recently receded from. Resp. App'x at 313–18. The Florida Supreme Court stayed its decision below and all Petitioner's state-court proceedings pending disposition of two other cases, *State v. Jackson* (SC20-257) and *State v. Okafor* (SC20-323). Resp. App'x at 320. Petitioner recognizes the lack of finality in the decision below by expressing concern that he could be deprived "of his penalty phase relief"—vacation of his death sentence—based on the Florida Supreme

Court's decisions in Jackson and *Okafor* a. (Petition at 5 n.2).[3]

The Florida Supreme Court's order staying its decision and Petitioner's state-court proceedings pending resolution of *Jackson* and *Okafor* raises a substantial question about whether it will modify the decision below after those cases issue. If the Florida Supreme Court permits reinstatement of Petitioner's death sentence, Petitioner will likely seek review of that decision in this Court. This demonstrates the decisions below are not final and granting this Petition risks the filing of another petition after the Florida Supreme Court lifts the stay. Because it remains an open question whether the Florida Supreme Court will significantly modify its decision below, there is no judgment to review. *See Limtiaco*, 549 U.S. at 487; *Hibbs*, 542 U.S. at 98. Therefore, this Court lacks jurisdiction and should dismiss the petition as premature.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor

[3] Petitioner incorrectly styles this a "Capital Case." His death sentence was vacated and has not yet been reinstated. *See Calhoun II*, 2019 WL 6204937, at *2 (noting the state trial court "vacated Calhoun's death sentence and ordered a new penalty phase"). The State is currently seeking reinstatement of Petitioner's death sentence, but that issue is pending the decisions in *Jackson* and *Okafor*. Therefore, this is not currently a "Capital Case" within the meaning of this Court's rules. *See* Sup. Ct. R. 14(1)(a) (requiring a "Capital Case" designation where the petitioner is "under a sentence of death").

be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, section one:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This certiorari petition arises from Petitioner's postconviction challenges to his 2012 conviction for the 2010 kidnapping and first-degree murder of Mia Chay Brown. *See Calhoun v. State*, 138 So. 3d 350, 354–58 (Fla. 2013) (*Calhoun I*). Petitioner seeks review of the Florida Supreme Court's nonfinal postconviction decision denying relief. *See* Petition; *Calhoun II*, 2019 WL 6204937, at *20; Resp. App'x at 320.

Trial Evidence

The facts of the victim's murder are set forth in Petitioner's direct appeal:

Johnny Mack Sketo Calhoun and Mia Chay Brown were both reported missing on December 17, 2010. On December 20, Brown's remains were found bound and burnt in her car, which had been lit on fire in the woods of Alabama. Calhoun, thought to be the last person to see Brown alive, was found hiding in the frame of his bed inside his trailer on December 20.

Guilt Phase

Brown worked at Charlie's deli and grocery store in Esto, Florida. Harvey Glenn Bush saw Brown working at Charlie's deli around 1 to 1:30 p.m. on December 16, 2010, and knew Brown drove a white car. Bush heard Calhoun ask Brown for a ride that evening and Brown responded that ***355** she would pick him up after work at approximately 8 to 9 p.m.

Brown drove to Jerry Gammons' trailer in a light colored, four-door car and knocked on his door at about 8:40 p.m. on December 16. Brown asked for Calhoun, and Gammons told her that Calhoun did not live there. America's Precious Metals junkyard, where Calhoun's trailer was located, is approximately one road down from Gammons' trailer.

Brandon Brown, Brown's husband, talked with Brown at lunch time on December 16 while she was working at Charlie's deli. Brown usually got off of work at approximately 9 p.m. Brandon called Brown at 10 p.m. because she was not home. Brandon fell asleep on the couch at about 10:30 p.m., and when he woke up at 2 a.m., his wife was still not home. It was unusual for Brown not to come home; Brandon started calling family members to find her.

Sherry Bradley, the manager at Gladstone's convenience store located between Enterprise and Hartford, Alabama, testified that Calhoun came into her store between 5:30 and 6:00 a.m. on December 17, 2010, and bought cigarettes. Bradley noticed scratches and dried blood on his hands and sores on his face. Calhoun was wearing a white shirt that had spots of blood on it and there was something black underneath his fingernails. She asked Calhoun about his appearance, and he responded that he had been deer hunting. Calhoun was driving

a white, four-door car with a Florida license plate. Darren Bratchelor, a former schoolmate of Calhoun's, also saw Calhoun at the convenience store at about 6 a.m. After that day, Bradley left town for a few days, but when she returned, another employee had posted a missing persons flyer in the store, on which she recognized Calhoun's photograph.

Chuck White, a patrol officer for Holmes County, Florida, arrived at America's Precious Metals at 8 a.m. on December 17. White looked in Calhoun's trailer and found clothes and trash scattered everywhere. Calhoun was not there. On cross-examination, White testified that Sketo Calhoun ("Sketo") and Terry Ellenburg, co-owners of America's Precious Metals, told him that there had been a break-in at the junkyard, that there were pry marks on Calhoun's trailer door, and that the skid steer loader, or Bobcat, had been hot-wired and moved. White noticed many tire tracks around the yard. White acknowledged that he did not secure Calhoun's trailer before he left the yard.

Brett Bennett, a cattle broker in Geneva, Alabama, noticed smoke from the highway on December 17 at approximately 11 a.m. Keith Brinley, a school maintenance employee in Geneva, Alabama, also saw a big fire behind the Bennett residence at about that same time.

Tiffany Brooks, a resident of Hartford, Alabama, found Calhoun in her family's shed on the morning of December 18, 2010. Calhoun was on the ground wrapped in sleeping bags that the family kept around the freezer. Calhoun was wearing overalls and a white t-shirt and was wet and dirty. Brooks brought Calhoun into the house and the family washed his clothes, gave him new clothes, let him shower and nap, and gave him some food. Steven Bledshoe, Tiffany's boyfriend, called the Brooks' residence and told them about the missing persons flyer he saw with Calhoun and Brown's pictures on it. Calhoun told the Brooks he did not know Brown but she was probably the person who was supposed to pick him up at his trailer the night before. Calhoun had the Brooks drop him off at a dirt road. Glenda Brooks, Tiffany's mother, also testified to these events.

Brittany Mixon, Calhoun's ex-girlfriend, testified that she went to school with Brown and that Brown knew Calhoun through her and from working at the convenience store. On December 16, Mixon stayed at her father's house and expected Calhoun to come over that night but he never came. Mixon drove to America's Precious Metals on the morning of December 17 to find Calhoun because he did not have a

phone to call. Mixon used to live in Calhoun's trailer with him but moved out in October of that year. She testified that they had lost the key to the trailer so they had had to pry the door open to get inside the trailer. Mixon asked Sketo if he had seen Calhoun, but he had not. Mixon looked inside Calhoun's trailer; no one was inside, but the trailer was ransacked. Lieutenant Michael Raley of the Holmes County Sheriff's Office investigated Brown's missing persons report. He called Mixon, who told Raley about a campsite in Hartford, Alabama, approximately ten miles from America's Precious Metals, where Mixon and Calhoun would camp. The campground was on the property of Charlie Skinnard, Calhoun's brother-in-law. Mixon met the Brooks family once while camping with Calhoun. She took Raley to the campsite. Raley noted that the burnt car was off of Coleman Road, approximately 1,488 feet away from Calhoun's campsite. The Brooks' residence was approximately 1.5 miles from the burnt car.

Angie Curry, Priscilla Strickland, and Mixon went to Calhoun's trailer around 4 p.m. on December 17. Mixon went into the trailer and found wine, a purse, and menthol cigarettes. They took the items and called the police. Brandon identified the purse as belonging to Brown. When Mixon gave Brown's purse to Raley, Raley sent a police officer to Calhoun's trailer to secure it until they got a search warrant. On cross-examination, Mixon acknowledged that Sketo and Ellenburg told her that the trailer had been broken into and not to go in it, but she did anyway. She stated that Calhoun did not smoke cigarettes and did not have cable television service in his trailer.

Dick Mowbry, former game warden for Geneva County, Alabama, participated in a search for Brown and Brown's vehicle on December 20, 2010. He found a burnt, white Toyota with no license plate. The entire inside of the car was burnt and while he was looking through the front of the car, he saw a rib cage in the trunk, so he called the police.

Mike Gillis, with the Alabama Bureau of Investigation, responded on December 20 to the call regarding the burnt vehicle. Remains of a body were in the trunk of the car. There was what looked like coaxial cable wrapped around the wrists of the body; duct tape was also found in the car.

On December 21, 2010, Dr. Stephen Boudreau, a medical examiner for Alabama, received the human remains found inside the burnt car. The remains were badly burnt; the hands and lower limbs

had been burnt off. Dr. Boudreau was able to identify the remains as female because the uterus and vagina were not destroyed, but the sex organs were denatured, or heated, to such an extent that there was no way to analyze them. He found coaxial cable wrapped around what was left of the remains' upper arms and tape on the neck. Dr. Boudreau determined that the cause of death was smoke inhalation and thermal burns and that the death was a homicide. He found soot embedded in the airway of the lungs' mucus blanket and carbon monoxide in the back tissue, meaning that the victim had inhaled smoke. Dental x-rays matched those of Brown's. On cross-examination, the defense elicited that no foreign DNA was found in Brown's vagina. Dr. Boudreau also acknowledged that no ends of the coaxial cable were found, and that he could not determine whether Brown was conscious or not when she inhaled the smoke or at what point in time she would have lost consciousness.

On December 20, 2010, Jeffery Lowry, deputy state fire marshal with the Alabama Fire Marshal's Office, took debris samples from the burnt car and sent them to the Alabama and Florida laboratories. Jason Deese, an arson investigator for the Florida Bureau of Fire and Arson, testified that on December 22, 2010, he inspected the car. The vehicle identification number (VIN) was matched to a 2000 Toyota Avalon. Brown owned a four-door 2000 Toyota Avalon. The fire originated in the driver's seat and passenger compartment; it was not an engine fire. Perry Koussiafes, senior crime laboratory analyst for the Florida Fire Marshal's Office, received six samples from the car on December 30, 2010. The samples from the right front quarter and left quarter of the car tested positive for ignitable liquid.

Trevor Seifret, a crime lab analyst for the Florida Department of Law Enforcement (FDLE), testified that blood found on the cardboard of a roll of duct tape taken from Calhoun's trailer was a major donor match to Brown and a minor donor partial match to Calhoun. Blood found on blankets taken from Calhoun's trailer were total matches to Calhoun and Brown. DNA from hair found in Calhoun's trailer also matched Brown; Seifret testified that DNA is found on hair only when the hair is pulled out of the scalp.

Jennifer Roeder, a digital evidence crime analyst for FDLE, testified that an SD memory card found in Calhoun's trailer was from Brown's camera, and based on the time and date stamps of other pictures on the camera, the last picture was taken between 3:30 and 4:00

a.m. on December 17, assuming no one reset the clock on the camera.

On December 20, 2010, Harry Hamilton, captain of the Holmes County Sheriff's Department, seized Calhoun's trailer pursuant to a search warrant. He noticed that the evidence tape on the door had been broken. He found Calhoun hiding under his mattress in the bed frame in his trailer. Calhoun had scratches on his hands, arms, and neck.

Raley executed a second search of Calhoun's trailer on December 28 at the impound yard of the Holmes County Sheriff's office after Brown's remains had been found. He found a TV face down on the mattress of the bed and a DVD player. A VCR was on the floor and the top was off, with wires tangled in the corner. A converter box with outputs for a coaxial cable and a TV with a coaxial coupling were found, but no coaxial cable was found in the trailer.

The State rested, and the defense provided witnesses as follows. José Martinez, owner of the Friendly Mini–Mart, testified that Calhoun came to his store on December 16 and bought a pack of cigars, wine, and apple cider. He never knew Calhoun to buy cigarettes.

Matt Crutchfield who lived near America's Precious Metals was awakened on December 17 between 1 and 3:30 a.m. by a loud bang. He had heard the noise before and thought it came from the recycling plant. Monica Crutchfield, his wife, was also awakened by a loud noise that came from America's Precious Metals, but she testified that she had never heard that noise before. Darlene Madden, who lived one block from America's Precious Metals, awoke to a loud noise that sounded like cars colliding at approximately 2:30 to 3:00 a.m. She testified that she may have heard a second noise but did not get up to investigate it.

John Sketo, Calhoun's father and co-owner of America's Precious Metals, testified that Calhoun's trailer was located beside the scrap yard. Sketo arrived at the scrap yard at approximately 7:30 a.m. on December 17 and noticed that the Bobcat was missing from the place it had been the day before. He also noticed that the door to Calhoun's trailer was open. Sketo testified that none of this was like that the day before. Ellenburg called the police. Ellenburg and Sketo found the Bobcat by the loading dock, and they thought it had pushed something off of the dock. Tread marks on the ground had not been there the day before. Sketo looked in Calhoun's trailer and it looked like someone had searched it; drawers were open and things were strewn about. Sketo saw

a small grill on Calhoun's bed, which usually remained outside the trailer. Sketo did not see anyone in the trailer. He did not see a purse on the floor of the trailer. Sketo exited the trailer and left the door open.

Mixon arrived at the junkyard and asked if Sketo had seen Calhoun. Sketo replied that he had not and told Mixon not to go into the trailer because someone had broken into it, but Mixon went into the trailer anyway. Mixon was in the trailer for about one minute. Then Mixon left the junkyard. Sketo went back into the trailer and found Calhoun's gun leaning against the couch on the floor. Sketo testified that if the gun had been there the first time he went into the trailer he would have noticed it. He stated that the gun was not there before Mixon went into the trailer. On cross-examination, the State elicited from Sketo that he did not see Mixon carry the gun or anything else into the trailer.

Ellenburg testified that he arrived at the junkyard at approximately 7:30 a.m. on December 17. He stated that Calhoun's door did not have pry marks on it the day before, and Calhoun's trailer was not in disarray the day before. He did not see a gun in the trailer the first time he looked. He stated that the tire tracks near the loading dock and next to the Bobcat looked like they were made by a dual-wheeled vehicle. A corner of the cement steps was also knocked off, and had not been like that the day before.

Lieutenant Raley searched a barn in Pine Oak Community in Geneva, Alabama, and a license tag bracket matching the description of one on Brown's car was found at the property. There was also a piece of cardboard that had oil and tire marks on it. Brown's family told Raley that her car had a small oil leak. However, Raley could not trace the oil stain or the bracket to Brown's car.

On February 28, 2012, the jury returned a verdict of guilty of first-degree murder and kidnapping.

Calhoun I, 138 So. 3d at 354–59. The court sentenced Calhoun to death. *Id.* at 359.

Postconviction Proceedings

In 2015, Petitioner moved to vacate his conviction and sentence. *Calhoun II*, 2019 WL 6204937, at *2. The postconviction court vacated his death sentence under

Hurst v. State, 202 So. 3d 40 (Fla. 2016) while denying relief on his guilt-phase claims. *Calhoun II*, 2019 WL 6204937, at *2; Resp. App'x at 1–54.

Petitioner sought review of that decision in the Florida Supreme Court (SC18-340) while also filing a state habeas petition (SC18-1174). Resp. App'x at 54–175, 266–91. In relevant part, Petitioner's initial brief raised newly discovered evidence claims and claims under *Strickland v. Washington*, 466 U.S. 668 (1984), *Giglio v. United States*, 405 U.S. 150 (1972), and *Brady v. Maryland*, 373 U.S. 83 (1963). Resp. App'x at 97–161, 166–170. Petitioner never argued the Florida Supreme Court was required to conduct a cumulative-prejudice analysis of *Brady*, *Giglio*, and/or *Strickland* violations. His habeas petition did not raise this claim either. Resp. App'x at 266–91. Petitioner has never argued in any pleading before the Florida Supreme Court that it should review his *Brady*, *Giglio*, and/or *Strickland* claims for cumulative error.

The Florida Supreme Court affirmed the postconviction order and denied habeas in a consolidated decision on November 21, 2019. *Calhoun II*, 2019 WL 6204937, at *20. The Florida Supreme Court rejected Petitioner's newly discovered evidence claim by finding some of the new evidence inadmissible and determining the new evidence would not probably produce an acquittal on retrial when considered with all the other admissible evidence. *Id.* at *2–4. The court rejected Petitioner's *Brady* claim because the State did not suppress evidence. *Id.* at *15. The court found Petitioner's *Giglio* claim was procedurally barred under state law, and that the

testimony adduced by the State was not false. *Id.* at 15–16. Finally, the court rejected all but one[4] of Petitioner's *Strickland* claims as speculative and insufficient for failure to show both deficient performance and prejudice. *Id.* at *5–15.

Post-Decision Events

On January 23, 2020, with rehearing pending in *Calhoun II*, the Florida Supreme Court receded from its decision in *Hurst* "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance." *State v. Poole*, No. SC18-245, 2020 WL 3116597, at *15 (Fla. Jan. 23, 2020), *reh'g denied, clarification granted*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020).

The Florida Supreme Court denied rehearing in *Calhoun II* on February 12, 2020 and issued the mandate. The State timely moved to recall the mandate, arguing the Florida Supreme Court's decision in *Poole* applied to Petitioner's case, and granting the motion would permit the supreme court to revise its decision in accordance with *Poole*. Resp. App'x at 313–19. The Florida Supreme Court issued a consolidated order staying its decision and all state-court proceedings in Petitioner's case "pending disposition of *State of Florida v. Michael James Jackson*, Case No. SC20-257 and *State of Florida v. Bessman Okafor*, Case No. SC20-323." Resp. App'x at 320.

Petitioner prematurely filed this Petition for certiorari seeking review of the

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[4] The court determined it need not reach the performance prong on this one claim since Petitioner could not demonstrate prejudice. *Id.* at *11.

Florida Supreme Court's decision on July 13, 2020. As of this filing, the Florida Supreme Court has not lifted its stay. This is the State's Brief in Opposition.

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari review of the Florida Supreme Court's nonfinal decision denying habeas relief and affirming the postconviction court's partial denial of postconviction relief. Petitioner currently has no death sentence—the state postconviction court vacated it in 2018 and has not held a new sentencing hearing. The Florida Supreme Court stayed its decision below and all Petitioner's state-court proceedings. This Court lacks jurisdiction over the nonfinal decision below.

Putting aside this dispositive, jurisdictional hurdle, this case presents no issue that warrants review. The decision below properly stated and applied all governing federal principles, is based in part on state law grounds, does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States Court of Appeals, and does not conflict with any decision of this Court. Petitioner does not argue otherwise, and review should be denied on that basis alone. *See* Sup. Ct. R. 10, 14(g)(i).

Instead, Petitioner first claims his Sixth Amendment right to effective assistance of counsel was violated by trial counsel's failure to investigate, discover, and present exculpatory evidence and introduce or exclude other evidence. Second, in a claim never presented to the Florida Supreme Court, Petitioner argues this Court should impose a cumulative-prejudice analysis requirement for his *Brady*, *Giglio*, and

Strickland claims. These prematurely presented issues have no merit and do not warrant this Court's review.

I. This Court Should not Grant Review of the Florida Supreme Court's Decision that Petitioner Received Effective Assistance of Counsel.

In this single question presented, Petitioner argues this Court should grant certiorari to review the Florida Supreme Court's rejection of seven distinct ineffectiveness claims. These claims are governed by *Strickland* and require Petitioner to show both deficient performance by counsel and prejudice stemming from that deficiency. *See Strickland*, 466 U.S. at 687. The Florida Supreme Court's rejection of Petitioner's claims was a routine, fact-specific, and correct application of *Strickland* that does not merit review in this Court.

A. Failure to Investigate and Disprove Doug Mixon's Alibi and Discover His Alleged Confession to Jose Contreras.

Petitioner first argues his right to effective assistance of counsel was violated by counsel's failure to disprove Doug Mixon's alibi and discover his alleged confession to Contreras. The Florida Supreme Court rejected this claim by deferring to the postconviction court's factual finding that Contreras was lying, finding Mixon's alleged confession was inadmissible hearsay, and determining Contreras's admissible statement that Mixon was not with him the night of the victim's disappearance was too minor to show ineffectiveness. *Calhoun II*, 2019 WL 6204937, at *6. Therefore, the Florida Supreme Court determined Petitioner met neither the performance nor prejudice prongs of *Strickland*. *Id.* A state court's application of a state hearsay rule

and exceptions raises questions of state, rather than federal, law that are not subject to review by this Court. *Lilly v. Virginia*, 527 U.S. 116, 125 (1999). Failure to put on inadmissible evidence results in neither deficient performance nor prejudice. *E.g., Goode v. Carpenter*, 922 F.3d 1136, 1157 (10th Cir. 2019), *cert. denied, Goode v. Sharp*, 140 S. Ct. 1145 (2020); *Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013).

The Florida Supreme Court correctly analyzed Petitioner's Sixth Amendment claim. First, the court determined Doug Mixon's alibi and alleged confession were "inadmissible hearsay." *See Calhoun II*, 2019 WL 6204937, at *6. Counsel's failure to discover evidence deemed inadmissible and untrue by a state's highest court does not show either deficiency or prejudice under *Strickland*. Petitioner raises no argument to the contrary and merely asserts error. Petition at 28.

Second, the Florida Supreme Court determined failure to discover the remaining false evidence impeaching Doug Mixon's alibi did not deprive Petitioner of effective trial counsel. The sole admissible evidence counsel could have discovered was Contreras's testimony that Doug Mixon was not at his house on December 16, 2020. *See Calhoun II*, 2019 WL 6204937, at *6. But the jury never heard Doug Mixon's alibi—given exclusively in depositions—that he was at Contreras's house the night the victim disappeared. *Id.* The State did not argue Doug Mixon's alibi made it impossible for him to commit the crime. *Id.* Without the inadmissible hearsay evidence regarding the confession and Mixon's alibi, "the evidentiary value of Contreras's testimony would have been miniscule, at best." *Id.* Counsel cannot be

deemed ineffective for failing to discover conflicting testimony about an alibi never presented to the jury. This claim was properly rejected.

B. Failure to Confront Brittany Mixon with Allegedly Impeaching Phone Records.

Petitioner next argues his right to effective assistance of counsel was violated when counsel failed to impeach Brittany Mixon with phone records indicating she did not call the victim's place of employment when she said she did. The Florida Supreme Court rejected this claim by finding it was speculative, that there was additional evidence confirming Brittany Mixon called the victim's place of employment and spoke with law enforcement, and any impeachment would not have implicated her in a coverup. *See id.* at *10.

Petitioner failed to establish both deficient performance and prejudice. Brittany Mixon did not testify at the postconviction hearing and there is no way to determine what she would have said had counsel confronted her with the phone records. *See id.* Petitioner's claim is based on nothing more than speculation that these records would have discredited her in the jury's eyes. The State also introduced evidence she did in fact call and speak with law enforcement. *Id.*

More fundamentally however, evidence Brittany did not inquire about the victim would not suddenly embroil her in an evidence-planting conspiracy to protect her father. Failing to make a phone call does not provide a motive for murder or a coverup and thus would not have enhanced trial counsel's strategy in any way. Injecting this minor "impeachment" would have created an issue where none existed

and detracted from Petitioner's defense. In any event, the trial evidence established Brittany took nothing into Petitioner's trailer and handed the items she recovered to law enforcement. *Id.* There was no evidence at trial or in postconviction that Brittany Mixon tampered with the evidence found in Petitioner's trailer. Impeachment evidence about phone records does not fill that void or serve to implicate her in anything, regardless of her role in Petitioner's case. Counsel's failure to adduce minor, contradicted impeachment evidence was neither deficient nor prejudicial.

C. Failure to Impeach Witnesses who Saw Petitioner Scratched and Blooded in a Convenience Store on the Morning After the Victim Went Missing.

For his third claim, Petitioner argues his right to effective assistance of counsel was violated when counsel failed to (1) impeach Sherry Bradley with her hesitance to identify the car Petitioner drove for fear she might have read that information and (2) impeach Darren Bratchelor with evidence he may not have known Petitioner from school. The Florida Supreme Court rejected these claims by finding them speculative and lacking prejudice. *Id.* at *9–10. Since neither witness testified at the hearing, there is no way to hold counsel deficient because there is no way to determine how these witnesses would have responded if impeached. *See id.* at *9–10; *Pearce v. State*, 880 So. 2d 561, 570 (Fla. 2004) (explaining witnesses impeached by prior statement must be given an opportunity to explain the statement and why it is not inconsistent). Further, because both witnesses testified they saw Petitioner at the store, this minor impeachment evidence is also insufficient to demonstrate prejudice. *Calhoun II*, 2019

WL 6204937 at *9–10.

D. Failure to Object to Alleged Hearsay Testimony from Tiffany and Glenda Brooks.

Petitioner's fourth claim argues counsel ineffectively allowed hearsay testimony—the fact a witness told the Brooks that Petitioner was on a missing persons flyer with a girl—into evidence. But the Florida Supreme Court determined this evidence was not hearsay under state law. *See id.* at *10–11 (citing three sections of the Florida Evidence Code to explain why this evidence was not hearsay); *see also Anderson v. United States*, 417 U.S. 211, 219–20 (1974) (explaining statements not admitted for their truth are not hearsay). Counsel is not ineffective for failing to object to properly admitted evidence. *E.g.*, *Carter v. Douma*, 796 F.3d 726, 735 (7th Cir. 2015).

Petitioner's arguments overlook the Florida Supreme Court's explicit determination this evidence was admissible under state law. *See Calhoun II*, 2019 WL 6204937, at *10–11. Since the highest court in Florida held these statements admissible as a matter of state law—and Petitioner does nothing other than assert they were hearsay in conclusory fashion—there is no true issue of federal law for this Court to review here. Certainly, counsel cannot be deemed ineffective for failing to make a meritless objection.

E. Failure to Cross-Examine the Victim's Employer About the Closing Time.

In his fifth distinct claim of ineffectiveness, Petitioner argues counsel violated

his Sixth Amendment rights by failing to cross-examine the victim's employer about the closing time. The Florida Supreme Court determined this claim was too speculative to support relief and there was no showing of prejudice. *Id.* at *13. In conclusory fashion, Petitioner argues evidence about the closing time raised reasonable doubt because there was no explanation of what the victim was doing between work and her last known sighting near Petitioner's trailer. Petition at 30. But "there is no evidence of how the store's closing earlier than usual on the day the victim disappeared is related to the victim's kidnapping and murder." *Id.* It does not matter what time the victim's job closed or what she did between then and going to pick up Petitioner. *Id.* Petitioner's claim is based on sheer speculation and incapable of establishing either deficiency or prejudice on these facts.

F. Failure to Clarify Petitioner's Post-Arrest Statements.

In his sixth claim, Petitioner urges this Court to review counsel's failure to clarify that Petitioner claimed he was in Florida—rather than Alabama—when he was in the woods with law enforcement. The Florida Supreme Court rejected this claim by determining the statement introduced at trial needed no clarification. *Id.* at *12–13. Petitioner stated he was in the woods with law enforcement before his arrest and this precise statement was admitted in Petitioner's trial. *Id.* While Petitioner claimed this occurred in Florida, the only searches in the woods occurred in Alabama. *Id.* Counsel was not deficient for failing to inject this issue considering the State's obvious rebuttal. Failure to clarify Petitioner's claimed—and disproven—location

also did not prejudice him.

G. Counsel's Presentation of Allegedly Incriminating Evidence.

Petitioner's seventh and final ineffectiveness claim argues counsel violated his Sixth Amendment rights by introducing incriminating evidence—the tire bracket and cardboard found on property associated with Petitioner. The Florida Supreme Court rejected this claim, finding it was part of counsel's reasonable strategy to show "the evidence against Calhoun looked too made up and must have been planted." *Calhoun II*, 2019 WL 6204937 at *13. Alternatively, the court found there was no prejudice. *Id.*

Petitioner cites *Sears v. Upton*, 561 U.S. 945, 953 (2010), but that case dealt with assessing the reasonableness of counsel's strategy considering investigative failures. Here, the evidence Petitioner claims counsel could have discovered was either inadmissible or would have had virtually no impact on the jury in Petitioner's trial. This evidence would thus not have affected trial strategy and *Sears* is inapposite. In view of the evidence against her client, and all admissible evidence counsel could have recovered, counsel's strategy was reasonable and should not be second guessed. *See Strickland*, 466 U.S. at 689.

Petitioner also argues counsel was ineffective for adducing evidence the Brooks family was uncomfortable with Petitioner's presence after learning about the missing persons flyer. This evidence was not prejudicial in the *Strickland* sense; its omission would have had no effect on the trial's outcome when viewed in light of the evidence

against Petitioner. *See Calhoun II*, 2019 WL 6204937 at *11.

For these reasons, this Court should deny review of these seven discrete *Strickland* claims.

II. This Court Should not Grant Review of the Florida Supreme Court's Decision and Require State Courts to Conduct a Cumulative-Prejudice Analysis of *Brady*, *Giglio*, and *Strickland* Claims.

Petitioner also urges this Court to impose a requirement that state courts analyze *Brady*, *Giglio*, and *Strickland* violations together for cumulative prejudice.[5] The cumulative-prejudice analysis urged by Petitioner reviews the prejudice stemming from discrete errors to determine whether—even if individually insufficient to show prejudice—the combined errors caused prejudice. *See* Petition at 34 (citing *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003)). The Tenth Circuit's cumulative-prejudice analysis requires at least two demonstrated errors before it applies. *Hanson v. Sherrod*, 797 F.3d 810, 853 (10th Cir. 2015). The same is true in Florida. *Brooks v. State*, 175 So. 3d 204, 233 (Fla. 2015); *Suggs v. State*, 923 So. 2d

[5] Petitioner's arguments obfuscate his seemingly clear question presented. Petitioner cites the Tenth Circuit and urges this Court to adopt their cumulative-prejudice analysis. Petition at 34. But Petitioner also argues the Florida Supreme Court failed to fully review all the evidence that would be admissible on retrial as part of its newly discovered evidence analysis. Petition at 34. Whether the Florida Supreme Court correctly analyzed Petitioner's state law claim of newly discovered evidence has nothing to do with finding *Brady*, *Giglio*, and *Strickland* violations. If granted a new trial based on newly discovered evidence, Petitioner could conduct his defense differently regardless of whether prior counsel's conduct was deemed ineffective. He could also use the evidence undergirding his *Brady* and *Giglio* claims—subject to Florida's Evidence Code of course—regardless of whether there were actual *Brady* and *Giglio* violations. But his question presented specifically asks this Court to decide whether the prejudice from *Brady*, *Giglio*, or *Strickland violations* must be combined in a cumulative-error analysis. This question is only implicated where there are multiple *violations* of *Brady*, *Giglio*, or *Strickland* and has nothing to with newly discovered evidence.

419, 441 (Fla. 2005).

This Court should decline review of this issue for three reasons. First, any newly discovered evidence arguments raised here are outside the question presented. Second, Petitioner never raised this issue before the Florida Supreme Court. Third, the Florida Supreme Court already performs a cumulative-prejudice analysis of *Brady*, *Giglio*, and *Strickland* violations when properly raised.

A. Petitioner Procedurally Defaulted His Meritless Newly Discovered Evidence Claim Because It Is Not Fairly Encompassed by the Question He Presented.

Petitioner's second question presented reads: "Whether a state court is required to conduct a cumulative-error analysis of violations of *Brady*, *Giglio*, and/or *Strickland*?" Petition at i. Notably absent from this question is any mention of his newly discovered evidence claims—claims distinctly different from *Brady*, *Giglio*, or *Strickland* claims. "Only the questions set out in the petition, or fairly included therein, will be considered by [this] Court." Sup. Ct. R. 14.1.(a).

Despite failing to include any mention of his newly discovered evidence claim in either question presented, Petitioner makes single-sentence assertions of error in the state court's assessment of the "newly discovered evidence in conjunction with Petitioner's evidence of ineffective assistance of counsel and the State's withholding of exculpatory evidence." Petition at 34, 37. Petitioner also argues the Florida Supreme Court incorrectly relied on the lower court's credibility determinations to reject his newly discovered evidence claims. Petition at 34–35. These arguments are

entirely outside the scope of the question presented in the petition and should not be addressed by this Court. *See Meyer v. Holley*, 537 U.S. 280, 292 (2003) (refusing to address matters falling outside the scope of the question presented).

Any newly discovered evidence argument fails on the merits as well. The Florida Supreme Court rejected the newly discovered "confession"—which was actually just a nonspecific apology for "doing a lot of things [Mixon was] not proud of"—to Robert Vermillion as inadmissible and untrue based on the lower court's decision to credit Doug Mixon's testimony over Vermillion's. *Calhoun II*, 2019 WL 6204937, at *3–4. This was not error. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573–75 (1985) (explaining a credibility determination is virtually unassailable on appeal when based on "the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence"). The postconviction court chose between two witnesses who told facially plausible, coherent stories about Doug Mixon's statements. It is not the province of an appellate court to question such a finding under either federal or Florida law.

The newly discovered evidence about Natasha Simmons's alleged encounter with Doug Mixon is no more persuasive. Simmons claimed she picked Doug Mixon up near the Florida/Alabama state line around the time the victim disappeared and that he was carrying a gasoline can. *Calhoun II*, 2019 WL 6204937, at *4. But the state court found Simmons not credible because she lied about reporting the matter to law

enforcement. *Id.* Forensic evidence also excluded gasoline as the accelerant used to burn the victim's car. *Id.* at *4 n.3.

Finally, to the extent Petitioner argues the Florida Supreme Court failed to consider all the evidence that would be admissible on retrial, he is incorrect. *See id.* (holding newly discovered evidence "considered cumulatively with all of the evidence that would be admissible on retrial" did not raise a reasonable doubt of Petitioner's guilt). The evidence Petitioner contends the jury would be confronted with on retrial—some of which was held inadmissible by the Florida Supreme Court—in conjunction with the nonspecific apology to Vermillion and Simmons's suspicious encounter with Mixon would not probably produce an acquittal in light of the evidence against him. *Id.* at *3–4. Petitioner failed to meet his exceptionally high burden to succeed on his state law newly discovered evidence claim. His arguments are therefore meritless and outside either question presented.

B. Petitioner Raised His Second Question Presented for the First Time in His Petition and Addressing It Would Permit Him to Circumvent a Well-Established State-Law Bar.

This Court often reminds litigants that it "is a court of final review and not first view." *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (quoting *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 56 (2015)). As a result, arguments not presented below are forfeited and will not be considered by this Court in the first instance. *United States v. Jones*, 565 U.S. 400, 413 (2012); *see also Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide

in the first instance issues not decided below."). This Court has dismissed certiorari review as improvidently granted where new, unaddressed issues are raised. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108 (2001). "[T]he importance of an issue should not distort the principles that control the exercise of [this Court's] jurisdiction." *Id.*

Petitioner's second question presented was never raised in the Florida Supreme Court. Petitioner separately raised *Brady*, *Giglio*, and *Strickland* claims, but never—in his 111-page opening brief or any other pleading—argued the supreme court should combine all prejudice flowing from any *errors* the court found into a single, cumulative-prejudice analysis. This Court should adhere to its well-established practice of refusing to review issues not presented below.

It is well settled in Florida that failure to raise a cumulative-prejudice argument in an initial brief waives the claim. *See, e.g., Heath v. State*, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) (holding capital defendant "waived his cumulative-error claim because his brief includes no argument whatsoever and instead consists of a one-sentence heading in his brief"); *Beasley v. State*, 18 So. 3d 473, 481 n.3 (Fla. 2009) (cumulative-prejudice claim waived by capital defendant where not properly briefed); *see also Calhoun II*, 2019 WL 6204937, at *17 n.7 (holding Petitioner waived a *Giglio* claim below because it was not presented in the initial brief).

The Florida Supreme Court did not address Petitioner's waiver of his cumulative-error claim because Petitioner never even cursorily raised it in state

court. The same respect for the independence of state courts that undergirds the independent and adequate state law doctrine requires state courts to at least have an opportunity to impose a well-established procedural bar before having the issue raised in a certiorari petition. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 326 (1985) (rejecting independent and adequate state law argument where state supreme court raised an issue sua sponte and only cryptically addressed the possibility of waiver). This Court should not countenance Petitioner's attempt to circumvent a clear, regularly imposed state-law bar to his cumulative-prejudice claim—his failure to raise it in his initial brief. *Cf. Cargle*, 317 F.3d at 1206 (reviewing cumulative-prejudice argument where the defendant "exhausted this claim by asserting cumulative error on both direct appeal and post-conviction").

C. The Florida Supreme Court Performs Cumulative-Prejudice Analyses of *Brady*, *Giglio*, and *Strickland* Claims when Properly Raised.

Petitioner's failure to properly present this issue below raises another problem with his Petition: the Florida Supreme Court already performs the analysis Petitioner seeks when it is properly raised. *See Parker v. State*, 89 So. 3d 844, 867 (Fla. 2011) (collecting cases conducting cumulative-prejudice analyses of *Brady*, *Giglio*, and *Strickland* claims); *Mordenti v. State*, 894 So. 2d 161, 174–75 (Fla. 2004) (reversing for a new trial where "a cumulative analysis weighing the undisclosed, favorable information implicating *Brady* concerns in conjunction with the asserted misrepresentations to [the] jury involving *Giglio* violations" convinced the supreme

court that the defendant "was prejudiced in this case"); *Rose v. State*, 774 So. 2d 629, 635 n.10 (Fla. 2000) (rejecting *Brady*, *Giglio*, and *Strickland* cumulative-prejudice claim on the merits because "[a]fter conducting a cumulative error analysis, we do not find that our conclusion as to prejudice would change"), *receded from on other grounds by Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003) (clarifying that the prejudice prongs of *Brady* and *Giglio* are not the same).

These decisions highlight the lack of a disputed legal issue for this Court to review. The Florida Supreme Court's failure to conduct a cumulative-prejudice analysis did not stem from any disagreement with Petitioner's general legal position that a state court should conduct a cumulative-error analysis that combines *Brady*, *Giglio*, and *Strickland*. Instead, the supreme court failed to conduct the analysis for two reasons. First, Petitioner never requested the court do so and thereby waived the issue.

Second, the Florida Supreme Court determined Petitioner failed to show multiple unprejudicial violations of *Brady*, *Giglio*, and/or *Strickland*. *Calhoun II*, 2019 WL 6204937, at *4–20 (rejecting *Brady* claim because the State did not suppress information, *Giglio* claim as procedurally barred and meritless since the prosecutor did not mislead the jury, and all but one *Strickland* claim as speculative and insufficient for failure to show both deficient performance and prejudice). Since Petitioner failed to show multiple nonprejudicial violations of *Brady*, *Giglio*, and/or *Strickland*, he was not entitled to a cumulative-prejudice analysis even under the

rule he urges. *See Hanson*, 797 F.3d at 853. In short, it was Petitioner's failure to raise a cumulative-prejudice argument and otherwise meritorious *Brady*, *Giglio*, and/or *Strickland* claims before the Florida Supreme Court—not the court's rejection of a cumulative-prejudice analysis—that led to the omission of a cumulative-error discussion below.[6]

For all these reasons, this Court should deny review of the second question presented.

[6] While Petitioner challenges the Florida Supreme Court's analysis of his *Strickland* claims in his first question presented, no question presented adequately encompasses the state court's handling of his *Giglio* and *Brady* claims other than urging cumulative prejudice. Since the state supreme court found against him on those claims for reasons other than lack of prejudice—including a state law bar of his *Giglio* claim and no suppression on his *Brady* claim—and Petitioner has not challenged those holdings, the *Brady* and *Giglio* claims could not be part of a cumulative-prejudice analysis anyway.

CONCLUSION

The premature Petition in the non-capital case before this Court does not present any conflict between the Florida Supreme Court's decision and any decision of this Court. Nor is any unsettled question of federal law involved. Therefore, the Respondent respectfully submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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