

No. 20-5221

**In The
Supreme Court of the United States**

ARTHUR JAMES MARTIN,

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 jurisdiction to entertain this petition for writ of certiorari because the Florida Supreme Court's decision in this non-capital, postconviction case is not yet final. The postconviction court simultaneously vacated Petitioner's death sentence and denied his guilt-phase claims. The Florida Supreme Court then affirmed the postconviction court's denial of Petitioner's guilt-phase claims and denied Petitioner habeas relief. The State timely filed a motion for rehearing in Petitioner's case, urging the court to reinstate Petitioner's death sentence under a new Florida Supreme Court decision. The Florida Supreme Court has stayed this case pending the outcome of two other Florida Supreme Court cases. Therefore, this Court lacks jurisdiction to entertain this case.

Even if this petition was timely, this Court should decline to exercise certiorari jurisdiction over the following two questions presented:

- I. Whether this Court should review the Florida Supreme Court's rejection of Petitioner's myriad *Strickland* claims where the underlying decision is fact specific, does not conflict with this Court's precedent, and does not present an important or unsettled question of law.
- II. Whether this Court should review whether to impose a cumulative-error requirement that combines prejudice from any *Brady*, *Giglio*, and/or *Strickland* claims where: (1) Petitioner failed to present this issue to the Florida Supreme Court for consideration; (2) the Florida Supreme Court conducts the cumulative-prejudice analysis Petitioner requests when it is properly raised; and (3) the Florida Supreme Court rejected Petitioner's *Brady* and *Giglio* claim on grounds other than Petitioner's failure to establish prejudice.

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OPINION BELOW

The Florida Supreme Court's decision petitioned for review appears as *Martin v. State*, Nos. SC18-214 & SC18-1696, 2020 WL 238546 (Fla. Jan. 16, 2020) (*Martin II*), *reh'g denied*, 2020 WL 922757 (Fla. Feb. 26, 2020).

JURISDICTION

This Court lacks jurisdiction to review the Florida Supreme Court's opinion in this case because the case is not yet final. After a state court renders a judgment or opinion, the court may take additional actions that suspend the finality of a criminal defendant's judgment and sentence.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

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).

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

Here, the state postconviction court vacated Petitioner's death sentence under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), while denying relief as to his guilt-phase claims. *Martin II*, 2020 WL 238546 at *24. Petitioner appealed the postconviction court's denial of his guilt-phase claims and filed a habeas petition alleging the ineffective assistance of his direct appeal appellate counsel.³ *Id.* at *1. The Florida Supreme Court affirmed the postconviction court's denial of Petitioner's guilt-phase claims and denied his habeas petition. *Id.* at *24. Petitioner filed a timely motion for rehearing, which was denied by the court. *Martin*, 2020 WL 922757.

On March 5, 2020, before the mandates issued, the State filed a motion for rehearing/clarification or for remand for reconsideration in light of the Florida Supreme Court's decision in *State v. Poole*, SC18-245, 2020 WL 3116597 (Fla. Jan. 23, 2020), *reh'g denied, clarification granted*, SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020). In its motion, the State argued that the postconviction court vacated Petitioner's death sentence under wrongly decided caselaw that the Florida Supreme Court expressly receded from in *Poole*. On April 1, 2020, the Florida Supreme Court stayed its decision in Petitioner's case pending the court's disposition of two other cases, *State v. Jackson* (SC20-257) and *State v. Okafor* (SC20-323). Petitioner recognizes the lack of finality in the decision below by expressing concern that he

³ Petitioner raised additional claims in his habeas petition to the Florida Supreme Court that were procedurally barred because he did not raise them in his direct appeal and the postconviction court granted him a new penalty phase. *Martin II*, 2020 WL 238546 at *22-24.

could be deprived “of his penalty phase relief”—vacation of his death sentence—based on the Florida Supreme Court’s pending decisions in *Jackson* and *Okafor*. (Petition at 5 n.2).⁴

The Florida Supreme Court’s decision to stay Petitioner’s case pending the resolution of *Jackson* and *Okafor* raises a substantial question whether it will modify its decision in Petitioner’s case. If the Florida Supreme Court permits the reinstatement of Petitioner’s death sentence, Petitioner will likely seek review of that decision in this Court. The Florida Supreme Court’s decision to stay Petitioner’s case demonstrates the lack of finality here and, accordingly, there is no judgment for this Court 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 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:

⁴ Petitioner incorrectly styles this a “Capital Case.” His death sentence was vacated and has not yet been reinstated. *See Martin II*, 2020 WL 238546 at *24 (noting that because Petitioner is receiving a new penalty phase the court would not address his postconviction claims pertaining to his initial 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”).

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 conviction for the 2009 first-degree murder of Javon Daniels. *Martin v. State*, 151 So. 3d 1184 (Fla. 2014) (*Martin I*). Petitioner seeks review of the Florida Supreme Court's nonfinal decision affirming the postconviction court's denial of his guilt-phase claims and denying his habeas petition. *Martin II*, 2020 WL 238546 at *1.

Trial Evidence

The facts of the victim's murder are set forth in Petitioner's direct appeal. *Martin I*, 151 So. 3d at 1187-90. On October 28, 2009, Petitioner's codefendant, Batie, drove him in a white Ford car to an apartment complex in Jacksonville, Florida, so Petitioner could visit someone. *Id.* at 1187-88. Petitioner exited the vehicle and

engaged in conversation while Batie's .45 caliber handgun, equipped with a thirty-round magazine, remained in the back seat of Batie's car. *Id.* at 1188. Batie noticed a white SUV and thought he recognized the driver as a person who had shot and grazed him two days before. *Id.* Batie retrieved his .45 caliber handgun, informed Petitioner of this information, and passed the handgun to Petitioner. *Id.* Petitioner then walked to the driver's side of the white SUV, fired multiple shots at the driver, and then walked around the front of the SUV to the passenger side to continue shooting at the driver who was attempting to escape. *Id.* When Petitioner finished shooting, he walked back to Batie's car and Batie drove him home while the victim died at the scene. *Id.* After dropping Petitioner off, Batie drove to Starke, Florida, where he disposed of his car and procured another vehicle. *Id.*

After arriving at the scene, law enforcement interviewed multiple eyewitnesses who identified Petitioner as the shooter in photo spreads of multiple suspects. *Martin I*, 151 So. 3d at 1188. Some of the witnesses identified Petitioner by his nicknames, "Beer Belly" or "Shorty Fat." *Id.* Petitioner was subsequently arrested, and a grand jury indicted him for first-degree murder. *Id.* Batie was then arrested in Starke and later entered a guilty plea to second-degree murder. *Id.* Batie was sentenced to ten years' imprisonment for his role in the victim's death after Petitioner's trial concluded. *Id.*

At Petitioner's trial, the State presented testimony from multiple eyewitnesses, including codefendant Batie, who identified Petitioner as the shooter. *Martin I*, 151 So. 3d at 1188. One of these witnesses, Tasheana Hart, testified that in

the days following the murder, Petitioner asked her “not to tell” what she saw on the day of the murder and offered her money in exchange for her silence. *Id.* The medical examiner testified that the victim sustained twelve gunshot wounds, including four wounds that produced fatal injuries to the victim’s lungs, heart, liver, and stomach. *Id.* She testified that the victim suffered numerous broken bones from the gunshots, endured significant internal and external bleeding, and was unable to escape from the SUV as a result of his significant injuries. *Id.* Petitioner rested without presenting any evidence and the jury returned a guilty verdict on the first-degree murder charge and subsequently recommended death by a vote of nine to three. *Id.* at 1188-89.

In its sentencing order, the trial court found three statutory aggravators: (1) Petitioner had committed a prior violent felony (second degree murder); (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was cold, calculated, and premeditated (CCP). *Martin I*, 151 So. 3d. at 1190. The court found one statutory mitigating circumstance, fourteen nonstatutory mitigating circumstances proposed by Petitioner, and two additional nonstatutory mitigating circumstances supported by the record. *Id.* The trial court gave the aggravating factors great weight, found the aggravating factors sufficient to impose the death penalty, found the aggravating factors outweighed the mitigating circumstances, and ultimately imposed the death penalty. *Id.* The Florida Supreme Court affirmed Petitioner’s conviction and sentence and this Court denied certiorari review. *Id.* at 1199; *Martin v. Fla. Dep’t of Corr.*, 135 S. Ct. 1194 (2015).

Postconviction Proceedings

In 2016, Petitioner moved to vacate his conviction and sentence. *Martin II*, 2020 WL 238546 at *3. On January 8, 2018, the postconviction court rendered an order granting Petitioner a new penalty phase pursuant to *Hurst*, 202 So. 3d 40, denying Petitioner's guilt-phase claims, and declining to consider Petitioner's penalty-phase claims. *Martin II*, 2020 WL 238546 at *3. Petitioner appealed the postconviction court's order denying his guilt-phase claims and filed a habeas petition raising, in relevant part, 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). *Martin II*, 2020 WL 238546 at *3-22. However, Petitioner never argued the Florida Supreme Court was required to conduct a cumulative-prejudice analysis of *Brady*, *Giglio*, and/or *Strickland* violations. Petitioner did argue for a cumulative-error analysis of all his *Strickland* claims, but he never asked the court to consider either his *Brady* or *Giglio* claims in connection with his *Strickland* claims. His habeas petition likewise does not contain this argument. Accordingly, 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.

On January 16, 2020, the Florida Supreme Court affirmed the postconviction court's order denying Petitioner's guilt-phase claims and denied Petitioner's habeas petition. *Martin II*, 2020 WL 238546 at *24. The court recited the factual record underpinning Petitioner's postconviction motion and the legal reasons for rejecting his claims. *Id.* at *1-24.

Strickland Claims

Petitioner raised three relevant inter-connected claims of ineffective assistance of counsel below: (1) trial counsel failed to investigate Mr. McGowan, a potential witness in the case; (2) trial counsel failed to effectively cross-examine another witness, Mr. Lucas; and (3) trial counsel failed to call Mr. McGowan as a witness during the guilt-phase of Petitioner's trial. *Martin II*, 2020 WL 238546 at *5-7, *10-12, *15-16.

(1) Failure to Investigate Mr. McGowan

Petitioner argued his trial counsel ineffectively failed to investigate Mr. McGowan, who informed law enforcement that he could positively identify the shooter and, when provided a photospread, failed to identify Petitioner as the shooter. *Martin II*, 2020 WL 238546 at *5-7. Petitioner's trial counsel never spoke with Mr. McGowan. *Id.* at *6. The Florida Supreme Court did find that trial counsel's performance was deficient because counsel's stated defense was misidentification. *Id.* However, the court also noted that trial counsel's decision may have been based on Petitioner's admission that he was, in fact, the shooter. *Id.* More importantly, the court held that Petitioner was not entitled to relief because he failed to establish that his trial counsel's deficient performance resulted in prejudice. *Id.* at *6-7. The court found that Petitioner failed to demonstrate that any conversation between trial counsel and Mr. McGowan would have uncovered additional information that could have influenced counsel's decision to call Mr. McGowan as a witness. *Id.* at *6. The court further found that Mr. McGowan's statements to police were consistent with other witness statements about the shooter and the "execution style" in which the

murder occurred. *Id.* The court also found that Petitioner was not prejudiced because trial counsel's decision to forego calling Mr. McGowan as a witness because such testimony would necessarily include that Petitioner was involved with illegal drugs and that Petitioner also fired a shot at Mr. McGowan. *Id.*

(2) Failure to Cross-Examine Mr. Lucas

Petitioner argued that his trial counsel was ineffective by failing to cross-examine Mr. Lucas about inconsistent statements he made to law enforcement concerning the identity of the shooter and what he observed at the scene of the crime. *Martin II*, 2020 WL 238546 at *10-11. The Florida Supreme Court found trial counsel's performance deficient but concluded that Petitioner was not prejudiced because Mr. Lucas' testimony was cumulative of other witness' testimony identifying Petitioner as the shooter and describing the shooting as "execution style." *Id.* at *11-12.

(3) Failure to Call Mr. McGowan as a Witness

Petitioner argued that his trial counsel was ineffective for failing to call Mr. McGowan as a witness because Mr. McGowan would have testified that Petitioner was not the shooter. *Martin II*, 2020 WL 238546 at *15-16. The Florida Supreme Court found that counsel's decision to not call Mr. McGowan as a witness was reasonable because counsel testified that he did not want Mr. McGowan's testimony about the execution-style nature of the murder or his testimony involving Petitioner and illegal drugs entered into evidence. *Id.* at *16. The court combined this analysis with its analysis of trial counsel's failure to investigate Mr. McGowan and concluded

that Petitioner had failed to establish deficient performance or prejudice with respect to this claim.

Brady Claim

Petitioner argued that the State committed *Brady* violations with respect to two individuals: (1) witness Tasheana Hart and (2) an individual who was not called to testify at trial, Corey Davis. *Martin II*, 2020 WL 238546 at*18-19. Tasheana testified at Petitioner's trial and identified him as the man who shot and killed the victim. *Id.* at *13-14. In 2016, Tasheana executed an affidavit in which she stated that she lied at Petitioner's trial and she did not see who shot the victim. *Id.* at *19. She testified at the postconviction evidentiary hearing to the same effect. *Id.* The Florida Supreme Court denied this claim because it relied upon the postconviction court's factual determination that Tasheana was not credible because her demeanor and attitude was combative and uncooperative, her postconviction testimony was contradicted by her mother's postconviction testimony, and her allegations that the State threatened or bribed her to testify against Petitioner conflicted with law enforcement personnel who testified to the contrary. *Id.* at *20-21.

Giglio Claim

Petitioner argued that the State committed a *Giglio* violation by knowingly submitting false witness testimony at Petitioner's trial that identified Petitioner as the individual who committed the murder. *Martin II*, 2020 WL 238546 at *19-20. Specifically, Petitioner argued that the State threatened and bribed Tasheana to falsely identify Petitioner as the individual who murdered the victim. *Id.* The Florida

Supreme Court rejected this claim because it deferred to the postconviction court's factual finding that Tasheana was not credible because her demeanor and attitude was combative and uncooperative, her postconviction testimony was contradicted by her mother's postconviction testimony, and her allegations that the State threatened or bribed her to testify against Petitioner conflicted with law enforcement personnel who testified to the contrary. *Id.* at *20-21.

Post-Decision Events

On January 23, 2020, with rehearing pending in *Martin 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.” *Poole*, 2020 WL 3116597 at *15, *reh’g denied, clarification granted*, 2020 WL 3116598. The court affirmed Poole’s death sentence because the jury’s determination he committed other violent crimes during the murder “satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt.” *Poole*, 2020 WL 3116597 at *15.

The Florida Supreme Court denied Petitioner’s motion for rehearing in *Martin II* on February 26, 2020. On March 5, 2020, the State filed a motion for rehearing and on April 1, 2020, the court rendered an order staying 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.”

Petitioner prematurely filed this Petition for certiorari seeking review of the Florida Supreme Court’s decision on July 30, 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 his habeas petition and affirming the postconviction court's denial of his guilt-phase claims. Petitioner currently has no death-penalty sentence—the state postconviction court vacated his sentence and has not held a new penalty phase. The Florida Supreme Court has stayed its decision below and all Petitioner's state-court proceedings, allowing the possibility that the court will remand the case to the postconviction court for further proceedings. Accordingly, this Court lacks jurisdiction to review this case because it is nonfinal.

Aside from the dispositive jurisdictional hurdle, Petitioner's case presents no issue that warrants this Court's 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 decisions of this Court. Petitioner does not argue otherwise, and review should be denied on that basis alone. *See* Sup. Ct. R. 10, 14(1)(g)(i).

Instead, the Petition first claims Petitioner's Sixth Amendment right to effective assistance of counsel was violated by trial counsel's failure to investigate and present a witness and effectively cross-examine another witness. 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 in this non-capital case have no merit and do not warrant this Court's review.

ISSUE I

I. THIS COURT SHOULD NOT GRANT REVIEW OF THE FLORIDA SUPREME COURT'S HOLDINGS THAT PETITIONER WAS NOT PREJUDICED BY TRIAL COUNSEL'S PERFORMANCE.

In this single question presented, Petitioner argues this Court should grant certiorari to review the Florida Supreme Court's rejection of three interrelated claims that his trial counsel was ineffective. 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 and fact-specific application of *Strickland* that does not merit review in this Court.

To establish that he is entitled to relief, Petitioner must demonstrate that trial counsel's "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. According to *Strickland*, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. This Court further explained:

Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, *when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.* And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be

challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Id. (emphasis added).

Here, trial counsel testified at the postconviction evidentiary hearing that Petitioner admitted he was the shooter. *Martin II*, 2020 WL 238546 at *6. This information, in conjunction with the multiple eyewitnesses who identified Petitioner as the shooter, clearly served as the basis for trial counsel's focus on negating premeditation as his primary defense strategy.

Moreover, Petitioner cannot demonstrate prejudice under *Strickland*. To demonstrate prejudice, Petitioner is required to establish that counsel's performance was so deficient as to "undermine confidence in the outcome" of the proceeding. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (quoting *Strickland*, 466 U.S. at 694). Given Petitioner's admission to trial counsel and the corroborating testimony of multiple eyewitnesses identifying Petitioner as the shooter, there is no basis to assert that the pursuit of a "misidentification" defense would have resulted in a different outcome.

A. Failure to Investigate Mr. McGowan

Petitioner first contends his right to effective assistance of counsel was violated by trial counsel's failure to investigate Mr. McGowan because such an investigation would have resulted in the discovery of exculpatory evidence; namely, Mr. McGowan failed to identify Petitioner in a police photospread after stating that he could identify the shooter. The Florida Supreme Court found that Petitioner's trial counsel rendered deficient performance but concluded that Petitioner was not prejudiced because

Petitioner failed to demonstrate that trial counsel would have called Mr. McGowan as a result of any investigation. *Martin II*, 2020 WL 238546 at *6-7. The court also found that Petitioner was not prejudiced because Mr. McGowan's testimony was cumulative of how other witnesses described the shooting, Mr. McGowan said that Petitioner resembled the shooter, and Mr. McGowan's testimony would have introduced evidence of Petitioner's involvement with illicit drugs and the fact that Petitioner fired a shot at Mr. McGowan after shooting the victim. *Id.*

The Florida Supreme Court correctly determined that Petitioner failed to demonstrate that he was prejudiced by trial counsel's performance. Trial counsel testified that he believed that Mr. McGowan's testimony "would never have benefitted [Martin]" because the testimony would have necessarily included reference to Petitioner's involvement with narcotics and the additional shot Petitioner took at Mr. McGowan. *Martin II*, 2020 WL 238546. at *7.

Trial counsel's decision to not call Mr. McGowan as a witness was predicated on counsel's correct determination that Mr. McGowan's testimony would place additional incriminating and prejudicial evidence before the jury. This decision was also informed by the fact that multiple eyewitnesses, including the codefendant, identified Petitioner as the shooter. *Martin II*, 2020 WL 238546 at *2. Those additional identifications were admitted during Petitioner's trial and Mr. McGowan's statement to law enforcement otherwise corroborated the events and execution style of the murder. Given the similarities between the additional eyewitness descriptions of the murder and Mr. McGowan's statement to law enforcement, there is no

reasonable probability that a jury would have reached a different result if Mr. McGowan had testified at Petitioner's trial.

B. Failure to Cross-Examine Mr. Lucas

Petitioner next contends his right to effective assistance of counsel was violated when trial counsel did not cross-examine Mr. Lucas about inconsistent statements he made to law enforcement concerning the identity of the shooter and what he observed at the scene of the crime. *Martin II*, 2020 WL 238546 at *10-11. The Florida Supreme Court found trial counsel's performance deficient but concluded that Petitioner was not prejudiced because Mr. Lucas' testimony was cumulative of other witness testimony identifying Petitioner as the shooter and describing the shooting as "execution style." *Id.* at *11-12. The court correctly determined that the cumulative testimony of three other eyewitnesses rendered trial counsel's failure to cross-examine Mr. Lucas non-prejudicial. Mr. Lucas' testimony thus did not present the jury with any unique evidence that was not duplicative of other testimony or physical evidence. *Id.* Accordingly, Petitioner cannot demonstrate that there is a reasonable probability that Petitioner's trial would have yielded a different result but for trial counsel's decision to not cross-examine Mr. Lucas with respect to the information he provided law enforcement.

C. Failure to Call Mr. McGowan as a Witness

In his third claim of ineffective assistance of counsel, Petitioner argues that he was deprived of effective assistance of counsel because his attorney did not call Mr. McGowan to testify on his behalf. The Florida Supreme Court rejected this claim

because Petitioner failed to demonstrate deficient performance or prejudice. *Martin II*, 2020 WL 238546 at *16. The court stated that trial counsel's decision to not call Mr. McGowan as a witness was reasonable because Mr. McGowan's testimony would have placed additional incriminating and prejudicial evidence before the jury. *Id.* at *7. The court also found that trial counsel's strategy to forego Mr. McGowan's testimony was reasonable because counsel was trying to negate premeditation and Mr. McGowan's testimony would have bolstered the State's case that Petitioner shot the victim in an "execution-style nature." *Id.* at *16.

Given that Petitioner admitted to trial counsel he was the shooter and trial counsel's strategy to negate premeditation, it was eminently reasonable for counsel to decline to call Mr. McGowan as a witness in this case. Such testimony would have both supported the State's case for premeditation and introduced additional prejudicial facts to the jury. Accordingly, counsel cannot be deemed ineffective for executing a reasonable trial strategy and this claim was properly rejected.

For these reasons, this Court should deny review of these three interrelated *Strickland* claims.

ISSUE II

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 urges this Court to impose a requirement that state courts analyze *Brady*, *Giglio*, and *Strickland* violations together for cumulative prejudice. 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 29 (citing *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (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 419, 441 (Fla. 2005).

This Court should decline to review this issue for two reasons: (1) Petitioner never raised this argument in the Florida Supreme Court; and (2) the Florida Supreme Court already performs a cumulative-prejudice analysis of *Brady*, *Giglio*, and *Strickland* violations when a defendant has demonstrated the violations occurred and properly raised the issue.

A. This Court Should Deny Review of the Second Question Presented Because Petitioner Raised It for the First Time in His Petition and Addressing It Would Permit Him to Circumvent a Well-Established State-Law Bar.

This Court “is a court final review and not first view.” *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. *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 even dismissed certiorari review as improvidently granted where new, unaddressed issues are raised. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). “[T]he importance of an issue should not distort the principles that control

the exercise of [this Court's] jurisdiction.” *Id.*

Petitioner never raised his second question presented in the Florida Supreme Court. Petitioner separately raised *Brady*, *Giglio*, and *Strickland* claims, but never—in his initial brief, reply brief, habeas petition, 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 a party has not properly preserved for its review.

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).

The Florida Supreme Court did not address Petitioner’s waiver of his cumulative-error claim because Petitioner’s failure to raise this claim did not afford the court the opportunity to address it. 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 the Florida Supreme Court. *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”).

B. 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; namely, the Florida Supreme Court performs a cumulative-prejudice analysis when a defendant raises the issue. *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 prejudice prongs of *Brady* and *Giglio* are not the same).

In Petitioner's case, the Florida Supreme Court examined a multitude of *Strickland* claims and found trial counsel rendered deficient performance in two

areas. *Martin II*, 2020 WL 238546, at *3, *6, *11. The court also denied two *Brady* claims and a single *Giglio* claim because it found no violations. *Id.* at *19-22. Because the court found that trial counsel rendered deficient performance in two areas it then proceeded to cumulatively evaluate those errors and concluded that trial counsel's deficiencies, individually and cumulatively, did not establish prejudice under *Strickland*. *Martin II*, 2020 WL 238546, at *18. Accordingly, the Florida Supreme Court did not conduct a cumulative-prejudice analysis of *Brady*, *Giglio*, and *Strickland* claims in this case for two reasons: (1) Petitioner never made the argument; and (2) the court correctly found that Petitioner had failed to demonstrate either a *Brady* or a *Giglio* violation.

Petitioner focuses his argument in the petition on the *Brady* and *Giglio* claim he made with respect to Tasheana Hart, one of the eyewitnesses who identified Petitioner as the shooter at trial. Tasheana executed an affidavit and testified at the postconviction evidentiary hearing that she lied at Petitioner's trial because the State threatened her and offered to pay her for testimony incriminating Petitioner. *Martin II*, 2020 WL 238546 at *20. The Florida Supreme Court denied Petitioner's *Brady* and *Giglio* claims, relying on the postconviction court's factual findings that her testimony at the evidentiary hearing was not credible because she was combative, uncooperative, her testimony conflicted with testimony provided by her own mother, and the State presented competent, substantial evidence contradicting Tasheana's testimony from multiple witnesses. *Id.* Thus, the Florida Supreme Court employed the long held appellate practice of deferring to the trial court's credibility

determinations when there was competent, substantial evidence in the record to support the trial court's factual findings. *Cf. Davis v. Ayala*, 576 U.S. 257, 274 (2015) (holding in part that credibility determinations lie within the province of a trial court absent exceptional circumstances).

Petitioner failed to show any violations of *Brady* or *Giglio* and was therefore not entitled to the cumulative-prejudice analysis even under the rule he urges this Court to adopt. Petitioner's inability to raise a cumulative-prejudice argument and any meritorious *Brady* or *Giglio* claims before the Florida Supreme Court necessitated the omission of a cumulative-prejudice analysis.

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

CONCLUSION

The premature Petition in the non-capital case before the 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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