No. 21-6472

In The

Supreme Court of the United States

ANTHONY MUNGIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION TO CERTIORARI

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Counsel of Record

Jason William Rodriguez
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT

Capital Case

QUESTION PRESENTED

Mungin was sentenced to death over twenty-five years ago and now seeks certiorari relief on the Florida Supreme Court's determination that his federal claims were barred on state law grounds. This Court lacks certiorari jurisdiction over the final decision below because this petition is untimely. The court below denied Mungin's first rehearing motion on March 18, 2021, and his petition was therefore due in August. While Mungin filed a second rehearing motion, it was duplicative and did not raise a question about whether the state court would modify its judgment. Even if Mungin could pass this jurisdictional hurdle, the court below rejected his belated attacks on his capital sentence as untimely under a regularly imposed state law bar and without reaching the merits of *any* federal question. Mungin never argued that Florida's time-bar violated due process.

This Court should accordingly decline to exercise certiorari jurisdiction over the following question presented:

I. Did Florida Supreme Court violate due process by determining Petitioner's *Strickland*, *Brady*, and *Giglio* claims were untimely under Florida law when Petitioner failed to argue Florida's timely filing requirement violated due process and these claims were filed over a year after they became discoverable by due diligence?

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Cases

Other Authorities

OPINION BELOW

The Florida Supreme Court's decision petitioned for review appears as *Mungin v. State*, 320 So. 3d 624 (Fla. 2020), *reh'g denied*, No. SC18-635, 2021 WL 1042377 (Fla. Mar. 18, 2021), and *reconsideration and reh'g denied*, No. SC18-635, 2021 WL 2550113 (Fla. June 22, 2021).

JURISDICTION

This Court lacks jurisdiction over the Florida Supreme Court's decision below. This petition is untimely under the 150-day period allowed by this Court's order. *See* 28 U.S.C. § 2101(c) (normal 90-day certiorari clock in civil[1] cases); Order Regarding Filing Deadlines, March 19, 2020 (permitting litigants 150 days to petition for certiorari due to the COVID-19 pandemic), *rescinded* July 19, 2021. It is well established that a timely-filed rehearing motion suspends the finality of a lower-court judgment and resets the (applicable to this case) 150-day clock to petition this Court for certiorari. *Limtiaco v. Camacho*, 549 U.S. 483, 487 (2007). The rationale behind

[1] This postconviction case is governed by 28 U.S.C. section 2101(c) instead of 28 U.S.C. section 2101(d). *See Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987) (explaining postconviction proceedings are "not part of the criminal proceeding itself, and it is in fact considered to be civil in nature"); *Murray v. Giarratano*, 492 U.S. 1, 8 (1989) (applying *Finley* to capital proceedings). *See also Heflin v. United States*, 358 U.S. 415, 418 n.7 (1959) (explaining postconviction certiorari petitions are governed by 28 U.S.C. § 2101(c)); *United States v. Hayman*, 342 U.S. 205, 209 n.4 (1952). 28 U.S.C. § 2101(c) is a jurisdictional limitation. *See, e.g., Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("We have repeatedly held that [28 U.S.C. section 2101(c)'s] statute-based filing period for civil cases is jurisdictional."); *Gibson Distrib. Co., Inc. v. Downtown Dev. Ass'n of El Paso, Inc.*, 439 U.S. 1000 (1978) (dismissing appeal for "want of jurisdiction" because it was not timely filed under section 2101(c)).

this rule is that a timely-filed rehearing motion raises a question about whether the lower court will modify its judgment. *Id. See Hibbs v. Winn*, 542 U.S. 88, 98 (2004) (noting a timely rehearing petition, court decision to entertain an untimely petition, and a sua sponte decision to address whether rehearing should be ordered, all "raise the question whether the court will modify the judgment and alter the parties' rights"). As long as that question remains open, there is no genuinely final judgment for this Court to review. *Limtiaco*, 549 U.S. at 487. Notably, however, "filings used as delaying tactics" do not reset time to petition for certiorari relief. *Id.* at 488 (citing *Morse v. United States*, 270 U.S. 151, 154 (1926) (holding a second application for leave to file motion for new trial did not suspend the finality of the lower court's judgment)).

Petitioner's second, duplicative motion for rehearing did not raise a question about the finality of the judgment below and therefore did not reset the certiorari petition clock. The Florida Supreme Court issued its decision denying Petitioner relief on February 13, 2020.[2] *Mungin*, 320 So. 3d at 624. Petitioner then timely filed a motion for rehearing on February 27, 2020, which the Florida Supreme Court denied on March 18, 2021, after deleting a single case cite and parenthetical. (Resp. App'x at 151–65.) The Florida Supreme Court's denial of rehearing reset the 150-day certiorari

[2] All entries in the case below are available on the Florida Supreme Court's online docket: http://onlinedocketssc.flcourts.org/DocketResults/LTCases?CaseNumber=635&CaseYear=2018.

clock under this Court's precedent. *E.g.*, *Limtiaco*, 549 U.S. at 487. Petitioner's certiorari petition was therefore due on August 16, 2021.

But instead of petitioning this Court for certiorari relief, Petitioner filed a *second* rehearing motion making the same arguments the Florida Supreme Court had already rejected when denying his first rehearing motion. (Resp. App'x at 166–76.) The second motion was a clear violation of Florida law. *See* Fla. R. App. P. 9.330(b) ("A party shall not file more than 1 motion for rehearing, clarification, certification, or written opinion with respect to a particular order or decision of the court."). Unsurprisingly, the Florida Supreme Court denied this second rehearing motion without altering its judgment. (Resp. App'x at 177.) This second, unauthorized, duplicative rehearing motion did not reset the certiorari petition clock because it relied on already-rejected arguments and could not, accordingly, raise a genuine question about the finality of the Florida Supreme Court's judgment. Further, since the motion was duplicative, its sole purpose was delaying the resolution of this capital case.

For either reason, this second rehearing motion did not reset the certiorari petition clock and the present petition is untimely. *See Limtiaco*, 549 U.S. at 488 (recognizing that filings used as delay tactics do not reset the certiorari petition clock); *Hibbs*, 542 U.S. at 98 (recognizing that the certiorari-clock reset question revolves around whether there is a genuine chance the court below will modify its decision); *Morse*, 270 U.S. at 154 (holding that a second application for leave to file motion for new trial did not suspend the finality of the lower court's judgment); *cf.*

Missouri v. Jenkins, 495 U.S. 33, 49 (1990) ("The time for applying for certiorari will not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time."). Therefore, this Court lacks jurisdiction and should dismiss this petition.[3]

CONSTITUTIONAL PROVISION INVOLVED

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 belated, successive postconviction challenges to his conviction for the 1990 first-degree murder of Betty Jean Woods. *See Mungin v. State*, 689 So. 2d 1026, 1028 (Fla. 1995). Petitioner seeks review of the Florida Supreme Court's decision affirming the denial of his third successive postconviction relief on state law grounds. *See Mungin*, 320 So. 3d at 626.

Prior State Court Proceedings

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

> Betty Jean Woods, a convenience store clerk in Jacksonville, was

---

[3] Additionally, the Florida Supreme Court decided the case below on state law grounds and without deciding any federal question. *See* 28 U.S.C. § 1257 (providing this Court jurisdiction to review final state court decisions when there is a *federal* question involved).

shot once in the head on September 16, 1990, and died four days later. There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, later identified the man as Mungin. After the shooting, a store supervisor found a $59.05 discrepancy in cash at the store.

Mungin was arrested on September 18, 1990, in Kingsland, Georgia. Police found a .25–caliber semiautomatic pistol, bullets, and Mungin's Georgia identification when they searched his house. An analysis showed that the bullet recovered from Woods had been fired from the pistol found at Mungin's house.

Jurors also heard *Williams* rule evidence of two other crimes. They were instructed to consider this evidence only for the limited purpose of proving Mungin's identity.

First, William Rudd testified that Mungin came to the convenience store where he worked on the morning of September 14, 1990, and asked for cigarettes. When Rudd turned to get the cigarettes, Mungin shot him in the back. He also took money from a cash box and a cash register. Authorities determined that an expended shell recovered from the store came from the gun seized in Kingsland.

Second, Thomas Barlow testified that he saw Meihua Wang Tsai screaming in a Tallahassee shopping center on the afternoon of September 14, 1990. Tsai had been shot while working at a store in the shopping center. A bullet that went through Tsai's hand and hit her in the head had been fired from the gun recovered in Kingsland.

The judge instructed the jury on both premeditated murder and felony murder (with robbery or attempted robbery as the underlying felony), and the jury returned a general verdict of first-degree murder.

In the penalty phase, several witnesses who knew Mungin while he was growing up testified that he was trustworthy, not violent, and earned passing grades in school. Mungin lived with his grandmother from the time he was five, but Mungin left when he was eighteen to live with an uncle in Jacksonville. An official from the prison where Mungin was serving a life sentence for the Tallahassee crime testified that Mungin did not have any disciplinary problems during the six months Mungin was under his supervision. Harry Krop, a forensic psychologist, testified that he found no evidence of any major mental illness or

> personality disorder, although Mungin had a history of drug and alcohol abuse. Krop said he thought Mungin could be rehabilitated because of his normal life before drugs, his average intelligence, and his clean record while in prison.
>
> The jury recommended death by a vote of seven to five. The trial judge followed the jury's recommendation and sentenced Mungin to death. In imposing the death penalty, the trial judge found two aggravating factors: (1) Mungin had previously been convicted of a felony involving the use or threat of violence to another person; and (2) Mungin committed the capital felony during a robbery or robbery attempt and committed the capital felony for pecuniary gain. The trial judge found no statutory mitigation and gave minimal weight to the nonstatutory mitigation that Mungin could be rehabilitated and was not antisocial.

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

> One of the State's witnesses was Malcolm Gillette, a deputy sheriff who played a relatively minor role in the police investigation. Deputy Gillette testified at trial that he stood by while other officers executed a search warrant and arrested Mungin. Gillette testified that he discovered a beige Dodge Monaco in a parking lot near where Mungin was arrested. Gillette ran the license plate and learned that the car was stolen, so he called for a tow truck to transport it to an impound lot. He filled out the relevant paperwork, including an "inventory and vehicle storage receipt." Gillette testified at trial that he saw two spent shell casings in the stolen car, but on the inventory and vehicle storage receipt, Gillette made a notation indicating he saw "nothing visible" in the car.

Mungin, 320 So. 3d at 625.

The Florida Supreme Court has consistently denied Petitioner postconviction relief on his meritless claims over the past twenty-five years. *Mungin v. State*, 932 So. 2d 986, 1004 (Fla. 2006); *Mungin v. State*, 141 So. 3d 138, 147 (Fla. 2013); *Mungin v. State*, 259 So. 3d 716, 717 (Fla. 2018); *Mungin*, 320 So. 3d at 626.

Federal Habeas

Petitioner filed his federal habeas petition in the Middle District of Florida (Jacksonville Division) in 2006. *Mungin v. Sec'y, Fla. Dep't of Corr.*, 3:06-CV-00650 (M.D. Fla.). (Doc. 1.) This petition has been pending in federal habeas for the past *fifteen years* without a decision due to repeated stays to exhaust untimely and meritless claims, including the ones undergirding the present petition. *See id.* at Doc. 70. Over the Secretary of Florida's fourteen-page objection (which argued a continued stay was improper because certiorari is unnecessary to exhaust and this Court lacked jurisdiction to review the Florida Supreme Court's exclusively state law based ruling), the district court stayed federal habeas proceedings while this Court resolves the present certiorari petition. *Id.* at Docs. 70, 72.

Postconviction Proceedings Below

The Florida Supreme Court outlined the postconviction proceedings in the case below:

> On September 25, 2017, Mungin filed his third successive postconviction motion. Attached was an affidavit signed by Deputy Gillette dated September 24, 2016. Gillette swore he did not see any shell casings in the Dodge Monaco and that, before the trial, he did not review the paperwork he had filled out. Mungin claimed that Gillette's affidavit gave rise to inferences of evidence tampering. Mungin alleged that the State committed a *Brady* violation by failing to divulge that Gillette saw no shell casings and committed a *Giglio* violation by allowing Gillette to give false testimony at trial. Alternatively, Mungin alleged that defense counsel was ineffective by failing to speak to or cross-examine Deputy Gillette, and that the information in Gillette's affidavit was newly discovered evidence that was likely to produce an acquittal at retrial.

Mungin, 320 So. 3d at 625 (footnotes omitted). The State argued Petitioner's claims

were untimely under Florida law. *Id.* The postconviction court held an evidentiary hearing, denied Petitioner's claims on the merits, and Petitioner appealed to the Florida Supreme Court. *Id.*

Appellate Briefing Below

Petitioner's initial brief argued he was entitled to relief on his *Brady*, *Giglio*, and *Strickland* claims. (Resp. App'x at 4–80.) The State argued that Petitioner's federal claims were untimely and meritless. (Resp. App'x at 102–04.) In response to the State's timeliness argument, Petitioner argued: (1) the State's failure to cross-appeal the issue waived the timeliness argument; and (2) his claims were in fact timely under Florida law. (Resp. App'x at 136–45.) Petitioner never argued that Florida's timely filing requirement violated the due process clause of the Fourteenth Amendment in his reply brief.

Decision Below

The Florida Supreme Court found Petitioner's claims were untimely under state law and explained:

> Generally, postconviction claims in capital cases are untimely if filed more than a year after the judgment and sentence became final. Fla. R. Crim. P. 3.851**Error! Bookmark not defined.** (d). For an otherwise untimely claim to be considered timely as newly discovered evidence, it must be filed within a year of the date the claim became discoverable through due diligence. *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013). It is incumbent upon the defendant to establish the timeliness of a successive postconviction claim. *Rivera v. State*, 187 So. 3d 822, 832 (Fla. 2015).
>
> Mungin's claims are untimely, for he filed the instant postconviction motion nearly twenty years after his judgment and sentence became final, and his claims became discoverable through due

> diligence more than a year before the motion was filed. Deputy Gillette signed his affidavit on September 24, 2016, but Gillette was a known witness who was available to the defense since Mungin's 1997 trial. *See Mills v. State*, 684 So. 2d 801, 805 n.9 (Fla. 1996) (finding a lack of due diligence where the witness with allegedly new information "was available and known to the defense").
>
> In fact, Deputy Gillette was not merely known to the defense, he was Mungin's close friend and former wrestling partner. He visited Mungin in prison and wrote him letters. Gillette testified at the evidentiary hearing that he had been in contact with the defense team "over the last twenty years on and off" and that he had discussed his affidavit with an investigator "probably a dozen times" over several months before eventually signing it. The third successive postconviction motion offers no explanation as to why Gillette's evidence could not have been ascertained long ago by the exercise of due diligence. *See* Fla. R. Crim. P. 3.851 (d)(2)(A).
>
> Because all claims raised in Mungin's third successive postconviction motion became discoverable through due diligence more than a year before the motion was filed, Mungin's claims are procedurally barred as untimely. Accordingly, we affirm the order denying postconviction relief.

Mungin, 320 So. 3d at 625–26. The Florida Supreme Court expressly declined to rule on the merits of Petitioner's claims (despite the fact that the lower court had)[4] because the claims were untimely regardless. *Id.* at 626 n.4.

Rehearing Phase Below

After the Florida Supreme Court rejected his federal claims on state law

---

[4] The state postconviction court denied Petitioner's *Brady* claim on the favorable evidence, suppression, and materiality prongs, his *Strickland* claim on the prejudice prong (without deciding the deficiency prong), his *Giglio* claim on failure to demonstrate the State's witness testified falsely, and his state-law newly discovered evidence claim on basis that the evidence was not new and would not probably produce an acquittal on retrial in light of its unsupported and speculative nature and the compelling evidence of Petitioner's guilt.

grounds, Petitioner filed for rehearing on February 27, 2020. (Resp. App'x at 151.) He repeated his arguments that the State waived its timeliness arguments by failing to cross-appeal the issue, that his claims were timely under state law, and also argued the Florida Supreme Court improperly relied on *Jones v. State*, 732 So. 2d 313, 322 (Fla. 1999). (Resp. App'x at 151–63.) For the first time in rehearing, Petitioner argued the following:

> The Court's conclusion is contrary to United States Supreme Court precedent. In *Banks v. Dretke*, the United States Supreme Court wrote:
>
> > Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred."
>
> 540 U.S. 668, 695-96 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999)). "A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

(Resp. App'x at 156.) Again, Petitioner failed to argue that the Florida Rules of Criminal Procedure's timely filing requirement violated the due process clause of the Fourteenth Amendment.

The Florida Supreme Court issued a corrected opinion that made a single change: deleting its citation to *Jones* and accompanying parenthetical. (Resp. App'x at 164.) The court then denied rehearing on March 18, 2021. (Resp. App'x at 165.)

Petitioner then filed a *second* motion for rehearing that duplicated the same arguments the Florida Supreme Court had already rejected while denying his first

rehearing motion. (Resp. App'x at 166–76.) The Florida Supreme Court denied this second rehearing on June 22, 2021. (Resp. App'x at 177.)

Petitioner untimely filed his petition for certiorari seeking review of the Florida Supreme Court's decision on November 19, 2021. This is the State's Brief in Opposition.

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari review of the Florida Supreme Court's decision rejecting his federal claims as time-barred under state law. This Court should dismiss/deny the petition for five reasons. First, the opinion below rests exclusively on state law grounds. Second, Petitioner's due process claim is meritless. Third, Petitioner's federal due process claim was not raised below. Fourth, this case presents no issue that warrants review. And fifth, in light of the Florida Supreme Court's analysis, this Court would be the first court to analyze the federal question Petitioner seeks to present.

First, this Court should not grant this jurisdictionally out of time petition because the Florida Supreme Court's opinion below is exclusively grounded in state law. It is well established that state law time-bars are independent and adequate state law grounds that preclude federal review. *Walker v. Martin*, 562 U.S. 307, 311 (2011); *cf. Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (same). The Florida Supreme Court's only citation to federal caselaw occurred in its description of Petitioner's claims. *See Mungin*, 320 So. 3d at 625 (noting Petitioner raised claims under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Strickland v. Washington*, 466 U.S. 668, 672 (1984)). The entirety of the Florida Supreme Court's rejection of Petitioner's claims rested on its determination that his "claims are untimely" under state law. *Id.* at 625–26. The court explained that Petitioner "filed the instant postconviction motion nearly twenty years after his judgment and sentence became final, and his

claims became discoverable through due diligence more than a year before the motion was filed." *Id.* at 626. The witness who supported Petitioner's untimely claims was well known to him at his 1997 trial. *Id.* This witness was Petitioner's "close friend and former wrestling partner" who visited him "in prison and wrote him letters." *Id.* And the court pointed out that Petitioner never offered any explanation why this witness's "evidence could not have been ascertained long ago by the exercise of due diligence." *Id.* (citing Florida Rule of Criminal Procedure 3.851 (d)(2)(A)).[5] Ultimately, the Florida Supreme Court determined Petitioner's claims were not timely filed, and therefore procedurally barred, on exclusively state law grounds. *Id.*

Strikingly, the Florida Supreme Court expressly declined to consider the merits of Petitioner's federal claims in light of this state law procedural bar. The state postconviction court had held an evidentiary hearing and denied Petitioner's claims without addressing the time-bar raised by the State. *Id.* The Florida Supreme Court did the opposite. It did not analyze his *Brady*, *Giglio*, or *Strickland* claim, and rested its decision exclusive on the fact that these claims were time-barred under state law. *Id.* at n.4 ("Because Mungin's claims were procedurally barred, they were properly denied; it matters not that the postconviction court denied them on the merits.").

---

[5] The State of Florida does not impose *any* time-bar on successive postconviction claims *if* a defendant can prove that the evidence undergirding the claim could not have been discovered earlier by exercise of due diligence. *See* Fla. R. Crim. P. 3.851 (d)(2)(A), (e)(2). But the Florida Supreme Court determined Petitioner failed to show diligence as required to pass Florida's timely filing requirement. Had Petitioner filed his claims within a year of when they became discoverable, they would have been considered on the merits no matter how many years had passed.

Since the Florida Supreme Court's opinion rests exclusively on state law, this Court should not grant the petition. *See* 28 U.S.C. § 1257 (providing this Court jurisdiction to review final state court decisions when there is a *federal* question involved).

Second, any federal due process claim is meritless. Petitioner attempts to supply this Court with jurisdiction by—for the first time—claiming Florida's timely filing requirement violates the Fourteenth Amendment's due process clause. But this Court's due process jurisprudence clearly shows that the due process clause has no application to Florida's timely filing requirement (which simply requires a defendant to file his claim within a year of when the claim became discoverable by due diligence). *See Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 70 (2009) (holding Alaska's postconviction DNA testing requirement of diligence did not violate due process); *Herrera v. Collins*, 506 U.S. 390, 400, 407–16 (1993) (requirement that newly discovered evidence claims be made within 60 days of sentence imposition or suspension did not violate due process even when the claim was actual innocence).

As this Court later recognized, "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011). Petitioner cannot invoke the due process clause where this Court has made clear the clause has no application. Florida's timely-filing requirement is an issue of pure state law under this Court's precedent. In light of this Court's precedent in the context of time-bars to *actual innocence* claims, Florida's imposition of a requirement that successive postconviction claims under *Giglio* and *Brady* must be filed within a

year after they become discoverable by due diligence is certainly not violative of due process. This Court should not grant the petition to resolve a meritless due process claim that it has resolved many times before.

Third, Petitioner failed to raise his due process claim below, which would likely result in any opinion from this Court being purely advisory. Petitioner never argued Florida's imposition of a time-bar for claims asserted more than one year after they became discoverable violates the Fourteenth Amendment's due process clause. Petitioner's failure to do so is particularly inexcusable because the State affirmatively argued his claims were untimely under state law and Petitioner's reply brief never argued this time-bar violated due process. (Resp. App'x at 102–04).

Petitioner's attempt to circumvent the Florida Supreme Court's state-law holding by raising a belated due process challenge fails to account for a second state-law procedural bar. Florida law is clear that arguments not raised during the briefing process are waived. Fla. R. App. P. 9.330(a) (stating that a motion for rehearing shall not include "issues not previously raised in the proceeding"); *Shelly v. State*, No. SC16-1195, 2019 WL 102481, at *1 (Fla. Jan. 4, 2019) (arguments not raised during briefing are waived). By presenting his federal due process challenge to this Court for the first time, Petitioner has precluded the Florida Supreme Court from imposing a regularly imposed procedural bar codified in the Florida Rules of Criminal Procedure. Due to Petitioner's gamesmanship, any opinion rendered by this Court—if it took jurisdiction—would likely be purely advisory because, on remand, the Florida Supreme Court could simply impose the clear, state-law bar that it had no

opportunity to impose earlier. *Cf. Long*, 463 U.S. at 1042 (explaining this Court lacks jurisdiction to render an advisory opinion that will have no effect on the judgment below in light of state law).

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 federal due process claim. Due to the risk of rendering an advisory opinion, this Court should deny the petition because Petitioner cannot—consonant with Florida law—raise a federal due process challenge after briefing below.

Additionally, as this Court has repeatedly recognized, 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 issues that went unaddressed below 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.* at 110. This Court should not grant this petition because the Petitioner failed to raise his federal arguments to the court below.

Fourth, this case presents no issue that warrants review. The decision below applied no federal principles, is based exclusively 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. *See* Sup. Ct. R. 10, 14(g)(i).

Finally, further counseling against review, the Florida Supreme Court did not analyze the merits of *any* of Petitioner's federal claims (including, obviously, his unpresented and now waived claim that Florida's time-bar violates the due process clause). This Court generally does not pass upon questions that went unanswered in the court below. *See Alabama v. Shelton*, 535 U.S. 654, 674 (2002) ("We confine our review to the ruling the Alabama Supreme Court made in the case as presented to it."). Granting certiorari on the question presented would make this the first court to analyze the Petitioner's due process claim. But of course, this 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)).

In sum, this Court lacks jurisdiction since the petition was not timely filed. Even without this jurisdictional bar, Petitioner failed to raise his meritless constitutional challenge to Florida's time-bar below, the Florida Supreme Court's opinion rests exclusively on state law grounds, this case does not warrant this Court's

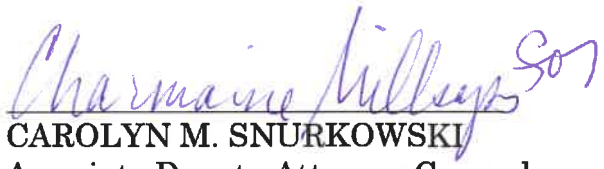
review, and this Court does not have the benefit of any appellate decision reaching the merits of Petitioner's federal claim. This Court should therefore deny/dismiss this petition at the earliest opportunity. This case has languished in federal habeas for the past fifteen years and the district court below (over the Secretary's objection) has delayed resolution of federal habeas proceedings further while awaiting the *pro forma* denial of this jurisdictionally barred petition.

CONCLUSION

This Court lacks jurisdiction over this untimely petition. The Florida Supreme Court's state law decision below does not present any conflict with 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 dismissed/denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL



CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Florida Bar No. 158541
Counsel of Record

Jason William Rodriguez
Assistant Attorney General

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Carolyn.Snurkowski@myfloridalegal.com
capapp@myfloridalegal.com
(850) 414-3300

COUNSEL FOR RESPONDENT