

No. 22-5432

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

TERENCE VALENTINE,
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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Capital Case

QUESTION PRESENTED

Whether the State violates a defendant's due process rights when a postconviction court denies the defendant an evidentiary hearing on his claims because they are either legally insufficient, untimely, or refuted by the record and, in addition, one of the claims is abandoned on appeal?

PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: Valentine's first trial ended in a mistrial and no record on appeal was produced. The record on direct appeal from Valentine's second trial which consists of documents, pleadings, motions, orders and transcripts will be referred to as "DR1" followed by the appropriate volume and page number. The record on direct appeal from Valentine's third trial which consists of documents, pleadings, motions, orders and transcripts will be referred to as "DR2" followed by the appropriate volume and page number. The record on appeal from Valentine's Second Successive 3.851 motion which was digitally produced and consists of documents, pleadings, motions, orders and transcripts from the postconviction appeal will be referred to as "PCR" followed by the appropriate page number.

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OPINION BELOW

The Florida Supreme Court's decision petitioned for review appears as *Valentine v. State*, 339 So. 3d 311 (Fla. 2022).

JURISDICTION

Petitioner, Terence Valentine, invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257. While this statutory provision sets out the scope of this Court's certiorari jurisdiction, it is Respondent's position that this case is inappropriate for the exercise of this Court's discretionary jurisdiction. The Florida Supreme Court's opinion does not conflict with the decision of another state court of last resort; a United States court of appeals; or this Court. The order is based, at the very least in part, on adequate and independent state grounds. Thus, there is no compelling reason to grant Petitioner's petition for writ of certiorari. Sup. Ct.

R. 10

CONSTITUTIONAL PROVISIONS 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.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Facts

Livia Romero married Terence Valentine while she was a teenager in Costa Rica. The couple emigrated to the United States in 1975, where they settled in New Orleans and adopted a child. However, they subsequently separated. Romero “married” Ferdinand Porche, and the family moved to Tampa, where they began receiving telephoned threats from Valentine. *Valentine v. State*, 688 So. 2d 313 (Fla. 1996).

On September 9, 1988, Valentine armed himself and forced his way into the family’s home. When Porche arrived home that day, he was shot in the back, which paralyzed him from the waist down. Valentine then confronted Porche, informed him “this is my revenge.” He forced Porche to crawl into a bedroom where Porche found Romero nude, bound, and gagged. Valentine then pistol whipped Porche, breaking his jaw and knocking out several teeth. Valentine then informed Porche “I’m gonna kill you, but you’re gonna suffer. This is not going to be easy.” Valentine stabbed Porche in the buttocks striking bone, kicked him in the chest, and dragged him around after Porche was bound hand and foot with wire. These injuries occurred while Porche was still alive, but none of the injuries would immediately result in loss of consciousness according to the testimony of the medical examiner. Romero testified that Porche told her that he was in so much pain that he did not know why he did not lose consciousness. At some point, Porche lost control of his bowels and was covered with his own excrement. Eventually, Porche was shot in the eye at point blank range,

which resulted in his death. *Id.* at 315-16. Valentine then shot Romero in the head and left her there.

That same day, Terry Spain went to a field in Hillsborough County to practice his motocross.¹ After he arrived, he went to the pit area where people practice shooting. He went to the pit area with the intention of informing the people practicing shooting that he was riding his bike in the area. At the time, he was wearing his gear, including a helmet and goggles. As he pulled up, he saw a Chevy Blazer. On the other side of the Blazer, he saw a woman naked, hog-tied, with blood coming down her face mouthing to him "Help me, help me." Spain saw a white man by the woods 40-100 yards away.² He then heard two shots. He believed that gunshots were being fired at him, as he heard what he assumed to be a gunshot go past his head, but because his back was turned he did not know if the shots were fired by the white male he previously observed. (PCR2/205).

About two weeks after Nancy Cioll, a friend of Valentine's and Romero's, learned of Porche's murder, Valentine visited her driving a maroon, gray, and black Ford Bronco. When Cioll and Valentine were alone, Valentine confessed to Cioll that

¹ Terry Spain did not testify in any of Valentine's trials. However, in Valentine's first two trials, by way of agreement between the assistant state attorney and defense counsel, his statement was admitted through cross-examination of the detective who took Spain's statement. It was not introduced in his third trial from which this petition emanates.

² Spain's affidavit dated 1/30/20 describes this individual as being about 40-50 yards away from Spain, but at Valentine's March 27, 1990 trial, Detective Fernandez testified that Spain told him that the white male Spain saw was about 100 yards from the Blazer. (DR1 V8:1054-55).

he shot both Porche and Romero and demonstrated to her how he did it. Valentine had previously informed Cioll that he was looking for the daughter he and Romero had adopted, Giovanna, and when he found Porche and Romero, he was going to harm them. (DR2 V12:1355-63). The vehicle Valentine drove matched the description of a faded red and white or red and gray Ford Bronco that Romero and Porche's neighbor, James Dillon, saw parked with two men inside opposite his house the afternoon of Porche's murder. (DR2 V10:1071-74). In addition, Cioll's mother, Louise Soab, who owned a travel agency with Cioll, testified that Valentine used various false names to make subsequent travel arrangements to enter and leave the United States and leave and return to Costa Rica, picking up the tickets in person at the agency and paying for them in cash. (DR2 V9: 539-552).

Several weeks after being released from the hospital, Romero began receiving telephone calls from Valentine, which she taped using a telephone and recorder supplied by police. These phone calls included damaging admissions from Valentine, including statements by Valentine that implied that he could have killed her but left her alive (DR2 V9:797-98), threatened to kill Romero's family if she did not cooperate in returning Giovanna to him (DR2 V9:823- 24), and stated he would bury her family. Valentine did not deny Romero's two statements to him that he killed the best thing that ever happened to her (DR2 V9:877-78), admitted to giving her "a scare" (DR2 V9:879), and laughed when Romero noted that he shot Porche in the back. (DR2 V9:882). In addition, he instructed Romero to provide Giovanna to "Nancy" (DR2 V9:825), who Romero identified as Nancy Cioll. (DR2 V9:833).

Procedural History

Valentine was initially tried in 1990 for the 1988 first-degree murder of Ferdinand Porche, the attempted first-degree murder of Livia Romero, and other related offenses. That trial resulted in a mistrial when the jury was unable to reach a verdict.

Valentine was again placed on trial in 1990 and in the second trial convicted of the first-degree murder of Ferdinand Porche, the attempted first-degree murder of Livia Romero, and other related offenses, and sentenced to death. *Valentine v. State*, 616 So. 2d 971 (Fla. 1993). Following retrial in 1994 due to a jury selection error, the same convictions and sentences were imposed. On appeal, the attempted murder conviction was vacated, but the other convictions and the death sentence were affirmed. *Valentine v. State*, 688 So. 2d 313 (Fla. 1996).

On or about May 10, 2001, Valentine filed a motion for postconviction relief. Among several other claims, he challenged his convictions based on his claim that his convictions could not stand where they were based on the victim being identified as “Livia Porche”, and that the vehicle Valentine was convicted of stealing was marital property. *Valentine v. State*, 98 So. 3d 44, 50 (Fla. 2012). The postconviction court denied the claims and the Florida Supreme Court affirmed. *Id.*

On December 21, 2017, Valentine filed a successive motion for postconviction relief. In the motion, he asserted two claims for relief: (1) there was no corpus delicti for the offenses of grand theft auto, burglary, and one count of kidnapping as a result of the victim’s name in the indictment not matching her name at trial; and (2) a claim

of relief pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Court affirmed the postconviction court's order denying the successive motion for postconviction relief. *Valentine v. State*, 296 So. 3d 375 (Fla. 2020).

Decision Below

On February 17, 2020, Valentine filed a second successive motion to vacate his judgment and sentence which alleged newly discovered evidence in the form of an affidavit from Terry Spain which reiterated his statements Detective Fernandez testified to and adding that during the first trial, law enforcement kept him in a hotel room, bought him lunch and paid him \$300 before releasing him once Romero testified. The motion alleged this was a *Brady*³ violation. The motion also alleged a *Giglio*⁴ violation but did not specify what false testimony had been introduced. (PCR:156-73). On October 13, 2020, the postconviction court entered its order denying the motion without an evidentiary hearing. (PCR:243-54). On October 28, 2020, Valentine filed his motion for rehearing, which the postconviction court denied on November 11, 2020. (PCR:259-60).

On December 9, 2020, Valentine filed his Notice of Appeal in the Florida Supreme Court (PCR:261-62). On April 7, 2022, the Florida Supreme Court affirmed the postconviction court's denial of Valentine's second successive motion for postconviction relief finding (1) that his claim for a new guilt phase based on newly discovered evidence was insufficient because the record conclusively demonstrated

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴ *Giglio v. United States*, 405 U.S. 150 (1972).

that the affidavit offered in support of the motion contained mostly information that was already known, that the information that was unknown could have been ascertained with diligence, and that the unknown evidence would not have likely produced an acquittal on retrial given the overwhelming evidence of Valentine's guilt; (2) that his *Brady* claim failed because Valentine did not demonstrate suppression of evidence in relation to the relevant trial (Valentine's allegation that the State concealed Terry Spain during the pendency of his first three trials); and (3) that Valentine abandoned his *Giglio* claim because he failed to challenge the circuit court's ruling that the *Giglio* claim was legally insufficient as a result of Valentine not identifying any false testimony by a state witness. *Valentine v. State*, 339 So. 3d 311, 313-14 (Fla. 2022). On August 23, 2022, Valentine filed his petition for writ of certiorari in this case.

REASONS FOR DENYING THE WRIT

Three decades after murdering Porche, Valentine claims that the affidavit executed by Terry Spain, who both parties have known about all along and whose statements that he observed a white male in the vicinity of where he found Romero lying bound, shot, and bloody on the ground outside a motor vehicle containing the corpse of Porche *were actually introduced into evidence in Valentine's first two trials*, is newly discovered evidence and a violation of both *Brady* and *Giglio*. He makes this claim even though the only new information it contains is that that at the time of the first trial, Spain remained in a hotel room provided to him by law enforcement, was

bought lunch, and paid three hundred dollars before being released once Romero had testified.

The postconviction court properly denied Valentine's motion to vacate his judgment of conviction and sentence of death. No evidentiary hearing was required because the motion, files, and records in the case conclusively show that Valentine is entitled to no relief: the newly discovered evidence claim is procedurally barred as a result of not timely raising the issue; the *Giglio* claim is meritless because the motion does not state what false testimony the State introduced into evidence; and Valentine cannot prevail on the *Brady* claim because he is not being held pursuant to a judgment or sentence from the trial in which he claims one occurred, there is no allegation or indication that the State prevented Valentine from speaking to Spain since the first trial, and due to the overwhelming strength of the evidence introduced against Valentine at his trial, Valentine is unable to demonstrate that the verdict would probably be different if the additional testimony of Spain was introduced.

Valentine asks this Court to decide whether his claim of actual innocence entitles him to an evidentiary hearing by the postconviction court despite a procedural bar for failing to bring his claims in a timely manner. However, because the Florida Supreme Court's decision is not in conflict with any other state court of last resort or of a United States court of appeals, was based on adequate and independent state grounds, and does not violate the Fourteenth Amendment, Valentine has not provided any "compelling" reason for this Court to review his case. Therefore, certiorari review should be denied. See Sup. Ct. R. 10.

I. Adequate and Independent State Grounds

The question of whether a defendant is entitled to an evidentiary hearing in a state court postconviction proceeding is purely a matter of state law. States are not required to provide defendants postconviction relief. *Pennsylvania v. Finely*, 481 U.S. 551, 557 (1990). Furthermore, when a state chooses to provide a postconviction relief remedy, the state has a great deal of discretion in determining the manner such relief may be granted:

At bottom, the decision below rests on a premise that we are unwilling to accept—that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review.

Id. at 559. Therefore, the fact that Florida has chosen to provide such a scheme for postconviction review should not limit the reasonable restrictions Florida has placed on a defendant's ability to avail himself of this protection by requiring defendants meet certain requirements regarding the timing of the filing of such motions or the criteria a defendant must meet before a court considers it adequate for review or deserving of an evidentiary hearing.

Rule 3.851, Florida Rules of Criminal Procedure, requires that a motion for postconviction relief shall be filed by the prisoner within one year after the judgment and sentence become final. Fla. R. Crim. P. 3.851(d)(1). The clock begins running on this one-year period either (1) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida's decision affirming a judgment and sentence

of death (90 days after the opinion becomes final) or (2) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed. *Id.* The rule permits a party to avoid this time limitation under certain circumstances, including as alleged here, if the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence. Fla. R. Crim. P. 3.851(d)(2)(a). However, even a timely-filed motion is not entitled to an evidentiary hearing when the motion is a successive motion for postconviction relief and "the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Fla. R. Crim. P. 3.851(f)(5)(B). In this case, both state courts determined that Valentine's claim of newly discovered evidence was both untimely and conclusively refuted by the motion, files and records in the case.

Valentine claims that the affidavit provided by Spain constitutes newly discovered evidence. Florida has established a two-part test for determining what constitutes newly discovered evidence. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998) (the evidence must not have been known to the trial court, the party, or counsel at the time of trial and could not have become known by use of diligence, and the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial). As the Florida Supreme Court noted in its opinion, "police reports and trial transcripts from the second trial contain much of the information in Spain's affidavit." *Valentine*, 339 So. 3d at 314. In fact, the only new information contained in the affidavit is that law enforcement provided Spain a hotel room,

meals, and \$300 in cash during Valentine's first trial, which resulted in a mistrial, and which Valentine has characterized as concealing Spain's whereabouts during the trial.

In addition, the Florida Supreme Court found that because trial counsel was aware of Spain's involvement in the case, he could with due diligence have discovered the unknown evidence. As a result, the court concluded Valentine failed to meet the first prong of the *Jones* test and denied this claim. Moreover, the court noted in a footnote, that the claim also failed the second prong of the *Jones* test because the evidence regarding Spain's whereabouts in the first trial was not likely to produce an acquittal on retrial.

Regarding Valentine's *Brady* claim, the court noted that the claim is premised on the information in the affidavit and ruled that the claim failed because the alleged violation, concealing a witness, was not related to the relevant trial. In addition, the court found that the alleged newly discovered evidence in the affidavit was untimely because Florida requires counsel to act with diligence in order to establish a *Brady* claim.

Finally, regarding the *Giglio* claim, the trial court found the motion meritless because Valentine failed to state what false testimony was presented at trial. The Florida Supreme Court determined that because Valentine failed to challenge on appeal the trial court's ruling, any *Giglio* claim Valentine had was abandoned.

The Florida courts' decisions regarding Valentine's *Brady* and *Giglio*

claims invariably involve some review of federal law in determining whether a substantive violation occurred. However, the determination that a defendant has abandoned his right on appeal or has no right to an evidentiary hearing on a successive motion when the claims are conclusively refuted by the motion, records, and files, is purely a matter of state procedural law. Furthermore, the courts' determinations that Valentine had no right to a postconviction hearing because his claims were not timely filed was purely a matter of state law.

This Court has repeatedly recognized that its jurisdiction "fails" where a state court judgment rests on adequate and independent state law grounds. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010). The state courts' decisions denying Valentine an evidentiary hearing on his claims was based on state law and this Court should not exercise its judicial discretion to grant review.

II. Valentine Never Presented to the Florida Supreme Court His Argument That His Claim of Actual Innocence Entitles Him to Avoid a Procedural Default

Although Valentine has repeatedly asserted that he is actually innocent, he has never argued below that his claim of actual innocence provides to him a means

to avoid a procedural bar. This is despite the fact that the lower court summarily denied him an evidentiary hearing after concluding that Valentine's allegations in support of his newly discovered evidence claim "do not constitute newly discovered evidence and are procedurally barred." (PCR:248).

Rather, on appeal to the Florida Supreme Court, Valentine only argued that the State concealed witness Spain's whereabouts during the first trial, that doing so constituted a *Brady* and *Giglio* violation, that this alleged concealment of the witness constituted newly discovered evidence, and the nature of this evidence was such that when considered along with the other evidence, gives rise to reasonable doubt of Valentine's guilt and contends it violates his right to a fair trial. As a result of Valentine not presenting this argument to the Florida Supreme Court, the court did not have the opportunity to pass upon this argument.

This Court is a court of review, not of first view. *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022). Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had ... where any ... right ... is *specially set up or claimed* under the Constitution or the treaties or statutes of ... the United States." 28 U.S.C. § 1257(a) (emphasis added). For that reason, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.' *Hemphill v. New York*, 142 S. Ct. 681, 689 (2022), quoting *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam). Indeed,

it is “unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider.” *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Therefore, this Court should deny the petition.

III. No Conflict between the Florida Supreme Court and this Court or the Circuit Courts of Appeal

Valentine incorrectly asserts that there is a conflict between the Florida Supreme Court’s decision and this Court’s decision in *Schlup v. Delo*, 513 U.S. 298 (1995). Valentine correctly points out that in *Schlup* this Court held that a colorable claim of actual innocence may provide a “threshold” through which a constitutional claim that is procedurally barred in state court may still be cognizable in a *federal habeas proceeding* even when a defendant is unable to demonstrate excuse and prejudice as a basis for avoiding the state procedural bar. However, this Court created a high standard for determining whether a defendant has demonstrated a colorable claim of actual innocence: the petitioner must establish that there exists new evidence which, if presented at trial, would establish that “it is more likely than not no reasonable juror would have convicted [petitioner] in light of the new evidence.” *Id.* at 327.

As a result, the Florida Supreme Court’s decision and that of this Court’s decision in *Schlup* are not in conflict. First, in *Schlup* this Court applied its decision only to federal courts in habeas corpus proceedings. *Id.* at 513. (“the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy” which the Court has consistently relied on to preclude application of strict rules of res

judicata). Valentine cites no case law requiring federal courts in direct appeals to apply *Schlup*, let alone any case in which this Court determined that state courts must do so.

Moreover, even if *Schlup* were applied, Valentine would not obtain any relief because Valentine cannot meet the threshold requirement of demonstrating a colorable claim of actual innocence. The standard of review the Court applies is that given the new evidence, no reasonable juror would have found the defendant guilty at trial. Although neither state court attempted to apply the *Schlup* standard of review, both courts did conduct a substantive review of Valentine's newly discovered evidence even though both courts determined that the newly discovered evidence claim was untimely.

In conducting its review of the *Brady* claim, the circuit court determined that even when considering the new evidence and Valentine's alibi defense, "there is not a reasonable probability of an acquittal on retrial." (PCR:248). On appeal, after the Florida Supreme Court determined that Valentine's newly discovered evidence claim failed because the newly discovered facts were discoverable with due diligence, the court further noted at footnote 4 that it also concluded that the newly discovered evidence "would not likely produce an acquittal on retrial – especially given the overwhelming evidence of guilt." *Valentine v. State*, 339 So. 3d 311 (Fla. 2022). Given that the Court in *Schlup* held that before a habeas court could excuse the procedural default of a constitutional claim the court must find that it is more likely than not no reasonable juror would have convicted a petitioner in light of the new evidence, the

state courts' determinations that the allegedly newly discovered evidence is not likely to produce an acquittal on retrial would prevent application of *Schlup* to provide a legal basis for review of Valentine's barred claims. The state court review of the evidence in this case under Florida law was less onerous than the *Schlup* standard. Therefore, the refusal of the Florida Supreme Court to review the barred claim based on Valentine's assertion of actual innocence does not conflict with this Court's decision in *Schlup*.

IV. No Conflict between the Florida Supreme Court and Other State Courts of Last Resort

Nor does the decision of the Florida Supreme Court conflict with the decisions of other state courts of last resort. Valentine lists two state court decisions he alleges conflict with the decision of the Florida Supreme Court in this case. The first case is *Beauclair v. State*, 419 P.3d 1180 (Kan. 2018). The second is *Marble v. State*, 355 P.3d 742 (Mont. 2015). Both *Beauclair* and *Marble* present very different situations from Valentine's case.

First, the newly discovered evidence in *Beauclair* and *Marble* involves the victim recanting the accusations against the defendant (although the victim in *Marble* subsequently retracted his recantation). As the court in *Beauclair* noted, the victim's affidavit, "if believed, would have exonerated him of both crimes." *Beauclair*, 419 P.3d at 1183. On the other hand, testimony of Terry Spain that was *actually* unknown at the time of his trial, consists of, at best, potential rebuttle. Unlike the victims in *Beauclair* and *Marble*, Romero never recanted her testimony. From the time the police first questioned her through the third of Valentine's trials, she has

maintained that Valentine was the person who shot her and murdered Porche. In addition, there exists strong corroboration of Romero's testimony as a result of her taping her phone conversations with Valentine and Valentine confessing his guilt to Cioll.

Second, the decisions in *Beauclair* and *Marble* rely on state statutory schemes that differ from that of Florida's. In *Beauclair*, Section 60-1507, Kansas's habeas corpus statute, in which Beauclair alleged ineffective assistance on an untimely and successive intervening motion, contained an exception to its one-year limitation "to prevent manifest injustice." § 60-1507(f)(2)(A), Kan. Stat. (Supp. 2017). The Kansas court recognized that in this Court's decision in *Schlup*, the Court had discussed a means of addressing claims of actual innocence in federal habeas corpus proceedings. The court further noted that in *Schlup* this Court permitted the defendant to avoid a procedural default to a constitutional claim to avoid "the kind of miscarriage of justice that would result from the execution of a person who is actually innocent." *Beauclair v. State*, 419 P.3d 1180, 1190 (Kan. 2018) (internal citations omitted). Moreover, the state's legislature had recently amended 60-1507, and the recent amendment not only mentions "a colorable claim of actual innocence" as a basis for finding manifest injustice but also "mirrors" the standard of review enunciated in *Schlup*. "This striking congruence in language and the United States Supreme Court's thorough articulation of the appropriateness of such a standard when a court is confronted with an actual-innocence claim used as a gateway beyond a procedural default in a postconviction proceeding combine to persuade us to adopt

[this] standard as well.” *Beauclair*, 419 P.3d at 1193 (Kan. 2018).

In *Marble*, the defendant sought postconviction release after the victim recanted in writing his accusation against the defendant. Montana’s postconviction statute, § 46-21-102(2), permits filing of a motion for postconviction release within one year of a conviction becoming final. However, similar to Florida’s Rule 3.851, it contains an exception for newly discovered evidence. This exception permits a belated motion within one year of when evidence that would establish defendant did not engage in criminal conduct is discovered or reasonably should have been discovered. Mont. Code Ann. § 46-21-102(2). Although the Montana court discussed the *Schlup* standard of review in response to a dissenting opinion, the court determined that *Schlup* did not apply to the facts in *Marble*’s case because *Schlup* requires that the defendant couple his new evidence of innocence with a constitutional violation, and the defendant in the case had not raised any constitutional violation to go along with his claim of actual innocence. *Marble*, 380 P.3d at 377. Instead, the court determined that the proper standard of review for the defendant’s claim was the very words of the statute itself. It concluded that “a district court presented with a postconviction petition based upon newly discovered evidence shall utilize the very test set forth in § 46–21–102, MCA. It shall determine whether the ‘newly discovered evidence ..., if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct’ for which he or she was convicted.” *Marble*, 355 P.3d at 749.

Valentine fails to argue precisely what the conflict is between this case

and the Kansas and Montana cases, other than to point out that these two state courts' statutory schemes may provide for an evidentiary hearing even when a motion for postconviction relief is not timely filed. In Kansas, a belated motion may still be heard because § 60-1507 expressly permits a defendant to avoid a time bar if he makes a colorable claim of actual innocence. In Montana, a defendant may have an untimely motion heard if he can demonstrate that the newly discovered evidence when proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which he or she was convicted.

Although the two states' statutory schemes differ from that of Florida, and may at times result in different outcomes, it is unlikely that applying the facts of Valentine's case to either Kansas's or Montana's schemes would lead to a different result in this case. Because the Florida Supreme Court determined as a result of its review of both the facts admitted in Valentine's trial and Terry Spain's statements about his whereabouts during Valentine's first trial, that the combined facts would likely not produce an acquittal on retrial, especially given the overwhelming evidence of guilt, Valentine is unable to meet either Kansas's or Montana's requirements for avoiding a bar to review of his untimely motion for postconviction relief. Nor would either the statutory scheme of Kansas or Montana appear to provide any relief to Valentine for his *Brady* or *Giglio* claims given that the Florida Supreme Court denied his *Brady* claim because it alleged "suppression" of evidence in a trial other than the one in which he was convicted, and the court denied his *Giglio* claim because he failed to present any argument in support of his claim, including failing to identify what

false testimony was allegedly introduced.

V. Valentine Will Not be Entitled to Any Relief Even if the Court Determines that Florida Courts May Not Procedurally Bar Constitutional Claims Without First Determining if He Has a Colorable Claim of Actual Innocence

The Court should deny review of this case because no matter how the Court rules on this claim, Valentine cannot prevail on his motion for postconviction relief.

Initially, Valentine argues that in cases in which a defendant raises a claim of actual innocence, *Schlup* prohibits a state court from summarily denying him an evidentiary hearing because his newly discovered evidence claim was barred due to a belated filing. He contends that *Schlup* requires courts first determine whether the claim of actual innocence is a colorable claim. If a party can establish this, then the colorable claim of actual innocence merely serves as gateway to avoid a procedural bar of his constitutional claims. However, this merely provides a court the ability to then consider a constitutional claim that would otherwise be barred from review.

The initial problem for Valentine is that he cannot make a colorable claim of actual innocence. The evidence on which Valentine relies for his argument of actual innocence was neither admitted into evidence, wrongly excluded, nor newly discovered evidence. Therefore, it cannot even be considered. *Schlup*, 513 U.S. 327–28 (The habeas court must make its determination concerning the petitioner's innocence “in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.”). It

is difficult, if not impossible, to see how Valentine can support his claim of actual innocence without resorting to this evidence.

However, even if Valentine was permitted to rely on this evidence, it does not support his claim of actual innocence. Valentine contends that because Spain saw a white man in the vicinity of the murder scene who Spain believes shot at him, this does not eliminate Valentine as the killer. While Valentine points out that Romero stated she only saw two black men during the course of the crime, one of whom was Valentine, this ignores a significant part of Romero's testimony. Romero also testified that Valentine informed her he was working with *two* other individuals. Romero never saw the third individual, and there is no evidence as to this other person's race. Therefore, even if the person Spain saw was white, shot at him, and is involved in the crimes, it does not rule out Valentine's involvement, as well.

More importantly, it ignores the substantial evidence of Valentine's guilt--- evidence that the Florida Supreme Court concluded was "overwhelming" and which included identification of Valentine by the surviving victim, who was Valentine's wife. It also includes Valentine's confession to Nancy Cioll, a person he trusted sufficiently to have her serve as a conduit for transferring physical custody of his daughter, Giovanna, from Romero to him. The taped phone calls from Valentine were also highly incriminating and when coupled with other evidence establishing motive and opportunity, including his purchase of airline tickets in and out of the United States and Costa Rica under false names and with cash, it becomes clear that under no view of the facts can this case be said to implicate actual innocence.

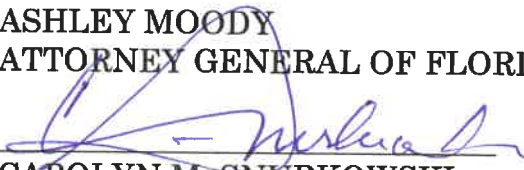
However, assuming for a moment that the Court determines Valentine has made a colorable claim of actual innocence, this merely provides the Court the opportunity to review Valentine's constitutional claims. This is the second problem for Valentine. Of the two constitutional claims Valentine has made – violations of *Brady* and *Giglio* – Valentine has (1) failed to provide even a basis for a *Giglio* claim, and (2) his *Brady* claim is based on events of his first trial, which did not result in the judgment and sentence from which he now seeks redress. Consequently, there is no substance to his constitutional claims and no reason to grant certiorari.

CONCLUSION

The Florida Supreme Court's 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 denied.

Respectfully submitted,

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