CASE NO. 22-6252

IN THE UNITED STATES SUPREME COURT

IN RE: JAMES E. HITCHCOCK,

Petitioner,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

[Restated]

I.

Whether this Court should grant certiorari review of the Eleventh Circuit Court of Appeals' decision to reject Petitioner's attempt under § 2244(b)(2) to file a successive habeas corpus petition, where Petitioner is specifically barred from seeking certiorari of the decision under 28 U.S.C.A. § 2244(b)(3)(E) and where Petitioner's application in the Eleventh Circuit Court of Appeals did not present any substantial constitutional claim or any credible evidence of innocence to warrant the filing of a successive habeas petition?

TABLE OF CONTENTS

CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

RULES

OPINION BELOW

The decision below is the opinion denying Hitchcock's motion for leave to file a second or successive petition for writ of habeas corpus, the district court's dismissal of Hitchcock's guilt phase claims, and the Eleventh Circuit's order denying an expanded Certificate of Appealability.

STATEMENT OF JURISDICTION

This action is an original petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2241(b). Because Petitioner Hitchcock is detained under the authority of the State of Florida, this Court's habeas jurisdiction may only be exercised if Hitchcock is found to be in custody in violation of the United States Constitution or a United States treaty. *See* 28 U.S.C. § 2241(c). To the extent that Petitioner is seeking review of the actions of the Eleventh Circuit Court of Appeals in denying his application to file a successive habeas petition, he is requesting that this Court exceed its jurisdiction, as this Court possesses no supervisory jurisdiction over circuit court proceedings seeking permission to file a successive habeas petition.

Additionally, Petitioner's claims are untimely. See 28 U.S.C. § 2244(d)(1) (providing that habeas petitioner has one year to file habeas petition commencing on the date a reasonably diligent petitioner could have discovered the factual predicate of his or her claims). Hitchcock asserts a self-supporting right to litigate claims regardless of time or procedural bars by invoking a claim that he is legally and factually innocent of his capital crimes. However, these claims cannot be resurrected at any time simply by asserting "innocence" in a habeas petition. The Court should deny the Petition on this basis alone.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Regarding federal constitutional provisions in this case, the Petitioner avers that his claims involve Article 1, Section 9, clause 2 and the Fifth, Sixth and Eighth Amendment. Irrespective of the merits of the Petitioner's claims, those federal constitutional provisions appear to be correctly identified.

STATEMENT OF THE CASE AND FACTS

Petitioner is once again before this Court, asserting that the Eleventh Circuit Court of Appeals erred in denying his application for leave to file a successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2244 (b) and dismissing his guilt phase claims as successive. See *Hitchcock v. Crews*, 135 S. Ct. 779 (2014) (denying review).

The Facts from Trial

In 1982, on direct appeal, the Florida Supreme Court summarized the salient facts from trial:

> A jury convicted Hitchcock of first-degree murder for the death of his brother's thirteen-year-old stepdaughter under an indictment charging one count of premeditated murder....
>
> Unemployed, ill, and with no place to live, Hitchcock moved in with his brother Richard and Richard's family two to three weeks before the murder. On the evening of the murder, appellant watched television with Richard and his family until around 11:00 p.m. He then left the house and went into Winter Garden where he spent several hours drinking beer and smoking marijuana with friends.
>
> According to a statement Hitchcock made after his arrest, he returned around 2:30 a.m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother.

> When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet, so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered, and went to bed.
>
> At trial Hitchcock repudiated his prior statement. He testified that the victim let him into the house and consented to having intercourse. Following this activity, his brother Richard entered the bedroom, dragged the girl outside, and began choking her. She was dead by the time appellant got Richard away from her. When Richard told him that he hadn't meant to kill her, Hitchcock told him to go back inside and that he, the appellant, would cover up for his brother. According to Hitchcock, he gave his prior statement only because he was trying to protect Richard.

Hitchcock v. State, 413 So. 2d 741, 743 (Fla. 1982) (*Hitchcock I*).[1] Hitchcock's conviction has never been disturbed by any court.

The Procedural History

The Eleventh Circuit summarized the relevant procedural history in its opinion below.

> In May of 1983, Hitchcock filed a federal habeas petition under § 2254, which the district court denied, and that denial was affirmed on appeal. *See Hitchcock v. Wainwright,* 770 F.2d 1514 (11th Cir. 1985) (en banc). The Supreme Court, however, granted his petition for a writ of certiorari and vacated his death sentence because the penalty phase jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances. *See Hitchcock v. Dugger,* 481 U.S. 393, 399, 107 S. Ct. 1821, 1824, 95 L.Ed.2d 347 (1987). Following his first resentencing proceeding, which again resulted in a sentence of death, Hitchcock challenged the state trial court's refusal to admit the prosecution's plea offer as relevant mitigating evidence at sentencing. The Florida Supreme Court rejected that challenge on appeal, concluding that the offer was not relevant mitigating evidence under the constitutional rule announced in *Lockett v. Ohio,* 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), because it had no bearing on

[1] The appeal following Hitchcock's first state post-conviction proceeding is reported at *Hitchcock v. State*, 432 So. 2d 42 (Fla. 1983) (*Hitchcock II*).

> Hitchcock's character, record, or the circumstances of his crime. *Hitchcock v. State,* 578 So. 2d 685, 689–91 (Fla. 1990) [*Hitchcock III*], *vacated on other grounds by Hitchcock v. Florida,* 505 U.S. 1215, 112 S. Ct. 3020, 120 L.Ed.2d 892 (1992).
>
> Hitchcock nevertheless managed to obtain two more penalty phase proceedings, each in its turn resulting in death sentences. After the third death sentence was vacated, *see Hitchcock v. State,* 673 So. 2d 859, 860 (Fla. 1996) [*Hitchcock V*], the fourth and (so far) last sentencing hearing was conducted in September 1996.
>
> In the 1996 resentencing proceeding, the jury recommended the death penalty by a vote of ten to two and the trial court followed that recommendation . . . . The court found four statutory aggravating circumstances . . . one statutory mitigating circumstance . . . and several non-statutory mitigating circumstances, which it gave comparatively little weight. . . . The Florida Supreme Court affirmed the death sentence on appeal and, in doing so, again rejected Hitchcock's contention that the sentencing judge erred in excluding evidence of the prosecution's rejected plea offer. *See Hitchcock v. State,* 755 So. 2d 638, 645 (Fla. 2000) [*Hitchcock VI*]. The court explained that the claim was barred because it had been considered and rejected on the merits during Hitchcock's appeal from his first resentencing proceeding. *Id.*
>
> In 2001 Hitchcock filed a state motion for post-conviction relief from his latest death sentence . . . . The Florida Supreme Court affirmed the denial of post-conviction relief . . . . *Hitchcock v. State,* 991 So. 2d 337, 356–58 (Fla. 2008) [*Hitchcock VIII*]. . . .

Hitchcock v. Sec'y, Florida Dept. of Corr., 745 F.3d 476, 478-80 (2014) (footnotes omitted).

When Hitchcock first came to federal court in 1983, he raised eleven claims from his guilt phase and penalty phase. The penalty phase claims from his petition in 1983 later became obsolete because he received penalty phase relief three times either from this Court or the Florida Supreme Court. The guilt-phase claims Hitchcock raised in his § 2254 petition in 1983 were,

1. Petitioner's conviction could have been based upon both premeditated and felony murder, but because the evidence of felony murder was constitutionally insufficient to sustain a conviction, and the jury's general verdict did not exclude reliance upon felony murder, petitioner's conviction violates the due process requirements of *Stromberg v. California*, 238 U.S. 359 (1931).

2. The trial court's reservation of ruling on the felony murder aspect of petitioner's motion for a judgment of acquittal made at the close of the state's case-in-chief unconstitutionally shifted the burden of proof to petitioner and denied petitioner the assistance of counsel at a critical stage of the proceeding.

3. The trial court's rulings which kept out nearly all of the evidence proffered by petitioner in support of his defense that his brother, rather than he, had killed the deceased, deprived petitioner of the right to present a defense, in violation of the Sixth and Fourteenth Amendments.

4. The trial court's communication to the jury in the absence of counsel and petitioner deprived petitioner of due process.

(Resp. Appendix A). Following the district court's summary dismissal, Hitchcock applied for a certificate of probable cause to appeal the district court's denial.[2] (Resp. Appendix B). The district court granted the certificate of probable cause with no restriction on which claims Hitchcock could appeal. (Resp. Appendix C). On appeal in the Eleventh Circuit, Hitchcock only raised the first issue from his petition in the district court; whether the evidence was sufficient to support the underlying felony for a felony murder theory. (Resp. Appendix D). The Eleventh Circuit panel affirmed the denial of relief. *Hitchcock v. Wainwright*, 745 F.2d 1332, 1340 (11th Cir. 1984). The court later readdressed two penalty phase issues on rehearing en banc. *See*

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[2] The certificate of probable cause was the mechanism by which petitioners sought permission to appeal a district court's order under the previous version of 28 U.S.C. § 2253. The enactment of the AEDPA changed the mechanism to a certificate of appealability.

Hitchcock, 770 F.2d at 1515-16 (en banc). Following the en banc Eleventh Circuit decision, this Court granted certiorari on Hitchcock's penalty phase claim regarding the trial court's refusal to consider and instruct on non-statutory mitigation[3] and found that Florida's statute on mitigating circumstances had been applied unconstitutionally under *Lockett* (separate from the plea-offer-mitigation claim *Lockett* claim now presented in the current petition) and remanded for resentencing. Hitchcock was granted penalty phase relief two more times, once from this Court and once more from the Florida Supreme Court. *See Hitchcock v. Florida*, 505 U.S. at 1215, *Hitchcock V*, 673 So. 2d at 859.

After his fourth penalty phase in 1996 was affirmed on direct appeal, *Hitchcock VI*, 755 So. 2d at 638, *cert. denied Hitchcock v. Florida*, 121 S. Ct. 633 (2000), Hitchcock went through state post-conviction proceedings a second time. Hitchcock filed a post-conviction motion in state court raising both guilt and penalty phase claims.[4] The state trial court held an evidentiary hearing, accepted a proffer as to some of Hitchcock's guilt phase claims, denied the guilt phase claims as procedurally barred, and denied the penalty phase claims on the merits. The Florida Supreme

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[3] The non-statutory mitigation was evidence that Hitchcock had a habit of inhaling gasoline as a child, he grew up one of seven children in a poor family that picked cotton for a living, his father died of cancer, and Hitchcock had been a fond and affectionate uncle to the children of one of his brothers.

[4] Hitchcock filed an initial motion in February 2001 and a first amended motion in June 2001 under *Florida Rule of Criminal Procedure* 3.851. The initial motion contained general averments and no facts to support his allegations, so the trial court dismissed it. The first amended motion was also dismissed because it was essentially a copy of the initial. Finally, in November 2001 Hitchcock filed a sufficiently pled motion that was accepted by the trial court.

Court remanded the case back to the trial court for an evidentiary hearing on all of Hitchcock's guilt phase claims and a decision from the trial court on the merits as well as instructions to make findings under a state-law evidentiary statute. After the supplemental evidentiary hearing, the trial court denied all of Hitchcock's claims on the merits. The Florida Supreme Court affirmed the denial on appeal. *Hitchcock VIII*, 991 So. 2d at 337 (Pet. Appendix E). Hitchcock then came back to federal court. In his initial 2008 petition under § 2254, Hitchcock raised eleven claims, four of which involved the guilt phase. Hitchcock framed his guilt phase claims as follows.

> 1. Trial counsel was ineffective during the guilt phase thus violating Mr. Hitchcock's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution....
>
> A. 1977 counsel was ineffective during investigation [sic] preparation and questioning of witnesses.
>
> B. The failure to seek admission of the similar fact evidence about Richard Hitchcock's[5] sexual attacks and choking.
>
> 2. The state courts denied Mr. Hitchcock's right to show his innocence by denying him the right to conduct DNA testing or other forensic evidence testing in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights....
>
> 3. The state courts denied Mr. Hitchcock's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because Mr. Hitchcock is actually

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[5] Petitioner has pursued, since his trial in 1977, a theory that his brother Richard Hitchcock actually killed the victim and that Petitioner falsely confessed to the murder to protect Richard. The jury in 1977 heard Petitioner's pre-trial confession and weighed it against his trial testimony that the confession was false and that his brother Richard was the actual killer. Hitchcock's innocence theory has also been refuted throughout this case's lengthy procedural history. *See Hitchcock III*, 578 So. 2d at 691 (Appellant's letter to his mother in which he confessed to killing the victim—that on cross examination he admitted he wrote—was admissible in re-sentencing to rebut Appellant's claim that he did not kill the victim), *reversed on other grounds by Hitchcock v. Florida*, 505 U.S. 1215 (1992).

innocent of the death penalty and of this crime[6]....

4. Mr. Hitchcock was convicted on the basis of inaccurate and false testimony[7] that created a false sense of scientific certainty, was inadmissible and facts relating to this evidence were not disclosed by the State thus denying his Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution....

Simultaneously with his initial petition in 2008, Hitchcock filed an application for leave to file a successive petition under § 2254 with the Eleventh Circuit. For his guilt phase claims, Hitchcock took the position that there was a "lack of definitive conclusion on whether these Grounds can simply be raised as any other ground or Mr. Hitchcock must comply with the requirement for a second successive petition...." The Eleventh Circuit answered that question and held that Hitchcock's guilt phase claims were successive and denied his application to file successive guilt phase claims. The district court dismissed the petition without prejudice and Hitchcock filed an amended petition raising only penalty phase issues from his 1996 penalty phase. In a comprehensive order, the district court denied all of Hitchcock's federal habeas claims and granted COA on the plea-offer-mitigation claim. The Eleventh Circuit later expanded the COA to include the ineffectiveness claims from the decision below.[8]

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[6] This was a separate newly discovered evidence claim regarding Petitioner's theory about his brother Richard regarding statements Richard was alleged to have made in the early 1990s prior to his death in 1996.

[7] The testimony at issue under this claim concerned the hair analyst who testified at Hitchcock's trial in 1977.

[8] While the case remained in district court, *Magwood v. Patterson,* 561 U.S. 320 (2010) issued. Petitioner could have but did not amend his petition to present the merits of

The Eleventh Circuit affirmed the district court's denial of Hitchcock's § 2254 petition for a writ of habeas corpus on March 12, 2014. *Hitchcock v. Sec'y, Fla. Dep't. of Corr.*, 745 F.3d 476 (11th Cir. 2014). On August 1, 2014, Hitchcock filed a petition for writ of certiorari in this Court, challenging the Eleventh Circuit's denial of a COA on the procedural dismissal of the guilt phase claims, which was denied. *Hitchcock v. Crews*, 574 U.S. 939 (2014).

On December 5, 2022, almost a decade later, Hitchcock, through counsel, filed the instant habeas petition in this Court. The petition was docketed on December 8, 2022. This response follows.

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his *Magwood* argument to the district court. Rather, Petitioner moved for a certificate of appealability (COA) on the procedural dismissal of his guilt phase claims.

REASONS FOR DENYING THE WRIT

This Court should decline to exercise its original habeas jurisdiction where no exceptional reasons exist for granting review of this case and where Petitioner's application to this Court is little more than an unauthorized second attempt to gain certiorari review of the Eleventh Circuit Court of Appeals' decision to deny authorization to file a successive habeas petition under § 2244(b)(2).

Petitioner has not asserted any constitutional right that has been denied him other than the opportunity to revisit issues from his undisturbed guilt phase adjudication. The foregoing suggests that Hitchcock is asking this Court to exercise original habeas jurisdiction simply to act as a second appeal and reverse a claimed procedural error in his specific case.[9] Under that approach, Hitchcock's claim does not constitute the denial of a constitutional right but is merely a procedural challenge for which a COA was properly denied. As such, this case presents no exceptional circumstances that warrant the exercise of the Court's discretionary powers.

I. The Instant Petition Seeks Unauthorized Certiorari Review of the Eleventh Circuit Court of Appeals' Decision to Decline Authorization to File a Successive Habeas Petition.

Hitchcock first argues that the federal court's refusal to hear his federal claims after he received a new judgement and sentence amounts to a suspension of the writ.

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[9] Under 28 U.S.C.A. § 2244(b)(3)(E) the "grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." While limitations on this Court's jurisdiction are subject to narrow construction under *Utah v. Evans*, 536 U.S. 452, 463 (2002), the application Hitchcock filed below fell squarely within § 2244(b)(3)(E), which expressly denies certiorari or appellate jurisdiction over the ruling entered by the Eleventh Circuit Court of Appeals.

While Petitioner presents his instant pleading in terms of an original habeas petition, his petition once again takes issue with the Eleventh Circuit Court of Appeals' denial of leave to file a second habeas petition, which Petitioner previously argued pursuant to 28 U.S.C. § 1254. (Resp. Appendix E). *See Hitchcock v. Crews*, 574 U.S. 1056 (2014). A request this Court rejected on essentially the same factual allegations.[10]

The statute governing federal habeas review of state court judgments, the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). "A claim presented in a second

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[10] Petitioner is asking this Court to exercise its original habeas jurisdiction to review claims that were presented and rejected almost ten years ago on essentially the same arguments. The arguments Hitchcock made on pages 16-31 of his 2014 petition are word for word the exact arguments he makes on pages 21-29 of the instant petition.

or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(3)(A). "The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(3)(C). "A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." 28 U.S.C.A. § 2244(4).

A state prisoner may not appeal from a district court's final order in

a habeas case "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(l). The statute governing appeals in habeas cases, 28 U.S.C. § 2253(c)(2), provides, in pertinent part:

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The AEDPA statute promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Panetti v. Quarterman,* 551 U.S. 930, 945 (2007). The same can be said of the successive petition rule of the AEDPA. §2244(b)'s restrictions on second or successive habeas petitions "constitute a modified res judicata rule" and do not constitute a suspension of the writ of habeas corpus. *Felker v. Turpin*, 518 U.S. 651, 664(1996); *see Williams v. Kelley*, 858 F.3d 464, 473 (8th Cir. 2017).[11] To the extent that due process, *Felker*, or any other source, potentially authorizes plenary review of the Eleventh Circuit ruling to deny Hitchcock's application for a successive habeas petition, Hitchcock is not entitled to relief because

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[11] This Court held that the Antiterrorism and Effective Death Penalty Act's new restrictions on successive habeas corpus petitions, codified at 28 U.S.C.A. § 2244(b), did not amount to an unconstitutional suspension of the writ of habeas corpus, but rather constituted a modified res judicata rule within the compass of the evolutionary process underlying abuse of the writ doctrine, in that the new restrictions which required a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court—simply transferred from the district court to the Court of Appeals a screening function which would previously have been performed by the district court, codified some preexisting limits on successive petitions, and further restricted the availability of relief to habeas petitioners.

the denial of his application and related COA request was proper in all respects. As noted by the federal district court and the Eleventh Circuit, Petitioner fully litigated a prior habeas petition.

Following his fourth penalty phase in 1996 and the state post-conviction proceedings thereafter, Petitioner came back to federal court under § 2254 raising both guilt and penalty phase claims. The Eleventh Circuit denied the application for a successive petition and the guilt phase claims were dismissed as successive. While the case remained in district court, *Magwood v. Patterson,* 561 U.S. 320 (2010) issued; the case Petitioner argues entitles him to pursue his guilt phase claims without permission from the circuit court for a successive petition. Petitioner could have but did not amend his petition to present the merits of his *Magwood* argument to the district court. Petitioner moved for a certificate of appealability (COA) on the procedural dismissal of his guilt phase claims.

Hitchcock now argues that *Magwood* supports his position that his guilt phase claims were not successive, and he did not need permission from the circuit court to file a successive petition on those claims. (*Petition* at 19). But when this Court decided *Magwood* in 2010, Hitchcock's case was still before the district court, and he did not file a second amended petition raising *Magwood* as a basis for the district court to hear the merits of his guilt phase claims. Hitchcock waited instead for the district court to deny his petition in 2012.

Hitchcock now petitions this Court to grant certiorari review of a question that he never asked the district court to decide and that was not before the circuit court below; that is, whether this Court's decision in *Magwood*[12] permits Hitchcock to pursue the merits of guilt phase claims from his undisturbed conviction in a second petition under § 2254 without the circuit's permission for a successive petition simply because he received a new death sentence. *Matsushita Elec. Industrial Co. v. Epstein,* 516 U.S. 367 (1996) ("generally [we] do not address arguments that were not the basis for the decision below."). *See also Taylor v. Freeland & Kranz,* 503 U.S. 638 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989); *Browning-Ferris Industries of Vermont, Inc. v. Kelso Disposal, Inc.,* 492 U.S. 257 (1989); *City of Canton, Ohio v. Harris,* 489 U.S. 378 (1989); *Youakim v. Miller,* 425 U.S. 231, 234 (1976); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Consequently, there is no final ruling to support this habeas petition on the grounds presented.

Even assuming the pure *Magwood* issue was properly before the Court, *Magwood* left unanswered the question Hitchcock now presents and in *Magwood*

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[12] Hitchcock also cites to a an Eleventh Circuit case that has interpreted *Magwood,* along with some of its own precedent, to allow petitioners to challenge undisturbed convictions even when they are only granted sentencing relief. *See Insignares v. Sec'y, Florida Dept. of Corr.,* 755 F.3d 1273 (11th Cir. 2014).

this Court left undisturbed other circuit decisions that were consistent with the Eleventh Circuit's ruling that Hitchcock's guilt phase claims were successive.

> The State objects that our reading of § 2244(b) would allow a petitioner who obtains a conditional writ as to his sentence to file a subsequent application challenging not only his resulting, *new* sentence, but also his original, *undisturbed* conviction. The State believes this result follows because a sentence and conviction form a single "judgment" for purposes of habeas review. This case gives us no occasion to address that question, because Magwood has not attempted to challenge his underlying conviction. We base our conclusion on the text, and that text is not altered by consequences the State speculates will follow in another case.

Id. at 342. This Court also commented that, "Several Courts of Appeals have held that a petitioner who succeeds on a first habeas application and is resentenced may challenge only the *portion of a judgment that arose as a result of a previous successful action." Id.* at 342 n.16 (emphasis added) *(citing Lang v. United States,* 474 F.3d 348, 351 (6th Cir. 2007) (citing decisions); *see also Walker v. Roth,* 133 F.3d 454, 455 (7th Cir. 1997); *Esposito v. United States,* 135 F.3d 111, 113-114 (2nd Cir. 1997)). Indeed, that was the question before the Eleventh Circuit in Hitchcock's case and this Court expressly stated that *Magwood* did nothing to disturb decisions like the Eleventh Circuit's that held Hitchcock's guilt phase claims are successive.

Even if Hitchcock identified new guilt phase claims or reframed the old ones differently, he is barred from raising those claims because he is attacking the same conviction as he did the first time he came to federal court. There was not (and has

never been) an intervening judgment of *conviction* between 1983 and 2008. And of course, his penalty phase claims from 1996 were not ripe when he first came to federal court because that penalty phase did not yet exist. That Hitchcock came back to federal court in 2008 with new counsel who chose new guilt phase claims or reframed the old claims is of no consequence for federal habeas purposes.[13] New counsel is not an intervening judgment. Magwood received a new sentence, and he attacked his new sentence, just as Hitchcock has been permitted to do. Much of the analysis of whether a new petition under § 2254 is successive has hinged on whether there was a new or intervening "judgment" since the previous petition.

In Florida, the adjudication of guilt and the imposition of sentence involve two separate proceedings and two separate documents: the judgment of conviction and the sentence. Indeed, Hitchcock himself has one judgment of conviction and four separate judgments of sentence. This distinction is exaggerated in capital cases with the additional penalty phase. In a capital penalty phase, additional evidence is presented that is relevant only to sentencing, the jury returns a second vote, the recommendation for life or death, that is independent and distinct from the finding of guilt, and the trial court, in Florida at least, must make specific

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[13] Additionally, Hitchcock mentions the Florida's Supreme Court having remanded in state post-conviction for the trial court to hear and rule on the merits of Hitchcock's guilt phase claims. Hitchcock argued the Florida Supreme Court's action as a basis for the Eleventh Circuit to grant the expanded COA. In the petition to this Court, however, Hitchcock does not appear to argue that the Florida Supreme Court's remand is a basis for this Court to order the same, and rightfully so. The Florida Supreme Court's exercise of discretion-perhaps in equity-under state law interpreting its own state procedure has no bearing on Congress's intent in restricting successive petitions under § 2254 nor a federal court's interpretation of the federal statute.

findings in an independent sentencing order. Indeed, this Court and the circuit below have long recognized that in a capital case the penalty phase and its resulting sentence(s) is a separate a distinct proceeding.

> Under the Florida bifurcated death penalty statute, the sentencing proceeding is entirely separate from trial on the capital offense. Indeed, in certain circumstances the state judge can summon different jurors for the latter phase. Fla.Stat. § 921.141(1). Guilt of the capital offense having already been decided, the sentencing jury's sole function is to render an advisory sentence aiding the state judge in determining whether the defendant should be sentenced to death or life imprisonment. *Id.*

Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983). *See also Spaziano v. Florida,* 468 U.S. 447, 458 (1984) ("This Court, of course, has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence.") *(citing Bullington v. Missouri,* 451 U.S. 430, 444 (1981)); *Adams v. Texas,* 448 U.S. 38, 40 (1980) ("Capital offenses in Texas are conducted in a two-phase proceeding.... first... the jury considers the question of the defendant's guilt or innocence. If the jury finds the defendant guilty of a capital offense, the trial court holds a separate sentencing proceeding"). Compare also that previous penalty phase verdicts have been treated as independent grounds for double jeopardy protection in sentencing. *See Sattazahn v. Pennsylvania,* 537 U.S. 101, 112-13 (2003) (emphasis added) ("[F]first-degree murder under Pennsylvania law...is... a lesser included offense of first-degree murder plus aggravating circumstance(s). Thus, if petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove... aggravating circumstances, that conclusion would [be] an "acquittal" of the greater offense [and] would bar Pennsylvania from...

[]seeking the death penalty[] on retrial"). And the cases in which the courts have held that the conviction and sentence comprise a single judgment are non-capital cases with a sentencing procedure that is simply a consequence of the conviction. *Ferreira v. Sec'y, Florida Dept. of Corr.*,494 F.3d 1286, 1288 (2007).

The sentencing procedure employed in non-capital cases like *Insignares* and *Ferreira* involved no (or very little, if any) additional evidence, sentencing guideline calculations, and pronouncement by the trial court in a hearing that may be part of a routine docket sounding. A far cry from the penalty phase trial with new evidence and a second, independent jury verdict employed in capital sentencing. It does not follow that the Court should now treat the two procedures as one event for purposes of federal habeas procedure and allow Hitchcock to attack his undisturbed conviction *again* simply because he received penalty phase relief.

Hitchcock's position that a petitioner can raise any new claim after a retrial or resentencing should not be allowed by this Court. The holding of the Eleventh Circuit does not prevent habeas petitioner's from challenging the same violations that triggered habeas relief in the first place immune from challenge after retrial or resentencing or prevent prisoners from being able to seek relief against their new judgments based on intervening decisions from this Court. Instead, the holding of the Eleventh Circuit is limited to those situations where the claim was available at the original trial or sentencing but was not raised at that time. In that situation, and that situation only, the Eleventh Circuit held that the claim would be successive under 28 U.S.C. §2244.

Accordingly, the instant habeas petition should be dismissed.

II. No Exceptional Circumstances Present to Warrant Habeas Review

An original habeas petition in this Court must present "exceptional circumstances" and such review is "rarely granted." *See* Sup. Ct. R. 20.4(a) and *Felker v. Turpin*, 518 U.S. 651, 665 (1996) (Only "exceptional circumstances" will justify issuance of the writ.) The State questions the propriety of this Court even entertaining an original habeas petition unconnected to any cognizable claim of constitutional error, which appears to simply assert a free-standing claim of innocence. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1933 (2013); *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

The "fundamental miscarriage of justice," only occurs in an extraordinary case, in which a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Actual innocence means factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998). To meet this standard, a petitioner must "show that it is more likely than not that no reasonable juror would have convicted him" of the underlying offense. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). In addition, "'[t]o be credible,' a claim of actual innocence must be based on [new] reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup*, 513 U.S. at 324).

Hitchcock mischaracterizes the holding of *Schlup*, which does not provide a freestanding claim to relitigate claims that are procedurally barred." In his petition, Hitchcock simply reasserts fact specific claims he has raised repeatedly in prior state

court post- conviction proceedings, all of which were properly rejected years ago. Consequently, these fact specific claims made by Petitioner here are of no consequence to anyone other than the parties in this case. Consequently, review in this Court would be inappropriate. *See generally Chevron U.S.A., Inc. v. Sheffield,* 471 U.S. 1140 (1985); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

Despite the jurisdictional and procedural hurdles to review, the instant successive habeas petition lodged by Hitchcock in this Court is also plainly meritless. Again, assuming for a moment this Court's original habeas jurisdiction can be invoked by a defendant's claim of innocence such as that lodged by Hitchcock here, Hitchcock has not alleged "clear and convincing evidence" of his purported innocence. None of his misleading claims comes close to suggesting, much less establishing a plausible claim of actual innocence. Indeed, the state court held an evidentiary hearing on Hitchcock's claim of newly discovered evidence, and both the trial court and the Florida Supreme Court adopted findings which are contrary to and inconsistent with the allegations which Hitchcock offers.

Pursuant to the Florida Supreme Court's order, the circuit court considered the evidence presented and proffered in the 2003 evidentiary hearing regarding Hitchcock's guilt-phase claims and conducted a two-part hearing on November 15, 2005, and December 7, 2005, during which the parties presented additional evidence. On March 29, 2006, the circuit court issued an order denying relief on Hitchcock's guilt-phase and newly discovered evidence claims. *State v. Hitchcock,* No. CR76-1942 (Fla. 9th Cir. Ct. order filed March 29, 2006) (Postconviction Order II). The Florida

Supreme Court affirmed holding:

2. Destruction of Evidence Claim

Hitchcock argues that the State destroyed exculpatory physical evidence, including hairs, blood samples, and clothing that, if subjected to DNA testing and hair comparison, could have been used to implicate Richard and exonerate Hitchcock. Hitchcock admits that this Court has already concluded that DNA testing would not exonerate Hitchcock, see *Hitchcock VII,* but argues that this Court should nevertheless order DNA testing of the hair samples in light of the postconviction evidence that the original hair analysis may have been flawed.

We agree with the circuit court's finding that Hitchcock has not demonstrated how DNA testing would result in newly discovered evidence likely to produce an acquittal on retrial. DNA analysis of the pubic hairs found on the victim would not exonerate Hitchcock because he admitted having sexual intercourse with her. DNA analysis of the non-pubic hairs found on the victim is also not likely to exonerate Hitchcock because the victim and Richard lived in the same household. Shared living space provides a reasonable, innocent explanation for the presence of Richard's hairs on the victim's body. *See King v. State,* 808 So. 2d 1237, 1247 (Fla.2002).

Hitchcock also claims that to the extent that the evidence is unavailable for testing, such destruction of evidence is a violation of his constitutional rights. "The loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution." *Guzman v. State,* 868 So. 2d 498, 509 (Fla.2003) (citing *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). In his second amended motion, Hitchcock failed to allege bad faith or any facts that would support such an allegation. Therefore, his claim is legally insufficient.

3. Newly Discovered Evidence of Hitchcock's Innocence

Hitchcock argues that testimony presented at the postconviction evidentiary hearing is newly discovered evidence which demonstrates his innocence and merits a new trial.

Hitchcock did assert in his postconviction motion and argue to the circuit

court that newly discovered evidence that Richard "confessed" to the murder of Cynthia Driggers demonstrates his innocence and merits a new trial. At the postconviction evidentiary hearing, Wanda Hitchcock Green testified that sometime in 1994, she commented to Richard about how sad their mother will be when Hitchcock is executed. Richard responded that Hitchcock will not be executed because he did not commit the murder; he only committed the rape. Rossi Meacham, an acquaintance of some members of Hitchcock's family, testified that sometime in 1993 or 1994, when she and Richard were sitting around his mother's kitchen table chatting, Richard confessed to killing "that girl in Florida" and blaming his brother for the crime. Meacham testified that on another occasion, Richard threatened her, stating that he had killed before and was "not ashamed to do it again." Judy Hitchcock Gamble, a niece of James and Richard Hitchcock, testified that in 1982 or 1983, Richard tried to sexually assault her. She was twelve or thirteen years old at the time. Gamble testified that when she resisted, Richard told her that if "I didn't shut up [the] same thing would happen to me that happened to Cindy."

The circuit court denied relief because the evidence of Richard's alleged confessions suffered "from an inherent lack of credibility." The circuit court found that due to this lack of credibility, the evidence did not demonstrate the presence of corroborating circumstances showing the trustworthiness of the statements as required by section 90.804(2)(c), Florida Statutes, and did not satisfy the second prong of *Jones II.*

We do not reach the issue of whether the trial judge erred in his consideration of the admissibility of the evidence under section 90.804(2)(c) because we conclude that the evidence did not satisfy the second prong of *Jones II.* Assuming without deciding that the newly discovered evidence would be admissible pursuant to section 90.804(2)(c), Hitchcock has not demonstrated that the newly discovered evidence would probably produce an acquittal or life sentence on retrial because the witnesses were not convincing. The credibility of Green, Meacham, and Gamble is critical to the newly discovered evidence analysis as set forth in *Jones II,* and the circuit court's finding that these witnesses were not credible is supported by competent, substantial evidence.

Meacham claimed that she did not come forward sooner because she was afraid of Richard. She admitted that she read about Richard's death in the newspaper around the time of his accident in 1994 and called Richard's mother, who confirmed that Richard was deceased. Meacham did not offer a plausible explanation for why she waited nearly a decade

after Richard's death to come forward with this evidence. Gamble, likewise, did not offer any reason for her delay in coming forward on her uncle's behalf. Green went public more promptly with her allegations that Richard confessed. She spoke to a reporter in 1996 and testified in an evidentiary hearing on the matter that same year. However, Green did not reveal Richard's alleged confession immediately after the statement was made or even immediately after his death in 1994. Instead, Green waited to reveal one brother's alleged confession until after her other brother was once again sentenced to death in his third resentencing. *See Kormondy v. State,* 983 So. 2d 418 (Fla. 2007) (finding fact that Hazen and Kormondy were "reared as cousins" to be one of many factors detracting from Hazen's credibility). Green's credibility is also questionable because her testimony during the instant postconviction hearing was not identical to her original testimony regarding Richard's alleged confession. In the postconviction hearing, Green did not testify that Richard specifically confirmed that he was responsible for the murder.

Moreover, *Jones I* directs courts to "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial" when evaluating newly discovered evidence claims. 591 So.2d at 916. The heart of the State's case against Hitchcock was his confession and the testimony regarding the discovery and condition of the victim's body. The evidence connecting Hitchcock to the murder was his confession, hair analysis evidence, and testimony regarding a blood stain on Hitchcock's jeans that matched the victim's blood type. Hitchcock's defense was that he did not kill Cynthia Driggers but helped hide her body and confessed to the murder to protect his brother, who was a father figure to him. Hitchcock was the only witness to testify to this theory. The jury obviously gave great weight to Hitchcock's initial confession and rejected his explanation of that confession. *See Melendez,* 718 So. 2d at 748 (denying newly discovered evidence claim because evidence presented was unlikely to change the verdict where the jury had already rejected the same defense theory). We agree with the circuit court that given the totality of the evidence, the testimony of these three witnesses, which lacked credibility and merely partially inculpated Richard because he expressed personal responsibility for the murder in only one of the comments, is not evidence that so "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II,* 709 So. 2d at 526. We hold that Hitchcock is not entitled to a new trial.

4. Expert Hair Analysis Testimony

Hitchcock argues that his constitutional rights were violated when the State failed to disclose the deficiencies of hair analyst Diana Bass and then knowingly presented her incompetent and false testimony in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); that guilt-phase counsel was ineffective for failing to challenge the admissibility of Bass's testimony; and that this newly discovered evidence of Bass's incompetence undermined confidence in his conviction.

At trial, Diana Bass testified as an expert hair analyst. She compared thirty hair samples taken from the victim's body against various standards consisting of hairs taken from the victim, Hitchcock, and Richard, and testified that three of the samples were "consistent in microscopic appearance" with Hitchcock's pubic hair. At the postconviction hearing, Hitchcock called as witnesses Bass and two of her former supervisors, Robert Kopec and Steven Platt. Robert Kopec testified that he evaluated Bass's performance in 1978 and concluded that she was not following the basic procedures to secure the integrity of the evidence that she was handling. Steven Platt confirmed that Bass was the expert referred to in *Peek v. State,* 488 So. 2d 52 (Fla.1986), whose testimony was discredited. Bass admitted that she was inadequately trained and that she had left hair samples out overnight against procedure on at least one occasion.

Turning to Hitchcock's newly discovered evidence claim, to obtain a new trial based on newly discovered evidence, a defendant must demonstrate that (1) the evidence was not known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence is of such a nature that it would probably produce an acquittal on retrial. *See Jones II,* 709 So. 2d at 521. Hitchcock argues that Bass may have erroneously matched the recovered hairs to Hitchcock and failed to find a match with Richard. First, Hitchcock offers no evidence that Bass actually mishandled the hairs in his case. Second, the hairs have been destroyed and cannot be retested. As a result, Hitchcock's hope of finding a match with Richard is merely speculative. Third, excluding Bass's testimony regarding the match with Hitchcock and non-match with Richard would not likely produce an acquittal. Hitchcock, Richard, and the victim all lived in the same household, and Hitchcock admitted to having sex with the victim. As a result, Bass's testimony that Hitchcock's hairs were found on the victim's body was just as consistent with Hitchcock's defense as it was with the State's case. The hair analysis evidence was of little probative

value and cannot reasonably be seen as a definitive feature of the State's case.

We also agree with the circuit court's denial of Hitchcock's *Brady* claim. In order to establish a *Brady* violation, Hitchcock must show the following: (1) the evidence at issue was exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the suppression caused prejudice that undermined confidence in the verdict. *Wright v. State,* 857 So. 2d 861, 869-70 (Fla. 2003). The circuit court found that the State did not suppress evidence of Bass's poor work habits with respect to the 1977 guilt-phase trial because the negative review did not occur until 1978. We agree that the State could not suppress a personnel evaluation that did not yet exist at the time of trial. Also, quoting *Preston v. State,* 528 So. 2d 896 (Fla. 1988), the circuit court explained that the State's responsibility under *Brady* does not extend "to examining in depth the personnel files of proposed expert witnesses and divulging possible adverse comments to the defense." In respect to the prejudice prong of this *Brady* claim, evidence of Bass's poor job performance would not be exculpatory because Hitchcock admitted to having sex with the victim, which explains the hair matches much more effectively than would evidence regarding the hair analyst's habits. Additionally, we agree that Hitchcock has failed to demonstrate prejudice because he did not present any evidence indicating that Bass mishandled the evidence in his case. *See Grim v. State,* 971 So. 2d 85, 93 (Fla. 2007) (finding no prejudice from State's failure to disclose documents questioning medical examiner's qualifications where defense failed to present any evidence challenging validity of examiner's autopsy in that case).

Hitchcock's *Giglio* claim is similarly without merit. In order to establish a *Giglio* violation, Hitchcock must show the following: (1) the testimony was false; (2) the prosecutor knew that the testimony was false; and (3) the testimony was material. *Craig v. State,* 685 So. 2d 1224, 1226 (Fla. 1996). Hitchcock presented no evidence that Bass's testimony in his case was actually false. Hitchcock merely speculates that her analysis came to the incorrect conclusions due to her subsequent poor performance evaluation. Hitchcock also did not offer any evidence indicating that the State knew about Bass's poor work techniques at the time of Hitchcock's trial, much less that the State knew her testimony to be false.

Finally, we also agree with the circuit court's conclusion that Hitchcock's counsel was not ineffective for failing to object to Bass's testimony during the 1977 guilt phase. There is no basis for finding counsel ineffective in the instant case, where the unfavorable report was not

written until the year after the trial.

Hitchcock v. State, 991 So. 2d 337, 348-52 (Fla. 2008).

In light of these findings, which were entered following a full and fair evidentiary hearing and are supported by competent and substantial evidence offered at the hearing, this Court should not give any credence to Hitchcock's allegations. It is clear that Hitchcock's previously presented and rejected claims are untimely, and completely fail to constitute a substantial or meritorious claim of innocence which could support a successive habeas petition, much less constitute extraordinary circumstances to warrant exercise of this Court's original habeas jurisdiction. *See* 28 U.S.C. § 2244(b)(2)(B) (authorizing a successive habeas petition only where (i) the facts could not have been discovered previously with due diligence and (ii) the facts "if proven and ***viewed* in *light of the evidence as a whole"*** establish that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying crime).

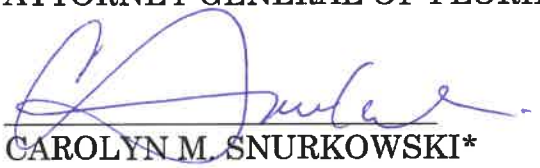
There is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding the denial of authorization to pursue a successive habeas petition in this case. The Eleventh Circuit Court of Appeals properly analyzed Petitioner's claims and held that they do not warrant the filing of a successive habeas petition. This thinly veiled attempt to obtain certiorari review of that decision should be denied, as an unauthorized appeal of that decision. In any case, Hitchcock has not demonstrated exceptional circumstances to compel transfer of his petition to the district court. Habeas relief should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Honorable Court dismiss or deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA



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