No. _____

IN THE

Supreme Court of the United States

In re Krishna Maharaj, Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

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QUESTION PRESENTED

In this original habeas petition, Petitioner seeks plenary review by this Court of the following question:

> **WHETHER, GIVEN THE CHAOS IN THE LOWER COURTS ON THE EXISTENCE OR SCOPE OF THE FEDERAL CONSTITUTIONAL RIGHT NOT TO BE IMPRISONED WHEN FACTUALLY INNOCENT, AND THE CLEAR INTENT OF THE FRAMERS WITH RESPECT TO THIS POINT, THIS COURT SHOULD DEFINE THE RIGHT?**

PARTIES TO THE PROCEEDINGS

Petitioner Krishna Maharaj was Petitioner in the district court and Petitioner/Appellant in the Court of Appeals.

Respondent Secretary, Florida Department of Corrections, was Respondent in the District Court and Respondent/Appellee in the Court of Appeals.

Respondent Warden, South Florida Reception Center, was Respondent in the District Court and Respondent/Appellee in the Court of Appeals.

Respondent Florida Attorney General was Respondent in the District court and Respondent/Appellee in the Court of Appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Maharaj v. Dixon*, No. 22-239, Order Denying Certiorari (U.S. Oct. 11, 2022)
- *Maharaj* v. *Secretary, Florida Department of Corrections*, No. 21-14816 (11th Cir. May 23, 2022)
- *Maharaj* v. *Florida Department of Corrections*, No. 17-cv-21965 (S.D. Fla. Nov. 30, 2020)
- *Maharaj* v. *Secretary, Florida Department of Corrections*, No. 05-1555 (U.S. Oct. 2, 2006)
- *Maharaj* v. *Secretary, Florida Department of Corrections*, No. 04-14669 (11th Cir. Dec. 15, 2005)
- *Maharaj* v. *Moore*, No. 02-22240 (S.D. Fla. Aug. 31, 2004)
- *Maharaj* v. *Secretary for the Department of Corrections*, No. 02-10257 (11th Cir. Sept. 13, 2002)
- *Maharaj* v. *Moore*, No. 01-cv-3053 (S.D. Fla. Dec. 27, 2001)
- *Maharaj* v. *Florida*, No. 00-9614 (U.S. June 25, 2001)
- *Maharaj* v. *State*, No. 91854 (Fla. Nov. 30, 2000)
- *Maharaj* v. *State*, No. 85439 (Fla. Sept. 19, 1996)
- *Maharaj* v. *Florida*, No. 92-5850 (U.S. Jan. 11, 1993)

- *Maharaj* v. *State*, No. 71646 (Fla. Mar. 26, 1992)

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Petitioner respectfully petitions for an original writ of habeas corpus to review his manifest claim of substantive innocence for the homicide of which he was convicted, based on the painstakingly developed evidence unavailable at trial which establishes not only that he did not commit the crime, but that members of the Colombian drug cartel of Pablo Escobar did commit the crime and have admitted to having done so.

OPINIONS BELOW

The judgment of the Eleventh Circuit Court of Appeals in *Krishna Maharaj* v. *Secretary, Department of Corrections*, No. 20-14816 (11th Cir. Mar. 17, 2022), is reprinted at *Pet. App. i.* The Eleventh Circuit's denial of Petitioner's application for rehearing, on May 13, 2022, is reprinted at *Pet. App. xl.*

JURISDICTION

The jurisdiction of this Court is invoked under U.S. Constitution art. I, § 9, cl. 2.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the Constitution of the United States provides in pertinent part:

> Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law. . . .

INTRODUCTION

Through decades of effort, *pro bono* counsel for Petitioner Krishna Maharaj have developed overwhelming evidence establishing that he did not commit the murders for which he was convicted. The perpetrators, associates of the Colombian drug cartel, *have admitted that Petitioner was framed and is innocent*. Mr. Maharaj had nothing to do with any of them, but was an upstanding businessman, once a self-made millionaire in Britain who had invested in property in South Florida, where he and his wife relocated for the climate.

The Court of Appeals authorized Mr. Maharaj to file a successor *habeas* petition based on this evidence, finding it to be (if proven) compelling evidence of innocence under *Schlup*.[1] However, the District Court failed even to reach the *Schlup*-innocence issue, finding that the State did not have possession of the *Brady* material[2] that made out the underlying constitutional claim. The Court of Appeals refused to authorize a hearing on Petitioner's substantive claim of *Herrera*-innocence and the District Court therefore refused to consider it. Petitioner was thus deprived of any consideration of his overwhelming evidence of innocence. The claim of *Herrera*-innocence remains a critical, undecided issue leading to uncertain and varying results throughout both the state and federal systems.

Ultimately, then, this case presents a relatively straightforward issue, albeit one that has caused confusion in the lower courts: it must be common ground that the overriding goal of a criminal trial since the

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[1] *Schlup* v. *Delo*, 513 U.S. 298, 317 (1995).

[2] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Founding of the Constitution is to distinguish the factually innocent from the guilty. Thus, the corollary question must follow of whether the Framers intentionally declined to enumerate a "Constitutional Right to be Liberated if Innocent"? Or, alternatively, was the proposition so fundamental to the entire process that it did not need to be said – and should therefore be encompassed by the Eighth or Fourteenth Amendment?

STATEMENT OF THE CASE

This case presents a well-developed and powerful case of innocence on behalf of an 84-year-old man who has been wrongly incarcerated for 37 years, first on death row and subsequently facing life imprisonment, for a crime that he patently did not commit. The state courts failed to consider this evidence in any meaningful way, and the lower federal courts have refused to consider a claim of innocence because of the Eleventh Circuit's rule that there is no constitutional right to liberty merely because one is factually innocent of the crime. This is a central – perhaps *the* central – issue for the criminal justice system, and this Court needs to provide clarity to the lower courts that individuals who are plainly innocent should not spend the rest of their lives in prison..

1. The Trial.

Petitioner Kris Maharaj is a British citizen, born in Trinidad in 1939, who moved to the United Kingdom and became a successful businessman, primarily in the importation of tropical fruit from Africa. In the 1970s, he invested in property in South Florida. He had been introduced to Derrick Moo Young in London, and accepted the offer to manage his property portfolio. Mr. Maharaj eventually discovered that

Derrick Moo Young was embezzling from him and sued him to recoup his losses.

Mr. Maharaj was charged in 1986 with two counts of first-degree murder and related offenses concerning the deaths of Derrick and his 23-year old son Duane Moo Young, who were killed in Room 1215 of the Dupont Plaza Hotel in Miami, Florida on October 16, 1986, at approximately noon.

Petitioner was tried before a jury in 1987. On the third day of Petitioner's trial, the presiding judge was arrested for allegedly taking a bribe from a law enforcement agent pretending to be a drug dealer. The trial was reassigned to a new judge and went forward. The prosecution's theory was that Mr. Maharaj had murdered the Moo Youngs in a dispute over $443,000, the amount embezzled. The victims were portrayed as impoverished businessmen whose tax returns revealed an income of approximately $20,000 a year. According to the prosecution, Petitioner wanted to force them at gunpoint to sign a check to cover the embezzled funds. The prosecution supported this theory with the testimony of an alleged 'eyewitness', one Neville Butler, who testified that he assisted Petitioner in luring the Moo Youngs to the hotel and witnessed Petitioner shoot them when the plan to recoup the embezzled funds went awry. The prosecution buttressed its case with the following evidence:

- Mr. Maharaj's fingerprints were found in Room 1215 of the hotel, despite the fact that the lead detective, John Buhrmaster, testified that Mr. Maharaj denied ever being in the room.
- Ballistics evidence indicated that the victims were shot with a Smith & Wesson pistol, and a state trooper testified that he had observed such

a weapon in the trunk of Mr. Maharaj's car some months before the shooting. Again Detective Buhrmaster testified Mr. Maharaj denied ever owning such a weapon.

- Testimony from Tino Geddes, who stated that he and Mr. Maharaj had engaged in three "dry run" attempts to kill Derrick Moo Young, and then Mr. Maharaj asked for Geddes' help in creating a false alibi.

Mr. Maharaj's counsel put on no evidence in his client's defense at trial. Counsel argued that reasonable doubt existed because the murders could have been committed by a Colombian named Jaime Vallejo Mejia, who was registered in Room 1214, across the hall from the murder scene and the only other suite that was occupied on the floor. There was blood outside the door of 1214.

In an attempt to neutralize "speculation" that Mejia was involved in the murders, the prosecutor led Detective Buhrmaster through the steps he took to "check out" Mejia (1987 Tr. At 3405-3408). On cross-examination (1987 Tr. 3495-3501), Detective Buhrmaster emphasized that he "ran checks" on Meija with "any and all agencies":

> Q. You did no investigation to determine what it is this gentleman imports and exports?
>
> A. [by Detective Buhrmaster] No, that's not true. *I stated that we ran checks on him.*
>
> Q. I am sorry, go ahead.
>
> A. *Checks on him throughout any and all agencies on Mr. Mejia as well as his name, business.*

(1987 Tr. 3497-3498) (emphasis supplied) The prosecutor continued this colloquy on re-direct (1987 Tr. 3551-3555) and in closing argument he told the jury that they had checked the story out and neither Mejia nor the cartel had anything to do with the murders. (1987 Tr. 3909-3910)

On the basis of what the jurors heard at trial, they convicted Mr. Maharaj for the murders. He was sentenced to death for the murder of Duane, to life imprisonment for the murder of Derrick, and to terms of years for the other offenses.

On appeal, the Florida Supreme Court affirmed. *Maharaj* v. *State*, 597 So. 2d 786 (Fla. 1992), *cert denied*, 506 U.S. 1072 (1993).

2. Prior Post-Conviction Proceedings (1993-2006).

Mr. Maharaj filed an initial state petition for post-conviction relief in November 1993. The trial court vacated his death sentence, finding it was illegally imposed because the substitute trial judge had solicited the prosecution, *ex parte*, to prepare an order sentencing Mr. Maharaj to death before the judicial sentencing hearing even took place. The trial court denied relief as to the convictions, and the Florida Supreme Court affirmed. *Maharaj* v. *State*, 778 So. 2d 944 (Fla. 2000). Mr. Maharaj was resentenced to life in prison in 2002. He is not eligible for parole until after his 100th birthday.

Mr. Maharaj then brought an action under 28 U.S.C. §2254 challenging his convictions. Although the initial post-conviction proceedings did not result in vacatur of Mr. Maharaj's convictions, considerable evidence had come to light suggesting that the Moo Youngs were murdered because they were laundering for the Columbian drug cartel, and skimming proceeds

off the top. Much of the evidence came from the files of the prosecution and the police, including documents found in a briefcase belonging to Derrick Moo Young, which had never been shared with trial counsel for Mr. Maharaj.

Derivative evidence was also obtained from a lawyer representing the William Penn Life Insurance Company, who had defended against the Moo Young family's attempt to collect on two life insurance policies taken out shortly before the deaths of Derrick and Duane. *2nd Pet. for a Writ of Habeas Corpus by a Prisoner in State Custody* ("Habeas Pet.") at 37-38, *Maharaj* v. *Jones*, No. 17-21965 ("*Maharaj* v. *Jones*") (S.D. Fla. May 25, 2017), ECF No. 1.

a. *The activities of the Moo Youngs.* The briefcase contained passports for the Moo Youngs, revealing extensive travel across the Caribbean and the United States. It also contained documents showing that the Moo Youngs offered loans to various Caribbean governments ranging from $100 million to $5 billion in the name of their front company, *Cargil International*, which had branches in the Bahamas (then run by a narco-corrupt government) and Panama (the fiefdom of Manuel Noriega). The briefcase also contained documents evincing their negotiations to purchase a bank in Panama for $600 million. On the basis of this and other evidence, the William Penn Life Insurance Company concluded at the time that the Moo Youngs were likely engaged in money laundering. *Id.* at 32-36.

b. *Facts concerning Room 1215 at the Dupont Plaza Hotel.* The room where the murders occurred had been rented by a Bahamian named Eddie Dames. Dames had close links to F. Nigel Bowe, an attorney linked to the Prime Minister, who was later extradited to the United States and jailed on drug charges.

Bowe's law office was the registered address of the Moo Youngs' laundering front corporation, *Cargil International (Bahamas)*. Bowe was also affiliated with Adam Amer Hosein, a Trinidadian who—according to telephone records that had not been disclosed to the defense—had called Room 1215 on the morning of the crime. A witness who worked for Hosein stated under oath that Hosein went to the Dupont Plaza that day with a pistol of the type used in the murders. *Id.* at 81-84.

c. *Facts relevant to motive.* Analysis of the documents in the briefcase further revealed that the Moo Youngs were trying to skim 1% from the billions of dollars they were laundering—which would itself run to millions of dollars, and would be a weighty reason to fear for their lives at the hands of the cartel. *Id.* at 35-36.

d. *Fingerprints*. With respect to the fingerprints, offered at trial as proof that Mr. Maharaj was lying, Det. Buhrmaster's colleague on the police force testified under oath in a pre-trial deposition (consistent with Mr. Maharaj's version of events) that Mr. Maharaj had stated from the very beginning that he *had* been in Room 1215 for a business meeting set up by Butler to discuss distributing his newspaper, *The Caribbean Times*, in the Bahamas. However Dames, whose room it was, never showed up, so Mr. Maharaj left three hours before the Moo Youngs apparently arrived. *Id.* at 40. As he had insisted all along he had been in the room for an innocent purpose, finding his

fingerprints was not evidence of guilt but corroborated his story.[3]

e. *Ballistics*. A note in Buhrmaster's file reflected, contrary to his testimony, that Mr. Maharaj had said from the beginning that he once owned a gun that he bought from Police Lt. Bernie Buzzo, but that it had been some months before the murders, along with $1,000 in cash. This was corroborated by an independent witness. *Id.* at 40-47. The defense was not aware at trial of this note in the police file.

f. *Tino Geddes, the "dry runs" and the allegedly false alibi*. Petitioner proved in post-conviction that the "dry runs" were physically impossible, and that alibi witnesses were available and ready to testify credibly for Petitioner that he was 40 minutes away from the Dupont Plaza at the time of the murders; they all said Geddes was lying when he testified Maharaj had made up the alibi that he was 40 minutes away, and defense counsel had failed to interview them before trial. *Id.* at 78.

g. *Neville Butler, the purported "eyewitness."* The prosecution had represented to the trial judge that Mr. Butler passed his polygraph test. The prosecution files showed he had *failed* in significant ways, and that the test had been used to coerce him into changing his testimony—rendering perjurious Butler's six-times repeated insistence that he voluntarily came forward to

[3] Later, the Cartel operatives explained that their *modus operandi* at the time when someone stole money was to recoup the funds before exacting their revenge. They suggested that Mr. Maharaj would have been lured into the room as the richest person known to the Moo Youngs, to coerce him into paying their debt.

correct his earlier story. In contrast, Mr. Maharaj took and passed a polygraph prior to trial.[4]

While this material seemed to put the evidence adduced against Petitioner at trial in a very different frame, state and federal courts nevertheless dismissed Petitioner's challenge to his convictions, albeit the District Court granted a certificate of appealability because reasonable jurists could differ on the *Brady* violation. Order on Report and Recommendation (ECF#35), *Maharaj* v. *Moore*, No. 02-22240 (S.D. Fla. Aug. 31 2004). The court also refused to consider Mr. Maharaj's *Herrera*-innocence claim, ruling that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying criminal proceeding." *Id.* at 49, quoting *Herrera* v. *Collins,* 506 U.S. 390, 400 (1993). The Eleventh Circuit denied Petitioner's appeal, finding the link to the drug cartel to be speculative. *Maharaj* v. *Secretary, Dep't. of Corrections*, 432 F.3d 1292, 1303 (11th Cir. 2005).

3. The Recent Proceedings (2012-2022).

State proceedings. Petitioner unsuccessfully sought clemency.[5] While for some time it seemed that

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[4] Mr. Maharaj's polygraph was conducted by the nationally recognized expert George Slattery, who is estimated to have a 97% accuracy rate and whose tests have been characterized as "highly probative." *Tinsley v. Dep't of Justice*, USMSPB No. 0752-04-0116-1-1, at 11 (Apr. 20, 2004) (Vitaris, Admin. J.).

[5] While clemency is sometimes thought to be a "safety valve" when it comes to innocence, Petitioner has sought such relief twice (once based on the evidence of his innocence, and once on medical grounds); the first application was summarily denied; he did not even receive acknowledgement that the second request had been filed and it was never even ruled upon.

Petitioner had no other legal avenues, his *pro bono* lawyers persisted with their investigation and uncovered new material that transformed what might have been "speculative" into hard fact. In 2012, , Mr. Maharaj filed a second petition for post-conviction relief in the state court.

The first new lead was the indictment of Jaime Vallejo Mejia for $40 million of drug money laundering, which was filed approximately five weeks prior to Mr. Maharaj's trial. Petitioner discovered this new indictment, and it led to documentation that there had been a three-year investigation into Mejia running from at least 1983-86 by the joint State/Federal taskforce CENTAC. A senior member of CENTAC was Detective Al Singleton, a colleague of Detective Buhrmaster in the local homicide department in Miami. The indictment was returned in Oklahoma, so the defense had no way to find it until a source in Colombia led *pro bono* counsel to seek it out. Hence, a centerpiece of the prosecution 'refutation' of the defense – that they had checked out Mejia with 'all agencies' – was demonstrably false; to the contrary, his long-term and continuing connection to the Colombian drug cartel, reflected by the undisclosed indictment strongly supported the defense.

Second, Mr. Maharaj showed that around the time of the original trial, the Florida State Department of Business Regulation, looking into an application for a liquor license filed by Mejia, had learned extensive details surrounding the CENTAC investigation through a simple request to their law enforcement colleagues. Clearly, the Miami homicide detective could readily have found this out if they had made any effort to "check out" Mejia.

Third, *pro bono* counsel conducted an extensive follow-up investigation. A tip-off from a Miami journalist led counsel to Baruch Vega, a former CIA informant who had worked for CENTAC, now living in Los Angeles. Vega testified without meaningful impeachment that:

- He had been part of the investigation into Mejia, who was a known Colombian cartel operative.
- He had met Derrick Moo Young with Mejia, and knew Moo Young to be involved in narcotics trafficking with Mejia.
- After the murders, Mejia admitted to Vega that they had to kill the Moo Youngs because they were stealing from Pablo Escobar, stating "we have to kill this bastard SOB for being a crook." 2014 Tr. 275. In other words, the actual perpetrators admitted *at the time* that they had killed the Moo Youngs, and not Mr. Maharaj.[6]
- Everything Vega learned he reported back to his CENTAC handlers, who made reports of what he told them. Unrebutted evidence thus established that CENTAC had *documentary* evidence dating back to 1986 that would have proved Petitioner's innocence.
- The State judge ordered discovery of this (and other) material. By then the copies were held

[6] Additionally, Vega testified that state witness Tino Geddes was another focus of the CENTAC investigation. This led *pro bono* counsel to follow up in Jamaica where, because Geddes was by now deceased, witnesses were willing to discuss his long-time links to the "Shower Posse", the Jamaican drug gang in league with the Colombian cartel..

by the federal agencies, and the federal government refused to comply with the order.[7]

Thus, had Detective Buhrmaster checked Mejia out, as he testified, he would have learned that Mejia had been the subject of two different narcotics investigations from 1983-1986 and was under indictment. *Habeas Pet. at 150-158*. Or he could have logged into NCIC. Before the age of the internet, the defense had no such access.

Mr. Maharaj's *pro bono* counsel followed this up, twice going to Colombia and developing further exculpatory evidence.

"John Brown,"[8] who worked for the cartel as a pilot, testified that in 1986, shortly after the Moo Young murders, he visited Pablo Escobar's farm. Escobar warned him not to steal or he would meet the same fate as the victims in this case. Brown testified that he also met Mejia there and knew him as a senior member of the cartel, nicknamed the "Evil Dwarf.".

Mr. Maharaj's counsel also identified Jorge Maya (who lived in Medellin),. who testified to how another

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[7] Disappointingly, the state prosecutors intervened and actively encouraged the federal authorities *not* to comply with the state court's discovery order. The Department of Justice apparently relied on the Supremacy Clause interests identified in *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951), when they ignored the state judge's order.

[8] "Brown" was not his real name. After he was arrested he became an informant for the U.S. government and was in the Witness Protection Program. He had testified in fifteen trials for the prosecution, putting many people behind bars with statements that fit the same hearsay exceptions as his testimony in this case.

cartel operative (his brother Luis) made co-conspirator statements concerning his role in paying the true architect of the murders, Guillermo Zuluaga Villegas (known as *Cuchilla*, or "the Blade"), on behalf of Escobar.

Jhon Jairo Vásquez-Velásquez (known as *Popeye*), was a notorious assassin for Escobar, who was first interviewed on this case in prison in Colombia. He relayed a number of co-conspirator statements with details about how the cartel carried out the murder. He was later released from prison and he then ratified those statements to former DEA Special Agent Henry Cuervo. Cuervo testified as an expert[9] on the cartel in Miami where he was an agent, and later agent in charge. He had personally investigated the Maya brothers, and confirmed various aspects of Jorge Maya's testimony and the statements of other Cartel witnesses.

Michael Flynn, a former Miami police officer, testified to how elements of the police had a corrupt arrangement with the cartel and would assist them with their crimes. He described how his friend Officer Pete Romero "hooked up" Petitioner (by which he meant that they framed him). Thus, not only was the police work shoddy, it appears that some police officers had worked with the Cartel to direct attention falsely toward Petitioner.

Finally, with respect to the "eyewitness" Neville Butler (who is also now deceased), Petitioner presented six newly-discovered legal proceedings in

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[9] The State trial court "credit[ed] Mr. Cuervo's testimony concerning how Colombian drug cartels operated in south Florida in the 1980s. He presents as a very informed and knowledgeable former law enforcement officer." ROA vol. 27, 5113.

which Butler had committed perjury. Another witness testified that Butler himself had been involved in the murders and had participated in making up a false story to tell the police. More broadly, Petitioner presented a complete analysis of Butler's changing statements, illustrating how he had committed perjury numerous times in Petitioner's case, and how his testimony was comprehensively undermined by the physical evidence.

Thus not only had the edifice of the prosecution case been dismantled as early as 1993, but by 2014 Petitioner had identified the true killers. Yet the state court found, remarkably that this not "give rise to a reasonable doubt as to Mr. Maharaj's guilt." (*Pet. App. xvi*) The Court could only reach this conclusion by dismissing all the co-conspirator statements and statements against penal interest as "inadmissible hearsay"; while such statements clearly fell within hearsay exceptions. The ruling was upheld on appeal without any reasons given. *Maharaj* v. *State*, No. 3D15-321 (Fla. 3d DCA July 31, 2016); *see Pet. App. viii* (district court decision).

Federal proceedings. Mr. Maharaj then sought leave from the Court of Appeals to file a successive petition for federal habeas relief. Order at 5, *In re Maharaj*, No. 17-10452-F (11th Cir. Mar. 18, 2017). A panel of the Court of Appeals granted the application, at least with respect to Mr. Maharaj's *Brady* claim. *Id.*[10]

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[10] Because the order was expeditiously entered to meet the 30-day deadline of 28 U.S.C. §2244, without full briefing or argument, it was not a model of clarity. The court purported to remand on *Brady* "subclaims 2(c) through (f)", *id.* at 2-3, when there were no such subclaims in Mr. Maharaj's application. This (footnote continued)

While pursuing his state appeals, Petitioner exercised continued diligence and developed additional evidence of his innocence, including further admissions by the actual perpetrators. This included a legal but surreptitious recording of two cartel operatives (Juan Lopez and another cartel hitman named Jhon Henry Millan) discussing in Spanish how the Moo Youngs had been defrauding Escobar, and "people were sent to skin [*pelar*] them."

Mr. Maharaj also developed the evidence of *Witness A*, who understandably insisted on anonymity due to death threats made after a visit to Jaime Vallejo Mejia in Colombia. Mejia is still trafficking narcotics and Pablo Escobar himself paid Mejia's bail when he was arrested. *Witness A* and a Colombian government lawyer went to speak with Mejia The lawyer was held outside at gunpoint while *Witness A* met with Mejia. Mejia did not dispute that Mr. Maharaj was innocent but said that "nobody who was involved in the cartel would take the risk to help someone like that" and that he "was not an exception."[11]

Based on this, the Eleventh Circuit panel ruled:

> Mr. Maharaj has made a *prima facie* showing that his new evidence, when viewed in light of the evidence as a whole, would demonstrate that he could not have been guilty of the Moo

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mistake led the court to dismiss Mr. Maharaj's subsequent appeal on the extraordinary ground that the district court never had jurisdiction to hear his claims in the first place. This injustice was the subject of Mr. Maharaj's recent *certiorari* petition, denied by this Court.

[11] *Witness A* made a successful application for asylum in the United States based on the danger then faced from cartel members.

> Young murders beyond a reasonable doubt because if a hit man for the cartel committed the murders, Mr. Maharaj did not.

Id. at 6.

The case was remanded and assigned to a magistrate judge. Mr. Maharaj asked for expedited discovery into the material that he had been unable to obtain in the state proceeding.[12] The magistrate denied the request without explanation as did the district judge.

The District Court then denied relief. The court did find the new evidence troubling. *Pet. App. xxxviii* ("To be clear, of the litany of habeas petitions before this Court, the facts of this case give the undersigned pause"). But the Court determined that Mr. Maharaj could not overcome the state court finding that the State did not have possession of the *Brady* material – hence it was not necessary to discuss all the other evidence of innocence from the 2014 state hearing, or the material developed prior to the federal remand.

There was no other avenue for considering this evidence, since the court ruled once again that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Pet. App. xxii.*, *quoting Herrera v. Collins*, 506 U.S. 390, 400 (1993). The Eleventh Circuit also refused to hear the claim of substantive innocence. *Maharaj v. Sec'y*, *Fla. Dep't of Corrs.* No. 20-

[12] While Mr. Maharaj insists that the evidence of his innocence is overwhelming and sufficient to determine the issues before this Court, there is additional evidence that the government (in one form or another) should have turned over.

14816, at 8 (11th Cir. Mar. 17, 2022). ("we will not expand the COA to include claims about actual innocence").

In order to streamline the issue of substantive innocence, and demonstrate that no other avenue remained open to him, Petitioner sought *certiorari* on what appeared to be a clear error in the lower court's judgment: the mis-application of 28 U.S.C. 2244(b)(3)(A) to bar consideration of the *Brady* issue in his case. This Court denied review, Order Denying Certiorari , *Maharaj v. Dixon*, No. 22-239 (U.S. Oct. 11, 2022), thereby leaving no way for Petitioner to reach the merits of his other constitutional claims. The claim of *Herrera*-innocence is therefore the only way for a court to ensure justice and to hold the principle that clearly innocent individuals have the right not to have to spend their lives in prison for offenses they plainly did not commit.

Here, an innocent 84-year-old man with an exemplary record for business and philanthropy,[13] and no record of criminality, has spent 37 years in prison for murders he did not commit. Half a dozen associates of the Colombian cartel admitted (one might say boasted) that they carried out the murders. The issue of *Herrera*-innocence is thus squarely presented here in a context where it appears it cannot be considered under the rubric of any other constitutional right. Petitioner has nowhere else to turn; his case provides an

[13] To give just one example, earlier proceedings included evidence that, as a self-made millionaire in the UK, he was an early donor to the campaign for justice for Nelson Mandela.

ideal vehicle for this Court to provide urgently-needed clarification of the law.[14]

In the end, if this Court ignores the innocence of an octogenarian who would otherwise die in prison, while the Colombian drug cartel reaps the benefit of this wrongful conviction, then the criminal justice system has become so mired in technicalities that has lost sight of its *raison d'etre*. This Court can, and should, make clear that unambiguous innocence established through probative post-trial evidence should be grounds for *habeas corpus*.

REASONS FOR GRANTING THE PETITION

The proceedings in this case illustrate in stark terms the need for this Court to clarify the scope of the constitutional right for an innocent person to be free from punishment. Petitioner submits that the unique record of this case meets any sensible standard of innocence and that failure to grant *habeas* would work a clear injustice, anathema to the core principles of our Constitutional order.

Hence, Petitioner respectfully requests that this Court *not* remand his case for further factual development – at least not without first setting out the scope of the constitutional right. Rather, this Court should set the case down for plenary review to settle the scope

[14] This case is the perfect vehicle to settle a series of issues in one sitting, since it presents the broadest possible range of issues relevant to a *Herrera*-innocence claim.

of a free-standing innocence issue ("*Herrera*-innocence") once and for all. Cf. *In re Davis,* 557 U.S. 952, 952 (2009) (remanding for further proceedings).[15]

This Court has made clear that existence and scope of a *Herrera*-innocence claim is an open one. *House v. Warden,* 547 U.S. 518, 554–55 (2006) ("We decline to resolve this issue."); *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

Ultimately, though, the true nature of the issue prsented is clear: does the precedent from this Court, including the originalist inquiry underlying *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, (2022), dictate recognition that the Framers expected that the Constitution would be read to protect an innocent person from spending the rest of his or her life in prison? The framework for such analysis involves two types of claim. There are some 'federal' rights that are incorporated into the Due Process Clause and applied in state cases; and then there is a

> second category which is the one in question here comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." And in conducting this

[15] In the event that this Court believes some relief is warranted but does not wish to undertake plenary review as a matter of case management, Petitioner will accept any relief that provides the prospect of release.

> inquiry, we have engaged in a careful analysis of the history of the right at issue.

Id. Slip Op. at 19 (citations and footnote omitted).[16] This is the inquiry that has confused the lower courts due to the lack of guidance from this Court. Here, after removing centuries of procedural barnacles, it is plain that the determination of guilt or innocence based upon objective evidence is at the heart of our history and tradition, at the heart of the common law, and there can be no concept more central to the notion of ordered liberty than this: The deprivation of liberty requires a sound and reliable finding of factual guilt.

* * *

There are few cases from this Court that have sparked more confusion and disquiet in the lower courts than the multiplicity of opinions *Herrera.* As one judge has written:

> "I write separately to address the elephant that I perceive in the corner of this room: actual innocence. *** The Supreme Court has … made statements in *dicta* which at least strongly signal that, under the right circumstances, it might add those capital defendants who are actually innocent to the list of persons who—like

[16] *See also id.*, at 124 (Kavanaugh, J., concurring) ("To be sure, this Court has held that the Constitution protects un-enumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty."). While the Constitution may be "neutral" on the issue of abortion, *id.*, the same cannot be said of convicting the innocent, as the Constitution and its amendments contain a plethora of proxy-provisions that are designed to make this less likely.

> the insane, the mentally retarded, and the very young—are constitutionally ineligible for the death penalty…The Second Circuit has noted the possibility that—in addition to the obvious Eighth Amendment concerns—the continued incarceration of an innocent person raises an "open and significant due process question.""

In re Swearingen, 556 F.3d 344, 350 &n.6 (5th Cir. 2009) (Wiener, J., specially concurring).[17]

This issue is as relevant to the state courts as it is to the federal circuits. *People v. Washington,* 665 N.E.2d 1330, 1335-36 (Ill. 1996) ("It is no criticism to read *Herrera* as a conflicted decision" with "conflicted analysis" from the various justices writing).[18] If there

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[17] See *McKithen v. Brown*, 481 F.3d 89, 91-92 (2d Cir. 2007). See also *Hernandez v. Sheahan*, 455 F.3d 772, 778 (7th Cir. 2006) ("Whether and when a claim of actual innocence (despite a formal conviction) requires more judicial proceedings remains a contentious subject.… But everyone assumes that, to the extent such claims must be entertained, the obligation rests on the judiciary rather than the jailer.")(citations omitted); *Cooper v. Woodford*, 358 F.3d 1117, 1124 (9th Cir. 2004); *In re Dailey*, 949 F.3d 553, 567 (11th Cir. 2020) (Wilson, J., concurring); *In re Byrd*, 297 F.3d 520, 521 (6th Cir. 2002) (Nathaniel Jones, J., dissenting); *Blair v. Delo*, 999 F.2d 1219, 1220 (8th Cir. 1993) (Heaney, J., concurring).

[18] See also *Jenner v. Dooley,* 590 N.W.2d 463, 471 (1999) ("Punishment of the innocent may be the worst of all injustices.")(citing *Herrera*, 506 U.S. at 417); *Ex parte Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002)("The purpose of criminal proceedings is to separate the guilty from the innocent"); *State v. Boots*, 848 P.2d 76, 96 (Or. 1993); *King v. Commonwealth*,, No. 2012–CA–001985–MR, 2014 WL 3547480, at *5 (Ky. Ct. App. July 18, 2014); *People v. Martinez,* 187 N.E.3d 1218, 1240 (Ill.

(footnote continued)

is a constitutional prohibition against punishing the innocent, then that must be enforced by both state and federal courts. Additionally, many states interpret their own constitutional provisions with both eyes firmly on the guidance provided by this Court. Some states have provisions limiting their judges to applying their state constitutions consistently with whatever gloss may be placed on the federal constitution by this Court;[19] other states merely follow the lead of this Court in interpreting their own rights.[20]

Even when it comes to identifying and applying a state constitutional right, the state courts have looked to the various opinions in *Herrera* for guidance. *Montoya v. Ulibarri*, 163 P.3d 476, 485 (2007) ("The variety of standards advanced by the various opinions in *Herrera* is echoed by the states recognizing freestanding claims of actual innocence").[21]

App. 2021); *King v. Com.*, 2014 WL 3547480, at *5 *State ex rel. Amrine v. Roper,* 102 S.W.3d 541, 547 (Mo. 2003).

[19] Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 Hastings Const. Law Quart. 95, 98 (1993) ("the voters have altered the constitution to restrict these "criminal rights" and have taken away from California courts the ability to independently interpret the state's constitution.").

[20] *People v. Caballes,* , 851 N.E.2d 26, 38 (Ill. 2006) (describing the interpretation of the state Bill of Rights in parallel to the federal interpretation as "the lockstep doctrine"); see also *Ex parte Fournier,* 473 S.W.3d 789, 790 (Tex. Crim. App. 2015).

[21] See, e.g., *Moore v. Commonwealth.,* 357 S.W.3d 470, 488 (Ky. 2011) ("[w]hether such a federal right [to be released upon proof of actual innocence] exists is an open question") (citing *Herrera*); *Dewberry v. State,* 941 N.W.2d 1, 6 (Iowa 2019); *Beauclair v. State*, 419 P.3d 1180, 1191 (Kan. 2018); *State v. Pierre,* , 125 So.

(footnote continued)

Unsurprisingly, given this lack of guidance, the lower courts are in well-recognized conflict, which can only be resolved by this Court. *Jones v. Johnson* No. 99–1016, 2000 WL 423438, at *3 (5th Cir. 2000) (acknowledging the conflict among the circuits on the issue of *Herrera*-innocence, but "we must follow absent its reversal by statute, the Supreme Court, or an *en banc* panel of this court").

In Petitioner's case, the Eleventh Circuit reiterated its long-standing position, albeit one that has faced periodic dissents,[22] that there is no free-standing issue of innocence in either capital or non-capital cases. This has become such an unexplained mantra that all discourse on this fundamental issue has been cut off on the subject in the Circuit.[23] The Fifth Circuit maintains the same position, referring to its own "entrenched" view that innocence, standing alone, cannot

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3d 403, 407 (La. 2013); *Williams v. State,* 195 So. 3d 433, 434 (La. 2016); *Dellinger v. State,* 279 S.W.3d 282, 290 n.4 (Tenn. 2009); *Beauclair v. State*, 419 P.3d 1180, 1191 (Kan. 2018); *Gould v. Comm'r of Correction*, 22 A.3d 1196, 1207 (Conn. 2011); *Mitchum v. State*, 834 S.E.2d 65, 68 n.2 (Ga. 2019); *State v. Graggs*, No. 19AP-173, 2019 WL 6041519, at *10 n.4 (Ohio 2019).

[22] *Davis*, 565 F.3d at 829 (Barkett, J., dissenting) ("Consistent with the opinions of five justices in *Herrera,* I believe that the Eighth and Fourteenth Amendments prohibit the execution of an actually innocent individual."); *In re Dailey*, 949 F.3d 553, 567 (11th Cir. 2020) (Wilson, J., concurring).

[23] *Ruth v. Sec'y, Fla. Dep't of Corr.*, No. 19-11153-E, 2019 WL 4860643, at *1 (11th Cir. July 9, 2019) ("Reasonable jurists would not debate the denial of the first claim, regarding actual innocence, because actual innocence does not present a freestanding claim for habeas relief").

justify *habeas* relief.[24] The Tenth Circuit takes a similar view.[25]

As long as 22 years ago, however, the *Jones* panel cited three Circuits that disagreed with the Fifth. The Seventh and Ninth Circuits identified a claim of *Herrera*-innocence as available, but only in capital cases. *Milone v. Camp,* 22 F.3d 693, 699–700 (7th Cir.1994) (noting that "[t]he Supreme Court appears to be willing to hold that it is unconstitutional to execute a 'legally and factually innocent person,' " but stating that this does not apply where a prisoner is not sentenced to death); *Carriger v. Stewart,* 132 F.3d 463, 476 (9th Cir.1997). The Eighth Circuit, however, did not expressly limit the claim to capital cases. *Griffin v. Delo,* 33 F.3d 895, 908 (8th Cir.1994) (suggesting that a claim of actual innocence might be possible, but rejecting the petitioner's showing).

The conflict has only burgeoned as this issue has remain unaddressed by this Court for so many years. *Gibbs v. United States*, 655 F.3d 473, 477-78 (6th Cir.

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[24] *Lucas v. Johnson*, 132 F.3d 1069, 1074 (5th Cir. 1998) (while the court acknowledges the dicta in *Herrera* by Justice O'Connor, this does not change the circuit's "entrenched habeas principle"); *Robison v. Johnson*, 151 F.3d 256, 267 (5th Cir. 1998) (referring to the Fifth Circuit's "entrenched principle"); *McDuff v. Johnson*, No. 98-51022.1998 WL 857876, at *1 (5th Cir. Nov. 17, 1998) ("*Herrera v. Collins*, 506 U.S. 390 (1993) is completely dispositive of his actual innocence claim"); *Kelly v. Cockrell*, 72 F. App'x 67, 73 (5th Cir. 2003). The same is true in federal capital cases. *United States v. Fields*, 761 F.3d 443, 479 (5th Cir. 2014).

[25] *Steele v. Young*, 11 F.3d 1518, 1522 (10th Cir. 1993) ("*Herrera* held that the fundamental miscarriage of justice exception is only available where the constitutional claim is supplemented with a showing of factual innocence.").

2011) ("Without Supreme Court guidance, the Courts of Appeals disagree over whether the actual innocence exception applies to noncapital sentencing cases"); *Milone v. Camp*, 22 F.3d 693, 700 n.5 (7th Cir. 1994) (citing the 4th, 5th & 11th circuits as not recognizing a *Herrera* claim while the 8th & 9th do); *Cal v. Garnett*, 991 F.3d 843, 851 (7th Cir. 2021) (citing conflict); *see also Pettit v. Addison*, 150 F. App'x 923, 926 (10th Cir. 2005) ("there are liberal readings that extend this to non-capital cases"), citing *White v. Keane,* 51 F.Supp.2d 495, 504 (S.D.N.Y.1999).

Meanwhile the Second Circuit has proposed that the *Herrera*-innocence claim should be applied to capital and non-capital cases alike, whether the court is dealing with a federal or a state conviction.[26] The D.C. Circuit would appear to agree,[27] as reflected in a significant opinion by then-Judge Kavanaugh:

> [O}our legal system accommodates post-conviction claims of innocence—including those based on newly discovered evidence—through new trial motions, appeals, *habeas proceedings*, the executive clemency process, and in recent times DNA procedures such as the process that Texas has employed in Bower's case. *See generally Herrera,* 506 U.S. at 411–16.

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[26] *Russo v. United States*, 692 F. App'x 75, 76 (2d Cir. 2017); *Gross v. Graham*, 802 F. App'x 16, 20 (2d Cir. 2020).

[27] *Ibrahim v. United States*, 661 F.3d 1141, 1143 (D.C. Cir. 2011) ("There are theoretically two recognized types of constitutional claims for which newly discovered evidence of actual innocence has been found relevant: "stand-alone" innocence claims associated with *Herrera v. Collins*…and "gateway" innocence claims associated with *Schlup v. Delo*").

Roth v. United States Dep't of Just., 642 F.3d 1161, 1191 (D.C. Cir. 2011) (Kavanaugh, J., concurring & dissenting) (emphasis supplied).

In between are the circuits that read *Herrera* as only recognizing a constitution claim of innocence in capital cases. These include the First, Fourth, Sixth, Seventh and Eighth Circuits.[28] The Ninth Circuit has unequivocally identified a *Herrera*-innocence claim[29]

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[28] *United States v. Sampson*, 486 F.3d 13, 27-28 (1st Cir. 2007) ("We understand *Herrera* to leave open the possibility that, in a particular instance of newly discovered, highly persuasive evidence of innocence, emerging at a time when no state remedy remains available, a federal court might be able to issue a writ of habeas corpus under the Constitution to prohibit execution."); *United States v. MacDonald*, 911 F.3d 723, 798 (4th Cir. 2018) ("the Supreme Court assumed 'that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional'"); *Dixison v. Perry*, No. 16-2265, 2017 WL 4123961, at *2 (6th Cir. Feb. 24, 2017) ("free-standing actual innocence claims are not cognizable in a non-capital habeas corpus proceeding."); *Gomez v. Jaimet*, 350 F.3d 673, 679 n.1 (7th Cir. 2003) ("the concurring opinion of Justices O'Connor and Kennedy makes clear that a majority of justices agree that habeas relief would be warranted upon a truly persuasive showing of actual innocence, at least in a capital case."); *Murray v. Delo*, 34 F.3d 1367, 1375 (8th Cir. 1994) ("It also held that in a capital case, an extremely persuasive demonstration of actual innocence might warrant federal habeas corpus relief if no state avenue existed in which to process the claim.").

[29] *Johnson v. Knowles*, 541 F.3d 933, 935 (9th Cir. 2008) ("*Herrera* claims are constitutional claims in and of themselves.").

which it seems to limit in application to capital cases[30] but curiously has not extended this to a federal conviction.[31] Of course, while release of an innocent capital defendant rather than his or her execution is much to be welcomed, it cannot be analytically correct that an innocent man serving a life sentence should get no relief. Here, Mr. Maharaj had his death sentence reduced to life imprisonment, which may have the perverse effect of depriving him of *Herrera* relief.

Various state courts have joined in this conflict with some adhering firmly to the Eleventh Circuit's view. *Christian v. State*, 106 Haw. 12, *2 n.3 (2004) ("Hawai'i law does not recognize a claim of 'actual innocence.'")(citing *Herrera*); *State v. El-Tabech*, 610 N.W.2d 737, 749 (Neb. 2000) ("there is no recourse currently available under which a prisoner alleging actual innocence is able to bring a claim after the time period has run to bring a motion for new trial") (citing *Herrera*); *Hicks v. State,* No. 03C01-9608-CR-00296, 1998 WL 88422, at *3 (Tenn. Crim. App. Mar. 3, 1998).[32]

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[30] *Cox v. Morgan*, No. 98-35920, 1999 WL 1103347, at *1 (9th Cir. 1999) ("Except for two situations not relevant to Cox's petition [capital cases, and cases where no state remedy is available], a claim of innocence without any allegation that a constitutional violation occurred in the underlying state proceedings is not a ground for federal habeas relief.").

[31] *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) ("Rather, a motion under § 2255 must be based upon an independent constitutional violation"); *United States v. Padilla*, No. 98-35920, 1998 WL 230855, at *2 (9th Cir. 1998).

[32] See also *Osborne v. State*, 110 P.3d 986, 994 (Alaska Ct. App. 2005) ("Several courts have flatly interpreted the *Herrera*

(footnote continued)

Some states have hedged: Delaware has relied on *Herrera* to decree that there is "probably" no independent claim of innocence. *Swan v. State,* 28 A.3d 362, 386 n.60 (Del. 2011) (actual innocence is *likely* not an independent ground for habeas relief).

Meanwhile, jurists in other states have roundly criticized the theoretical underpinnings of the various opinions in *Herrera*. For example, in *People v. Washington*, , 665 N.E.2d 1330 (Ill. 1996), the Illinois Supreme Court suggested:

> "We think that the Court overlooked that a "truly persuasive demonstration of innocence" would, in hindsight, undermine the legal construct precluding a substantive due process analysis. The stronger the claim--the more likely it is that a convicted person is actually innocent--the weaker is the legal construct dictating that the person be viewed as guilty. A 'truly persuasive demonstration of innocence' would effectively reduce the idea to legal fiction."

Id. at 1336. See also *State v. Riofta*, , 209 P.3d 467, 477 (Wash. 2009) (Madsen J) ("Judicial finality is a virtue but a vastly inferior one to actual substantive justice"); *Montoya v. Ulibarri*, 163 P.3d 476, 484 (N.M. 2007) ("[i]t cannot be said that the incarceration of an

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decision to mean that defendants have no federal due process right to present post-conviction evidence of their innocence") (citing cases); *Allen v. Butterworth,* 756 So. 2d 52 (Fla. 2000); *Commonwealth. v. Wright,* 14 N.E.3d 294, 454 n.18 (Mass. 2014); *People v. Brown*, No. 337860, 2019 WL 3386459, at *9 (Mich. Ct. App. July 25, 2019); *Pipkin v. State*, 350 So.3d 1147, 1152-53 (Miss. Ct. App. 2022).

innocent person advances any goal of punishment, and if a prisoner is actually innocent of the crime for which he is incarcerated, the punishment is indeed grossly out of proportion to the severity of the crime."); *Ex parte Tuley*, 109 S.W.3d at 390 ("There are two types of actual innocence claims that may be raised in a collateral attack on a conviction. A bare innocence claim, or *Herrera*-type claim 'involves a substantive claim in which applicant asserts his bare claim of innocence based solely on newly discovered evidence.' The other actual innocence claim, a *Schlup*-type claim, we explained "is a procedural claim in which applicant's claim of innocence does not provide a basis for relief, but is tied to a showing of constitutional error at trial.'") (citations omitted).

Some state courts limit the claim to capital cases. See *In re Lincoln v. Cassady,* 517 S.W.3d 11, 23 (Mo. Ct. App. 2016) ("Until the Supreme Court announces that a freestanding claim of actual innocence is a recognized basis for securing habeas relief … we have no authority to presume that Missouri's habeas jurisprudence permits such a claim in a non-death penalty case.").

No matter where the states land, the issue has provoked sometimes acrimonious debate. *Compare People v. Bull,* 705 N.E.2d 824, 842 (Ill. 1998) (majority opinion) ("Defendant's complaint is simply that the American criminal trial, as the means of determining the guilt or innocence of an accused, is not perfect. However, as imperfect as he describes the system, defendant does not suggest a substitute for this system as the means of determining guilt or innocence. Indeed, in a sense, defendant's protest is unanswerable. Have mistakes been made? Will

mistakes be made? Certainly."); with *id.* at 848 (Harrison, J., dissenting) ("It is no answer to say that we are doing the best we can. If this is the best our state can do, we have no business sending people to their deaths.").

Within all these debates lie various false dichotomies: for example, if we identify a flaw in our system, this means that it should be improved, not ignored on the grounds that life is not perfect.

There is also confusion over where such a right might be located in the Constitution. The D.C. Circuit has looked to the Due Process Clause,[33] as have various states.[34] The Third Circuit seems to draw a distinction between the Due Process claim and a

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[33] *United States v. Clark*, 977 F.3d 1283, 1289 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 1506 (2021) ("The Supreme Court has not squarely precluded a 'due process' habeas claim based on newly discovered evidence probative of actual innocence—notwithstanding the extraordinary showing any such claim may require").

[34] *State v. Love,* 700 N.W.2d 62, 73 n.18 (Wis. 2005) ("Due process and its guarantee of fundamental fairness ensure that a defendant at least have access to the courts and an opportunity to be heard where newly discovered evidence creates a reasonable probability that a different result would be reached at a new trial…"); *Ex parte Elizondo*, 947 S.W.2d 202, 204--05 (Tex. Crim. App. 1996) (deeply divided court relies on *Herrera* to hold that the Due Process Clause forbids the incarceration of the innocent; "At the threshold, we must decide whether the Due Process Clause of the United States Constitution forbids, not just the execution, but the incarceration as well of an innocent person. We need not pause long to answer this question. *** It follows that claims of actual innocence are cognizable by this Court in a postconviction habeas corpus proceeding whether the punishment assessed is death or confinement. In either case, such claims raise issues of federal constitutional magnitude.").

distinct Eighth Amendment claim that the court implies would apply to capital cases.[35] Whether there should be the distinction between a capital or non-capital case is not clear,[36] given that this Court has predicated various claims in non-capital cases on the Eighth Amendment.[37] However, presumably allowing a concededly innocent man to serve 37 years and then die in prison is a question that could reasonably be considered within the ambit of cruel and unusual punishment

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[35] *Goldblum v. Klem*, 510 F.3d 204, 241 n.22 (3d Cir. 2007) ("the "actual innocence" showing a petitioner who has been sentenced to death must make to establish that, absent any other constitutional violation, his execution would violate the Eighth Amendment."). See also *Perrone v. United States*, 889 F.3d 898, 903 (7th Cir. 2018); *Farrar v. People*, 208 P.3d 702, 706 (Colo. 2009)("with the possible exception of an Eighth Amendment limitation on imposing the death penalty notwithstanding a sufficient allegation of actual innocence"), citing *Herrera,* 506 U.S. at 401-02.

[36] Relying on the Eighth Amendment has, in some jurisdictions, led a court to refuse to recognize an innocence claim in non-capital cases. *Reeves v. Nooth*, 432 P.3d 1105, 1113 (Or. Ct. App. 2018) ("to the extent the Court has assumed for the sake of argument that the Eighth Amendment could provide a basis for a freestanding claim of actual innocence, it has only done so in cases in which an innocent person could be executed; it has never employed that same assumption in a noncapital case").

[37] *See, e.g., Miller v. Alabama*, 567 U.S. 460, 469 (2012). At the same time, destroying the very essence of Mr. Maharaj's person-hood by subjecting him to 37 years of punishment for something he did not do is surely equal to the "use of denationalization as a punishment [which] is barred by the Eighth Amendment. *** It is a form of punishment more primitive than torture, for it de-stroys for the individual the political existence that was centuries in the development." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Given the confusion in the lower courts, it is essential that this Court should provide full and proper guidance. At one point, Petitioner's execution was a possibility despite his innocence. Now, it is the rest of his life that is slowly ebbing away. Absent guidance from this Court, other innocent individuals will depend on the vagaries of inconsistent precedents. Therefore, Petitioner respectfully requests that this Court grant plenary review of his case, and resolve the issues for once and for all.

CONCLUSION

The petition for a writ of habeas corpus should issue, this Court should grant plenary review, and order that the writ should issue. See *Ex parte Grossman*, 267 U.S. 87 (1925); *Reynolds v. Cochran*, 365 U.S. 525 (1961).

Respectfully submitted,

April 2023.

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APPENDIX TO PETITION FOR A WRIT OF
HABEAS CORPUS

INDEX TO APPENDIX

APPENDIX A

No. 20-14816

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

KRISHNA MAHARAJ, Petitioner-Appellant, v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, WARDEN, SOUTH FLORIDA RECEPTION CENTER, FLORIDA ATTORNEY GENERAL, Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before JILL PRYOR, LAGOA, and BRASHER, Circuit Judges.

[Filed March 17, 2022]

OPINION OF THE COURT

PER CURIAM:

Krishna Maharaj is a Florida inmate currently serving a life sentence for murder. He appeals the district court's denial of his second or successive federal habeas petition for habeas corpus relief. When Maharaj sought leave to file a second or successive habeas petition, we granted his request as to a *Brady* claim. When he filed his petition, he

raised the authorized claim along with several others outside the scope of our grant: an unauthorized *Brady* subclaim and a freestanding actual innocence claim. The district court allowed him to proceed and denied postconviction relief. Then, the district court issued a certificate of appealability limited to two *Brady*-related issues. On appeal, in addition to litigating the issues in the COA, Maharaj asks us to expand the scope of the COA to include claims for actual innocence and cumulative error. Upon consideration, we affirm in part the district court's denial of Maharaj's *Brady* claim and vacate and remand in part for the district court to dismiss the unauthorized *Brady* subclaim for lack of jurisdiction. We also deny Maharaj's request to expand the COA to include claims for factual innocence and cumulative error, and we vacate and remand to the district court with instructions to dismiss these claims for lack of jurisdiction.

I.

When Maharaj requested leave to file a second or successive habeas petition, we granted him leave to raise a *Brady* claim based on evidence that Jamie Vallejos Mejia, an alleged cartel associate, was under investigation for money laundering at the time of the murders, and on the following material that allegedly would have derived from that evidence: (i) testimony from a former pilot for a drug cartel, who testified in state court under the pseudonym "John Brown"; (ii) testimony from Jorge Maya, who implicated the cartel in the subject murders; (iii) an affidavit from Jhon Jairo Velasquez Vasquez, also known as "Popeye," who may have implicated the cartel in the

murders; and (iv) proffered testimony from an anonymous "Witness A," who would provide evidence of a relevant conversation between two alleged cartel members, Juan Lopez and Jhon Henry Millan. Maharaj sought, but did not receive authorization, to bring a sub-claim based on testimony of a CIA informant, Baruch Vega.

Maharaj filed a second or successive § 2254 petition in the district court and proffered this evidence in support of his theory that the drug cartel committed the murders for which he was convicted. The district court denied relief, concluding that the prosecution team did not possess information relating to an investigation into Mejia. Because there was no "possessed and suppressed evidence to bootstrap" the other materials to, there was no *Brady* violation. The court nonetheless issued a COA on two issues: whether the Mejia indictment and/or the information from Baruch Vega could be imputed to the prosecution for purposes of establishing possession and suppression by the prosecution under *Brady*; and (2) if so, whether this information would have changed the outcome of the verdict in light of the deference to be afforded under AEDPA. Maharaj appealed.

II.

A.

We are obligated as a threshold matter to inquire into our own subject matter jurisdiction *sua sponte*, including the jurisdiction of the district court in actions we review. *Kirkland v. Midland Mortg. Co.*,

243 F.3d 1277, 1279–80 (11th Cir. 2001); *see also Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012) (holding that a defective COA does not deprive an appellate court of jurisdiction). We review *de novo* whether the district court had jurisdiction over a habeas petition. *Holland v. Sec'y, Fla. Dep't of Corr.*, 941 F.3d 1285, 1287 (11th Cir. 2019).

A state prisoner who wishes to file a second or successive habeas corpus petition must file a motion with the court of appeals requesting an order authorizing the district court to consider such a petition. *See* 28 U.S.C. § 2244(b)(3)(A). If a petitioner does not receive authorization to file a second or successive petition, the district court must dismiss it for lack of jurisdiction. *See Burton v. Stewart*, 549 U.S. 147, 153 (2007); *cf. Ross v. Moore*, 246 F.3d 1299, 1300 (11th Cir. 2001) (vacating the district court's order granting a COA certifying a constitutional claim after it had dismissed the underlying § 2254 petition as time-barred under the AEDPA); *see also Magwood v. Patterson*, 561 U.S. 320, 338–39 (2010) (noting that a district court should dismiss without prejudice, not deny on the merits, an unauthorized second or successive application challenging the movant's sentence).

Having *sua sponte* considered our jurisdiction over certain of Maharaj's claims, we conclude that we cannot review the merits of Maharaj's *Brady* claim as it relates to Vega's testimony. The district court did not have jurisdiction to consider arguments outside the scope of our grant of leave to file a successive habeas petition. Because we never granted Maharaj leave to raise a sub-claim based on the testimony of

Vega, the district court lacked jurisdiction to consider it at all, much less certify it for appeal. Accordingly, it is not properly before us now.

B.

We turn now to the claims that we authorized Maharaj to file. We conclude that Maharaj has not established that the district court erred in finding that the state court did not unreasonably apply *Brady* or make unreasonable findings of fact.

A petitioner is permitted federal habeas relief for a claim adjudicated on the merits in state court if the state court adjudication was "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court," or "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). A state court's fact finding is presumed correct unless rebutted by clear and convincing evidence. *Id.* § 2254(e)(1). A state prisoner seeking federal habeas relief "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter,* 562 U.S. 86, 103 (2011). Even if the federal court concludes that the state court applied federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 694 (2002).

To prevail under *Brady*, a petitioner must show that the prosecution suppressed evidence favorable to the

defense, either willfully or inadvertently, and that the suppression of the evidence prejudiced the defense. *Rimmer v. Sec'y, Fla. Dep't of Corr.*, 876 F.3d 1039, 1054 (11th Cir. 2017). When the defendant has "equal access" to the evidence disclosure is not required. *Maharaj I*, 432 F.3d at 1315 n.4.

Maharaj's *Brady* claim relies on his assertion that the state should have disclosed evidence that Mejia was being investigated at the time of the murders. But Maharaj cannot establish that the state suppressed this evidence under *Brady* for two reasons. First, Maharaj had "equal access" to public records of the indictment such that disclosure of the indictment itself was not required. *Id.* Second, at the time he was indicted for money laundering in another jurisdiction, the state did not consider Mejia a suspect in the murder investigation. After an evidentiary hearing, the state postconviction court found as a matter of fact that the state lacked actual knowledge or constructive knowledge of the investigation into Mejia. We cannot say that fact-finding was unreasonable. Under our case law, the state was under no obligation to embark on a fishing expedition into Mejia across jurisdictional lines. *See United States v. Naranjo*, 634 F.3d 1198, 1212 (11th Cir. 2011). Because Maharaj cannot establish suppression under *Brady*, we need not address materiality, including the other materials that Maharaj asserted were derivative of the Mejia material.

C.

In his brief, Maharaj requests that we expand the COA to include separate issues of actual innocence and cumulative error. Although we have not established a strict rule rejecting all improperly formed requests for expansion of the COA, parties generally must make such requests by filing the appropriate motion. *See Dell v. United States*, 710 F.3d 1267, 1272 (11th Cir. 2013). Such a motion must be brought "promptly, well before the opening brief is due," and "[a]rguments in a brief addressing issues not covered in the [COA], . . . will not be considered as a timely application for expansion of the certificate; those issues simply will not be reviewed." *Tompkins v. Moore*, 193 F.3d 1327, 1332 (11th Cir. 1999). A petitioner granted a COA on one issue may not "simply brief other issues as he desires in an attempt to force both the Court and his opponent to address them." *Dell,* 710 F.3d at 1272.

We deny Maharaj's construed motion to expand the COA for two reasons. First, as discussed above, we granted him leave to file a second or successive habeas motion only as to a *Brady* claim, so the district court plainly lacked jurisdiction to consider his proposed claims of actual innocence or cumulative error. *See Burton*, 549 U.S. at 153. Second, Maharaj, who is counseled, waited until briefing to request that we expand the COA, which we have expressly warned against. *See Tompkins*, 193 F.3d at 1332. In exceptional cases, we may *sua sponte* expand the COA to include issues that reasonable jurists would find debatable. *Mays v. United States*, 817 F.3d 728, 733 (11th Cir. 2016). But no such circumstances exist here. In short, even assuming we could do so, we decline to retroactively expand our order granting

Maharaj leave to a file a successive petition to include these claims and expand the district court's COA to include them.

III.

Because a portion of the district court's COA falls outside of our authorization to file a second or successive habeas petition, we lack jurisdiction over that sub-claim. As to the portions of the COA over which we have jurisdiction, we affirm the district court's denial of relief. Finally, we will not expand the COA to include claims about actual innocence and cumulative error that plainly fall outside our order granting leave to file a successive petition. Accordingly, we deny Maharaj's construed motion to expand the COA, we affirm in part, and we vacate in part the order granting a COA and remand his case to the district court with instructions to dismiss the remainder of the appeal for lack of jurisdiction, consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART AND REMANDED WITH INSTRUCTIONS TO DISMISS FOR LACK OF JURISDICTION; CONSTRUED MOTION TO EXPAND THE COA DENIED.

APPENDIX B

No. 17-cv-21965

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

KRISHNA MAHARAJ, Petitioner,

v.

JULIE JONES, et al., Respondents.

[Filed November 30, 2020]

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon the Report and Recommendation ("R&R") of Magistrate Judge Otazo-Reyes, recommending that Petitioner's § 2254 habeas corpus petition be denied. [ECF No. 127]. Section 636(b)(1) of the Federal Magistrate Act requires a *de novo* review of those parts of the R&R to which an objection is made. 28 U.S.C. § 636(b)(1); *United States v. Raddatz*, 447 U.S. 667, 673 (1980).

Having conducted a *de novo* review of the entire record, including the issues presented in Petitioner's Objections, [ECF No. 128], Magistrate Judge Otazo-Reyes's R&R is affirmed and adopted. The state court's disposition of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established federal law; nor was its decision based on an unreasonable determination of the facts in light of

the evidence. The new evidence provided by Petitioner is insufficient to overcome this finding.

I. Background

This case has garnered over thirty years of litigation. The facts of this case have been laid out at length during the course of those thirty years—at both the state and federal level. At issue in the instant Petition is whether Petitioner's newly discovered evidence—cumulated with the facts raised in his previous habeas claims—is sufficient to warrant relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

On October 21, 1987, Petitioner Krishna Maharaj was convicted of two counts of first-degree murder, two counts of kidnaping, and the unlawful possession of a firearm. The convictions arose from the shooting deaths of Derrick and Duane Moo Young, who were found at the Dupont Plaza Hotel in Miami, Florida on October 16, 1986. According to the testimony presented at trial, Maharaj owned and operated the *Caribbean Times*, a newspaper that catered to the West Indian Community. The *Caribbean Echo*, another local newspaper, was owned by Eslee Carberry. Maharaj approached Carberry to pitch a story about how his neighbor Derrick Moo Young had stolen money from him. After providing Carberry documents that purported to corroborate his accusations, Maharaj paid the *Caribbean Echo* a $400 "sponsorship fee" to publish the article.

After the article was published, Derrick Moo Young presented the *Caribbean Echo* with his version of the

story, pointing to an ongoing civil lawsuit Moo Young had filed against Maharaj. Subsequently, the *Caribbean Echo* published a series of articles describing Maharaj's alleged involvement in an illegal scam to take millions of dollars out of Trinidad. Maharaj, however, claimed that Moo Young was committing fraud and extortion against him and his family, including the alleged extortion of $160,000 from Maharaj's relatives in Trinidad.

Neville Butler, the State's primary trial witness, was previously employed by the *Echo* before writing several articles for the *Caribbean Times* under various pennames. Butler testified at trial that Maharaj informed him that Carberry and Moo Young were attempting to extort money from Maharaj's relatives in Trinidad in exchange for suppressing additional unflattering stories. Butler further testified that Maharaj asked him to lure Derrick Moo Young to a meeting in order to (1) extract a confession from Moo Young that he was actually behind the extortion and bribery; (2) require Moo Young to write two checks to repay him for the fraud; and (3) cause Butler to go to a bank with the checks and certify them, after which Maharaj would allow Moo Young to leave.

The meeting was set for October 16, 1986, under the pretext that Moo Young, who was involved in the import/export business, would be meeting with Eddie Dames and Prince Ellis of the Bahamas to discuss the purchase of goods for their catering business. Butler arranged for the meeting to be held in Dames's room at the Dupont Plaza Hotel. Moo Young

was never informed that Maharaj would be in attendance.

When Derrick Moo Young arrived at the Dupont, he had unexpectedly brought his twenty-three-year old son, Duane Moo Young. When the Moo Youngs entered the room, Maharaj emerged from behind the door with a gun in his right hand and a pillow in his left. An argument ensued, and Maharaj shot Derrick Moo Young in the leg. Butler testified that Maharaj then instructed him to tie the Moo Youngs up, but before he could do so, Derrick Moo Young lunged at Maharaj, who again shot the elder Moo Young three or four more times. Maharaj then turned his attention toward Duane Moo Young, who was loosely tied to a chair with a cord from an immersion heater. While Maharaj questioned Duane about the money, Derrick Moo Young managed to open the door to the hallway and attempted to crawl outside. Maharaj shot Derrick Moo Young again and dragged him back inside the room by his ankles.

Maharaj took Duane Moo Young upstairs for further questioning, attempting to verify what the Moo Youngs had done with the money allegedly extorted from Maharaj's relatives in Trinidad. Soon thereafter, a hotel security guard shouted from outside the room that he noticed blood in the hallway and inquired whether everyone was alright. Maharaj apparently moved toward the door and verified that things were fine. After several minutes, Maharaj poked his head into the hallway and appeared to tell someone that everyone was fine. After Maharaj returned upstairs to question Duane once more, Butler testified that he heard a single gunshot.

Maharaj then came downstairs alone and they both left room 1215.

Butler testified that he and Maharaj waited in the car in front of the hotel for three hours for Dames's return. Maharaj promised Butler that, in exchange for his silence, he would provide Butler a job at the *Caribbean Times*, a down payment for Butler's home, and a car. Once Dames arrived, Butler exited the vehicle and left the scene. Later that day, Maharaj contacted Butler and asked to meet at a Denny's restaurant near the Miami Airport to coordinate their stories. Butler testified that before meeting with Maharaj, he met with Dames and Ellis and told them what happened. Dames and Ellis had already given statements to police investigators and encouraged Butler to contact the police. Butler then called the lead investigator, Miami Police Detective John Buhrmaster, and explained what had transpired. Butler and Buhrmaster arrived at the Denny's together, where Maharaj was arrested for the murders.

The State presented other witnesses who testified at trial to Maharaj's motive and prior acts that were consistent with the murders at the Dupont Plaza Hotel. For example, Tino Geddes, a journalist at the *Caribbean Echo*, and Carberry, testified about Maharaj's payment to Carberry to publish unfavorable articles about Derrick Moo Young. Geddes also testified that Maharaj had previously met Geddes at the Dupont Plaza Hotel with a handgun and asked Geddes to lure Carberry and Derrick Moo Young to the hotel. According to Geddes,

Maharaj purchased exotic weapons and had attempted to harm Carberry on several occasions.

Additionally, the State presented corroborating physical evidence and testimony from hotel staff as to the blood outside of room 1215, the "Do Not Disturb" sign that was later found with Maharaj's fingerprints on it, and the eleven additional fingerprints found inside the room that matched Maharaj's. The State also presented evidence linking Maharaj to a Smith & Wesson model 39, nine-millimeter pistol—the type of gun a firearms expert testified was used in the Moo Young murders.

The jury found Maharaj guilty on all counts. His convictions were affirmed, and he was denied state post-conviction relief on the guilt phase of his case.[1] Maharaj then petitioned for federal habeas relief and was again denied in both the district court and the Eleventh Circuit Court of Appeals. *See Maharaj, v. Sec'y for Dep't of Corrs.*, 432 F.3d 1292 (11th Cir. 2005).

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[1] Maharaj's death sentence was overturned and he was subsequently sentenced to life in prison.

As relevant to Maharaj's instant successive petition, Judge Huck found in a lengthy and comprehensive order that Maharaj's *Brady* claims were insufficient to warrant habeas relief. *See Maharaj v. Moore*, No. 02-22240-HUCK/TURNOFF, ECF No. 54 (S.D. Fla. Aug. 31, 2004). The alleged *Brady* evidence at issue before Judge Huck included: (1) a transcript of Neville Butler's statements during a polygraph examination conducted by the State; (2) the contents of the Moo Youngs' briefcase, including their passports; and (3) information concerning the Moo Youngs' life insurance policies. *Id.* at 17. Though Judge Huck noted that the evidence produced may have afforded Maharaj "perhaps a better developed theory of defense," he nonetheless found that Maharaj did not "provide[] sufficient evidence... to undermine the verdict of the jury." *Id.* at 6. Judge Huck further found that Maharaj could not establish a constitutional violation under *Brady* to form the basis for relief under the AEDPA. *Id.* at 6, 17–25.

This finding was upheld by the Eleventh Circuit. As to the transcript of Butler's polygraph examination, the Eleventh Circuit agreed that the Florida Supreme Court's analysis, under both *Brady* and *Giglio*, was neither contrary to nor an unreasonable application of clearly established federal law. Noting that Butler was thoroughly and vigorously cross-examined about the inconsistencies in his accounts of the murders, and that Maharaj's counsel indeed elicited testimony from Butler that he had lied under oath, the panel found that "even if Maharaj had established that Butler's testimony was false (which

he did not), the falsehood was not material." *Maharaj*, 432 F.3d at 1314. As such, the Butler polygraph was insufficient to support a *Brady* claim.

Regarding Maharaj's second piece of evidence—the contents of the Moo Youngs' briefcase—the Eleventh Circuit deemed such evidence insufficient to support a *Brady* violation for two reasons: (1) "the briefcase and its documents were not suppressed by the State because Petitioner knew of their existence and had the power to compel their return from the Moo Young family by subpoena," and (2) "the information was not material." *Id.* at 1315. Accordingly, the Court found that the Florida Supreme Court's conclusions regarding the briefcase was neither contrary to nor an unreasonable application of clearly established federal law. *Id.*

The Court similarly rejected Maharaj's reliance on the Moo Youngs' life insurance policies as the basis for his *Brady* claims, agreeing with the Florida Supreme Court that the policies were not exculpatory nor would the disclosure of the policies "have put the case in so different a light as to undermine confidence in the verdict." *Id.* at 1316–17. The Court emphasized that Maharaj's arguments that the life insurance policies indicated shady dealings on behalf of the Moo Youngs were "even more speculative than his argument concerning the other contents of the briefcase." *Id.* Viewing the evidence cumulatively, the Eleventh Circuit determined that "there [was] no reasonable probability, had all of the items been disclosed to the defense, the result of the proceedings would have been any different." *Id.* at 1317.

In 2012, Maharaj filed a second motion for post-conviction relief pursuant to Rule 3.850, which was denied at the trial level and affirmed on appeal. *See* ECF No. 38, Ex. 1–9; *Maharaj v. State*, No. 3D15-321 (Fla. 3d DCA July 31, 2016). Maharaj's *Brady* claims were specifically dismissed by the state court judge as unavailing. *See* Order Def.'s Mot. Post-Conviction Relief, No. F86-030610 (Fla. Cir. Ct. Jan. 5, 2015), ECF No. 38-3 ("2012 Rule 3.850 Order").

Maharaj advanced three *Brady* claims. *Id.* First, he alleged that the State failed to disclose the indictment of Jaime Vallejo Mejia, the man staying in the room across the hall from the murder scene who had alleged ties to the cartel. *Id.* Mejia was indicted for money laundering in the Western District of Oklahoma approximately five weeks prior to Maharaj's trial. *Id.* Second, Maharaj alleged that "DEA special agent Kimberly Abernathy made a statement in a memorandum document with the Department of Business Regulation that Mr. Mejia was arrested on the federal indictment for laundering money on behalf of Colombian drug smugglers." *Id.* Finally, Maharaj alleged that the testimony of Baruch Vega, a former CIA informant, was in the constructive possession of the State and was therefore withheld in violation of *Brady*. *Id.* In all, Maharaj—as he does today—purports that this allegedly withheld evidence supports his innocence based on the theory that Mejia conducted the murders on behalf of Pablo Escobar and the Colombian cartel.

The state court disagreed, holding not only that Maharaj "failed to meet his burden to demonstrate

that the State willfully or inadvertently suppressed favorable material evidence," but that even if such evidence had been disclosed, "the jury verdict would have been the same." *Id.*

Before denying relief, the trial court also conducted an evidentiary hearing on Maharaj's claims of newly discovered evidence based upon witness testimony that Escobar and the Colombian cartel were responsible for the murders.

The evidence presented at the hearing included: (1) testimony and documentation from Brenton Ver Ploeg, an attorney representing the life insurance company in a lawsuit filed by the Moo Young family; (2) testimony from Jorge Maya that the Moo Young murders were actually ordered by Pablo Escobar and carried out by Manuel Guillermo Zuluaga Salazar; (3) a two-minute television interview of Jhon Jairo Velasquez Vasquez conducted by BBC; (4) testimony from Baruch Vega, a former CIA informant, who testified about his relationship with Jaime Vallejo Mejia; (5) testimony from John Brown, a former pilot for the cartel; (6) testimony from Michael Flynn, whose claim that the Miami Police Department framed Maharaj was found to be "one of the most obvious self-serving endeavors [the state court had] seen in ten years on the Circuit Court bench"; (7) testimony from Prince Ellis; (8) testimony from Henry Cuervo, who testified as an expert in investigating Colombian drug cartels in South Florida in the 1980s; and (9) additional miscellaneous evidence related to other witnesses and the Moo Youngs. *Id.*

The state court, having "fully considered all the newly discovered evidence which would be admissible," ultimately found that the new evidence presented at the hearing was insufficient "to give rise to a reasonable doubt as to Mr. Maharaj's guilt." *Id.* The court specifically took issue with the "inherent credibility concerns and admissibility issues surrounding the newly discovered evidence...." *Id.* Accordingly, despite finding certain testimony presented at the hearing probative, the state court denied relief. This decision was upheld on appeal.

Pursuant to the AEDPA, Maharaj sought leave from the Eleventh Circuit to file the instant successive federal habeas petition. *In re Maharaj*, No. 17-10452F (11th Cir. Mar. 18, 2017), ECF No. 63-1 at 5 ("11th COA Order Permitting Successive Petition"). The Eleventh Circuit panel granted Maharaj's application with respect to certain *Brady* claims. *Id.*

II. Eleventh Circuit Scope of Successive Petition

In his application to the Eleventh Circuit, Maharaj sought permission to raise seven distinct claims in a second or successive petition:

> (1) he is actually innocent; (2) the government suppressed favorable evidence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) the government knowingly presented perjured testimony at trial, in violation of *Giglio v. United States*, 405 U.S. 150 (1972); (4) his trial counsel was ineffective; (5) he was intentionally framed by law enforcement officers; (6) his post-conviction counsel was

> ineffective; and (7) cumulative error in his prosecution violated his fundamental rights.

Id. at 2.[2] The Eleventh Circuit, however, only granted leave as to "Claims 2(c)–(f),"—i.e., Maharaj's *Brady* claims. *Id.* at 2–3 ("Because we conclude that Mr. Maharaj has made a *prima facie* showing that his subclaims 2(c) through (f) satisfy § 2244(b)(2)(B), we grant his request for authorization to file a second or successive habeas petition in the district court.").

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[2] The Court noted that although Maharaj indicated in his application that he wished to raise a single claim, his proposed habeas petition actually set forth seven claims. *See* 11th COA Order Permitting Successive Petition, ECF No. 63-1 at 2 n.1.

In Claims 2(c)–(f), Maharaj "alleges that the State suppressed materials or information from five individuals who could testify that a cartel hit man actually committed the murders." *Id.* at 3. Specifically, the alleged *Brady* evidence includes (1) testimony from John Brown; (2) a statement from Jorge Maya, an "enforcer" for the cartel, that Escobar in fact ordered the murders; (3) an affidavit from Jhon Jairo Velasquez Vasquez to the same effect; and (4) testimony from an additional witness insisting on anonymity who portends to provide additional evidence that the cartel carried out the hit and not Maharaj. *Id.* at 4–5.

Accordingly, this Court's review is limited to the foregoing claims—which, as it pertains to Maharaj's Petition, is listed as "Ground One: Violations of Brady v. Maryland." *See* ECF No. 29; *see also In re Hill*, 715 F.3d 284, 296 (11th Cir. 2013). Therefore, as recommended in the R&R, Grounds Two through Four of the Petition will not be addressed for lack of jurisdiction. *See* ECF No. 127 at 5.

With this in mind, the Court must also dispel Petitioner's notion—or insistence, rather— that the Eleventh Circuit's permission to file a second or successive petition constitutes a finding that no reasonable jurist could find Petitioner guilty—i.e., that its permission amounts to a declaration of Petitioner's innocence. This is not so.

For example, the Eleventh Circuit stated:

> Mr. Maharaj has sufficiently alleged a *Brady* violation: he learned in 2014 that Mejia—an individual who resided in close proximity to the murder scene and who apparently was involved with the cartel—was under criminal investigation of the Moo Young murders, a fact that the prosecution or the police knew but did not disclose.

11th COA Order Permitting Successive Petition, ECF No. 63-1 at 5. This statement, however, merely means that Maharaj has made a threshold showing; it is not a finding that a *Brady* violation indeed occurred. The Eleventh Circuit highlighted this point, stating "'[a]s usual nothing about our ruling here binds the district court, which must decide every aspect of the case fresh, or in the legal vernacular, *de novo*.'" *Id.* at 6 (quoting *In re Chance*, 831 F.3d 335, 1338 (11th Cir. 2016)). This includes—as the Eleventh Circuit clarified—"the merits" of Maharaj's *Brady* claims. *Id.* at 7.

Now that the boundaries of this Court's review are set, the Court will do so.

III. AEDPA Standard

The AEDPA circumscribed a federal court's role in reviewing state prisoner applications "in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

In reviewing the decisions of the Florida Supreme Court, the Court is governed by the terms of AEDPA, which provide that the Court may grant a § 2254 writ of habeas corpus only if (1) the state decision 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) the state decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)– (2).

The phrase "clearly established Federal law," as used in § 2254(d)(1), "encompasses only the holdings of the Supreme Court of the United States." *Maharaj*, 432 F.3d at 1308. A state court decision is ***contrary to*** clearly established federal law if either "(1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case." *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001) (emphasis added). An "***unreasonable application"*** of clearly established federal law may occur if the state court "identifies the correct legal rule from Supreme Court case law but unreasonably applies this rule to the facts of the petitioner's case." *Id.* (emphasis added).

Differing slightly from its (d)(1) counterpart, § 2254(d)(2) provides an additional basis for relief where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). "A state court's

determination of the facts, however, is entitled to substantial deference." *Maharaj*, 432 F.3d at 1309; *see* 28 U.S.C. § 2254(e)(1) (noting that "a determination of a factual issue made by a State court shall be presumed to be correct" and the habeas "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

Indeed, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. 312, 316 (2015). In sum, "AEDPA erects a formidable barrier to federal habeas relief or prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 1 (2013).

IV. *Brady* Standard

As discussed above, Petitioner's claims are limited by the Eleventh Circuit's Order permitting a second or successive petition to the alleged *Brady* violations enunciated in his subclaims 2(c)–(f)—here, "Ground One." [ECF No. 29].

Brady violations are defined as "the suppression by the prosecution of evidence favorable to an accused...when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The duty to disclose, however, is applicable even in the absence of a request by the defendant and includes both exculpatory evidence

and impeachment material. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999).

There are four elements required to establish a *Brady* violation: (1) the State possessed evidence favorable[3] to the defense; (2) the defendant did not possess the evidence and could not obtain it with any reasonable diligence; (3) the prosecution suppressed the evidence, either willfully or inadvertently; and (4) a reasonable probability exists that the outcome of the proceeding would have been different had the evidence been disclosed to the defense—i.e., the evidence was "material". *See Moon v. Head*, 285 F.3d 1301, 1308 (11th Cir. 2002).

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[3] Evidence is considered favorable to the accused if it is either exculpatory or because it is impeaching. *See Strickler*, 527 U.S. at 281–82.

In sum:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (internal quotation marks and citations omitted).

V. Analysis

With these principles in mind, the Court reviews the merits of Petitioner's *Brady* claims. Today, Maharaj presents new evidence that he alleges establishes both his innocence and the factual predicate for a *Brady* violation when viewed together with the evidence previously rejected. As discussed, the new evidence includes (1) testimony from John Brown; (2) a statement from Jorge Maya, an "enforcer" for the cartel, that Escobar in fact ordered the murders; (3) an affidavit from Jhon Jairo Velasquez Vasquez to the same effect; and (4) testimony from an additional witness insisting on anonymity who portends to provide additional evidence that the cartel carried out the hit and not Maharaj. *See* 11th COA Order Permitting Successive Petition at 4–5. Like its predecessors, the Court notes at the outset that, upon review of the Petition and the evidence set forth therein, were this case to be tried again today, Maharaj would undoubtedly have a stronger theory of defense to present to the jury. This, however, is insufficient to warrant relief under the AEDPA.

Maharaj can neither show that this evidence constitutes *Brady* material nor can he establish that, had the evidence been disclosed, the result of his trial would have been different.

A. *Actual Innocence Issue*

"The guilt or innocence determination in state criminal trials is 'a decisive and portentous event.'" *Herrera v. Collins*, 506 U.S. 390, 401 (1993) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). Accordingly, the Supreme Court has determined that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. "This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.*

As such, despite his contentions to the contrary and despite the capacious amount of allegedly exculpatory evidence presented in the Petition, Maharaj is only entitled to habeas relief if he can establish that a *Brady* violation occurred. The Court finds that he cannot.

B. *The Prosecution Team Did Not Possess or Suppress the Alleged Brady Material*

The state court held that Maharaj "failed to satisfy his burden to demonstrate that the State willfully or inadvertently suppressed" the alleged *Brady*

material. *See* 2012 Rule 3.850 Order, ECF No. 38-3 at 3. The state court specifically found that "there is no evidence in this record to even suggest the State had any knowledge of the claimed *Brady* evidence," and likewise "reject[ed] any suggestion that the claimed *Brady* evidence was in the constructive possession of the State." *Id.* This finding is neither contrary to nor an unreasonable application of clearly established federal law. Nor was it an unreasonable determination of the facts in light of the evidence.

There are two pieces of material that could be argued to have been in the possession of the prosecution—the indictment of Jaime Vallejo Mejia that occurred approximately five weeks prior to Maharaj's trial, and testimony from Baruch Vega, who was an informant for the CIA at the time of the murders. The testimony from John Brown, Jorge Maya, Jhon Jairo Velasquez Vasquez, and anonymous Witness "A" could not be construed to be in the prosecution's possession—constructively or otherwise. Like much of the additional evidence presented in this case, this evidence could bolster Maharaj's materiality argument in that it tends to reinforce his assertion that his trial would have turned out differently. Maharaj may have had significantly more evidence to strengthen his theory of defense that a Colombian man carried out the murders on behalf of the cartel. Nonetheless, without any ***possessed and suppressed evidence*** to bootstrap this testimony to, the testimony is insufficient on its own to assert a *Brady* violation.

"*Brady* and its progeny apply only to evidence possessed by the prosecution team, which includes both investigative and prosecutorial personnel," as

well as "anyone over whom [the prosecutor] has authority." *Kelley v. Sec. for Dep't of Corr.*, 377 F.3d 1317, 1354 (11th Cir. 2004); *Moon*, 285 F.3d at 1309. "[T]he prosecution team generally is considered a unitary entity, and favorable information possessed by the police but unknown to the prosecutor is nonetheless subject to the *Brady* test." *Breedlove v. Moore*, 279 F.3d 952, 961 (11th Cir. 2002). The Eleventh Circuit has made clear, however, that "[k]knowledge of information that state investigators obtain is not imputed for *Brady* purposes to federal investigators who conduct a separate investigation when the separate investigative teams do not collaborate extensively." *United States v. Naranjo*, 634 F.3d 1198, 1212 (11th Cir. 2011); *see also Moon*, 285 F.3d at 1310 (holding that knowledge obtained by investigators in one state is not imputed to investigators that conduct a separate investigation in another state).

1. Indictment of Jaime Vallejo Mejia

As previously mentioned, Jaime Vallejo Mejia was a Colombian man staying in the room across from room 1215 in the Dupont Plaza hotel at the time of the murders. On September 3, 1987—some five weeks before Maharaj's trial and almost a year after the murders—Mejia was indicted in the United States District Court for the Western District of Oklahoma for money laundering. *See* ECF No. 47-3 at 6. It is Maharaj's contention that Mejia was engaged in currency crimes on behalf of the Colombian cartel and was either the murderer himself or was otherwise involved in the double homicide. Maharaj argues that the State knew of or should have been

aware of Mejia's federal indictment in Oklahoma, and that the prosecutorial team either willingly failed to disclose this information or failed to conduct a sufficient investigation of Mejia. This theory is the gist of Maharaj's claim.

In support of such claim, Maharaj offers the testimony of Agent Henry Cuervo, who was a retired Drug Enforcement Administration ("DEA") agent working in Miami from about 1986 to 2002. The R&R outlines Agent Cuervo's testimony at length, but in sum, Agent Cuervo opined as an expert that certain characteristics of Mejia, including the fact that he was from Antioquia, Colombia, had recently traveled from Aruba, and claimed to be in insurance sales, all should have raised red flags to the investigative team at the time of the murders. Agent Cuervo also testified that based on the indictment, Mejia was likely being investigated by the DEA as early as 1985 and potentially earlier. Agent Cuervo had also reached out to DEA Agent Kimberly Abernathy, who informed him that the DEA had been investigating Mejia as part of the 1983–84 Operation Greenback in South Florida. In all, Agent Cuervo testified as to the numerous leads that could have—and in his opinion, should have—been pursued.

Maharaj also presented a memorandum from the Florida Department of Business Regulations, indicating that an agent for the department was able to determine that Mejia—who was then applying for a liquor license—was being looked into by the DEA. This document is also offered to "illustrat[e] how Det[ective] Buhrmaster would have easily found this"

information had he performed an adequate investigation. *See* ECF No. 128 at 3.

2. Testimony from Baruch Vega

Baruch Vega worked as an informant for the CIA in South America and the United States, where he was also introduced to the DEA and other government agencies. Vega's testimony is also outlined at length in the R&R but is summarized as follows.

In the mid-1980's, Vega worked with a federal task force known as CENTAC-26, consisting of personnel from Miami and Miami-Dade police, the DEA, and the FBI. Vega testified that he reported to his supervisory agents consistently from 1978 to 2000, and that he was confident he reported what he knew at the time of the murders. Vega acknowledged that he had a friendship with Mejia and knew Mejia to be highly involved in money laundering for various cartels. Vega testified that Mejia used an individual known as "El Chino Mau" to launder money and that Mejia stated to him that the cartel "needed to kill this son of a bitch crook, Chinese crock [sic]" for stealing from Pablo Escobar. Vega asserts that he reported this admission to his handlers who were allegedly conducting a "very advanced" investigation. According to Vega, he knew "El Chino Mau" to be Derrick Moo Young. He also testified, however, that he knew only of the name "El Chino Mau" and that the FBI's posting of pictures on the wall identified "El Chino Mau" to him as Derrick Moo Young. Indeed, though asserting that he had met Moo Young in the past, Vega was unable to identify him in a picture the night before his deposition.

The state court considered Vega's testimony both "very interesting" and "probative." *See* 2012 Rule 3.850 Order, ECF No. 38-3 at 6–7. Nonetheless, the court found that his testimony was "profoundly weakened by his inability to identify a photograph of Mr. Mejia or Derrick Moo Young," was "fraught with inadmissible hearsay[,] and [was] woefully insufficient to establish a reasonable probability of acquittal on retrial." *Id.* at 7. Accordingly, the materiality of Vega's testimony was considered "questionable." *Id.*

3. Insufficient Evidence to Impute to Prosecutorial Team

The state court's determination that Maharaj did not meet his burden to impute this evidence to the prosecutorial team is not unreasonable.

John Kastrenakes, former Circuit Court Judge in Palm Beach County, Florida, and one of two Assistant State Attorneys assigned to the case, testified that the prosecution was aware of Mejia's presence across from room 1215 at the time of the murders. He knew Mejia had been interviewed by the police and had given a statement. Mejia, however, was not a trial witness, so the prosecution had not focused on him. Kastrenakes further testified that he was never aware of Mejia having been federally indicted a short time prior to Petitioner's trial, as neither the prosecution team nor law enforcement conducted any follow-up investigation of Mejia.

Maharaj's defense counsel testified at the 1997 evidentiary hearing that he was aware that room

across the hall from the murder scene was occupied by Mejia, and confirmed that the prosecution had disclosed his name and the available information about him. *See* ECF No. 71-1 at 115. The defense received Mejia's 1986 statement to Detective Buhrmaster and had its own investigator look into Mejia. The State also gave the defense Mejia's overseas address and phone number.

There is no indication of collaboration between the State's prosecution team in Florida and federal investigators in Western Oklahoma. *See Moon*, 285 F.3d at 1310 (holding that knowledge obtained by investigators in one state is not imputed to investigators that conduct a separate investigation in another state). Maharaj cannot establish that the prosecution team in his case knew of Mejia's wrongdoings in another state; what he contends, however, is that the prosecution should have known.

Maharaj specifically asserts that had Detective Buhrmaster actually checked Mejia with "all agencies" as he contended at trial, the indictment, information from the Florida Department of Business Regulations, and Vega's intel to CENTAC-26 would have come up in his investigation. In hindsight and all other things aside, this may have been true.[4]

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[4] Though, again, the Court highlights that Mejia was not indicted in Oklahoma until almost a year after the murders took place. This statement should not be construed to agree with Maharaj's contention that this information would have come up in an investigation but merely states that it may have.

Nonetheless, the prosecution "has no duty to undertake a fishing expedition in other jurisdictions...." *See Meros*, 866 F.2d 1304, 1309. Mr. Kastrenakes explained why the prosecution did not focus its resources on Mejia— namely, he was cooperative and was not being called as a trial witness, and the evidence against Maharaj was overwhelming. Indeed, Maharaj's own private investigation of Mejia was fruitless at the time of trial. Nor does the record reflect a connection between CENTAC-26 and the state prosecution. Therefore, even if Vega's testimony that he reported Mejia's admission to his handlers is true, there is no indication that the team prosecuting Maharaj had access to or knowledge of such.

In sum, much of the evidence proffered by Maharaj makes a strong case that the investigation was not up to par. In fact, that is precisely what Agent Cuervo opined. But even if this were true—a contention made doubtful by the overwhelming record evidence implicating Maharaj in the murders—it is insufficient to establish the first and third *Brady* prongs. The prosecution could not have suppressed information it was not aware of.[5]

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[5] At the very least, the Court finds that the state court's determination of this issue was not contrary to or an unreasonable application of clearly established federal law. Nor was it an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1)–(2).

C. *Cumulative Impact of the Evidence*

Before the Court moves on to the final *Brady* prong of materiality, it must address Maharaj's assertions that both the state court and Magistrate Judge OtazoReyes failed to analyze his claims cumulatively. That is, that both decisions fail to include the evidence set forth in Maharaj's 1997 *Brady* claims.

The Supreme Court has made clear that a *Brady* materiality determination must consider the aggregate effect of all the suppressed evidence. *See Kyles*, 514 U.S. at 436, 441. "That does not mean, however, that an individual assessment of each piece of suppressed evidence is somehow inappropriate." *Maharaj*, 432 F.3d at 1310. A court can evaluate the cumulative effect only by first examining each piece of material standing alone. *See Kyles*, 514 U.S. at 436 n.10 (noting that "[w]e evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion...."); *see also Kelley*, 377 F.3d at 1335, 1369.

Maharaj's objections to this point are unavailing. Not only does the Court agree with the R&R's determination that the state court analyzed the alleged *Brady* materials in the aggregate, Maharaj's arguments regarding their cumulative effect are misplaced. For example, Maharaj continues to argue that cumulatively, the documents contained within the briefcase paired with this newly discovered evidence demonstrates a clear *Brady* violation. *See* ECF No. 128 at 11–12. This is not so. As found by the

Eleventh Circuit, the documents within the briefcase were not *Brady* material at all, in that they were available to Maharaj at the time of trial. *Maharaj*, 432 F.3d at 1314–15. The Eleventh Circuit similarly found that evidence regarding the Moo Youngs' insurance policies was not *Brady* material because it was not exculpatory. *Id.* at 1317–18. Finally, the Eleventh Circuit found that the Florida Supreme Court's finding that Neville Butler's polygraph test was not suppressed was neither contrary to nor an unreasonable application of clearly established law. *Id.* Therefore, even cumulatively, this evidence cannot serve as the basis of a *Brady* violation.

So, while the Court must address the cumulative effect of all of the ***suppressed evidence*** to properly analyze the materiality prong of Maharaj's *Brady* claims, those items found to not constitute *Brady* material—whether it be because the evidence was not suppressed or because it is not exculpatory—are not relevant to the materiality analysis under *Kyles*. *See* 514 U.S. at 436, 441. In short, if an item was not suppressed, it does not matter if it is material in this context. *Brady* requires all four prongs to be met. The Court agrees that, in the aggregate, Maharaj's materiality argument is strengthened by the evidence he has set forth. However, the Court also agrees with the state court's conclusion that the evidence discussed above was not suppressed by the prosecution team. Therefore, even analyzed in the aggregate, Maharaj's evidence is insufficient to assert a *Brady* claim.

D. *Materiality*

AEDPA, the state court's determination that the evidence presented does not undermine the jury's verdict should be upheld.

VI. Certificate of Appealability

A Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," and it must indicate the issue on which the petitioner made such a showing. 28 U.S.C. § 2253(c)(2), (3); *see also* ECF No. 114 at 3. Where the district court has denied a motion to vacate in whole or in part on procedural grounds, a movant must show that reasonable jurists could debate: (1) whether the motion states a valid claim for the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A Certificate of Appealability "must specify what constitutional issue jurists of reason would find debatable. Even when a prisoner seeks to appeal a procedural error, the certificate must specify the underlying constitutional issue." *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (*en banc*).

The Court finds that reasonable jurists could debate whether Maharaj has set forth a *Brady* claim to warrant habeas relief. Specifically, the Court certifies the following questions:

> (1) Whether the Mejia indictment and/or the information from Baruch Vega could be imputed to the prosecution for purposes of establishing possession and suppression by the

prosecution under *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

(2) If so, whether this information would have changed the outcome of the verdict in light of the deference to be afforded under the AEDPA.

VII. Conclusion

To be clear, of the litany of habeas petitions before this Court, the facts of this case give the undersigned pause. Unfortunately, pause is insufficient to overcome the highly deferential standard set forth by the AEDPA. *See Woods*, 575 U.S. at 316. Because Maharaj has failed to overcome this "formidable barrier," his Petition must be denied. *Burt*, 571 U.S. at 1.

Accordingly, after careful consideration, it is hereby:

ORDERED AND ADJUDGED that

1. United States Magistrate Judge Otazo-Reyes's Report and Recommendation, [ECF No. 127], is **AFFIRMED and ADOPTED**.

2. Petitioner's Petition for Habeas Corpus, [ECF No. 29], is **DENIED**. As set forth above, a Certificate of Appealability is **GRANTED** and **SHALL ISSUE**.

3. This case is **CLOSED**, and all pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of November 2020.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

APPENDIX C

No. 20-14816

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KRISHNA MAHARAJ, Petitioner-Appellant, v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, WARDEN, SOUTH FLORIDA RECEPTION CENTER, FLORIDA ATTORNEY GENERAL, Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before JILL PRYOR, LAGOA, and BRASHER, Circuit Judges.

[Filed May 13, 2022]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)