No. 23-5851

In the

Supreme Court of the United States

HECTOR SANCHEZ-TORRES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
***Amended as to page numbers**

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a claim of relative culpability analysis which compares the death sentence and role of the capital defendant with the sentences and roles of the coperpetrators in the particular crime.

II. Whether this Court should grant review of a decision of the Florida Supreme Court rejecting a successive postconviction claim of newly discovered evidence of mitigation related to the coperpetrator.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Sanchez-Torres v. State*, 365 So. 3d 1134 (Fla. 2023) (SC2022-0322).[1]

JURISDICTION

On March 16, 2023, the Florida Supreme Court affirmed the state postconviction court's summary denial of a successive postconviction motion. *Sanchez-Torres v. State*, 365 So. 3d 1134 (Fla. 2023). On March 31, 2023, Sanchez-Torres, represented by Capital Collateral Regional Counsel–North (CCRC–N), filed a motion for rehearing in the Florida Supreme Court. On June 20, 2023, the Florida Supreme Court denied rehearing. On October 18, 2023, following an extension, Zack, represented by CCRC–N, filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). This Court has jurisdiction under 28 U.S.C.§ 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Eighth Amendment and the Fourteenth Amendment.

The Eighth Amendment to the United States Constitution, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

[1] The pleadings filed in this case are available online on the Florida Supreme Court's website under the heading "Online Docket" which will default to the "Florida Appellate Case Information System." In the left column, under the search icon, the option "Case Search" will appear as the first choice. Clicking on case search yields several boxes including the "Court" box which includes, in the drop downs, the "Supreme Court of Florida" as an option. Select the Supreme Court of Florida option. Then in the next "Case Number" box enter the case number SC2022-0322, which will lead to the full docket of the case including a link on the right to the briefs filed in the case.

> the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This petition involves two questions regarding a successive postconviction motion filed in the state court in a Florida capital case.

Facts of the case and procedural history

In 2008, Sanchez-Torres and the coperpetrator, Markeil Thomas, robbed and killed Erick Colon as he was walking home from a friend's house. The victim's body was discovered a few hours later, at 1:30 a.m., on the sidewalk with a single gun shot through the head and his cell phone and wallet were gone. The facts of the case and the evidence presented at the bench penalty phase are recounted in the Florida Supreme Court's direct appeal opinion. *Sanchez-Torres v. State*, 130 So. 3d 661, 664-68 (Fla. 2013), *cert. denied*, *Sanchez-Torres v. Florida*, 571 U.S. 1210 (2014) (No. 13-7735). Sanchez-Torres entered a guilty plea and waived a penalty phase jury. *Sanchez-Torres*, 130 So. 3d at 664. The Florida Supreme Court affirmed the convictions for first-degree murder and armed robbery and the sentence of death. *Id.* at 676. Judge Skinner presided at the bench penalty phase and at the coperpetrator's trial and juvenile resentencings as well.

The Florida Supreme Court affirmed the denial of the initial state postconviction motion and also denied the state habeas petition. *Sanchez-Torres v. State*, 322 So. 3d 15 (Fla. 2020).

In August of 2021, Sanchez-Torres, represented by the Capital Habeas Unit of the Office of the Federal Public Defender of Northern District of Florida (CHU–N), filed a § 2254 habeas petition in the federal district court. *Sanchez-Torres v. Sec'y, Fla. Dep't of Corr.*, 3:17-cv-00939-MMH-PDB (M.D. Fla.) (Doc. #31). Since September of 2021, the federal habeas litigation has been stayed in the federal district court pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), pending the outcome of the successive postconviction litigation in the state courts. (Doc. #39, #47).

Background facts of the coperpetrator's sentences

The coperpetrator, Markeil D. Thomas, was 17 years old when the murder occurred on September 10, 2008. Because Thomas was a minor at the time of the murder, the Eighth Amendment precluded a death sentence for him. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the "death penalty is disproportionate punishment for offenders under 18...").

Thomas was charged by indictment with two counts: 1) first-degree murder by shooting; and 2) armed robbery. Thomas' jury convicted him as charged but made a special finding that Thomas "did not actually possess or discharge a firearm." Thomas was originally sentenced to life in prison without parole for the first-degree murder count and to 30 years imprisonment for the armed robbery count.

Thomas appealed his convictions and sentences to the First District Court of Appeals of Florida. *Thomas v. State*, 110 So. 3d 541 (Fla. 1st DCA 2013). The First District affirmed the convictions but reversed and remanded for a resentencing based on *Miller v. Alabama*, 567 U.S. 460 (2012). *See Thomas*, 110 So. 3d at 541 (citing *Washington v. State*, 103 So. 3d 917 (Fla. 1st DCA 2012)).

On May 30, 2014, on remand, the trial court conducted a *Miller* resentencing. The trial court sentenced Thomas to 40 years for the first-degree murder and 30 years for the armed robbery. On appeal, the First District affirmed the new sentences. *Thomas v. State*, 135 So. 3d 590 (Fla. 1st DCA 2014). The First District, however, cited *Horsley v. State*, 121 So. 3d 1130, 1131 (Fla. 5th DCA 2013), *rev. granted*, 2013 WL 6224657 (Fla. 2013), in its written opinion, which was then pending in the Florida Supreme Court. Thomas then filed a notice of appeal in the Florida Supreme Court asserting jurisdiction based on *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). *See Thomas v. State*, SC14-961 (Fla). On September 15, 2015, the Florida Supreme Court quashed the First District's opinion and remanded Thomas' case for another juvenile resentencing relying on its decision in *Horsley v. State*, 160 So. 3d 393, 395 (Fla. 2015)

(applying the new statute governing sentencing hearings for juveniles being considered for life sentences, § 921.1401(2), Florida Statutes, to all cases involving juvenile *Miller* resentencings). *See Thomas v. State*, 177 So. 3d 1275 (Fla. 2015).

On remand, at the second juvenile resentencing, the State filed a memorandum of law addressing the statutory factors of § 921.1401(2), Florida Statutes (2016). (T. 1685-1695).[2] In the memorandum, the State noted that Thomas admitted to committing perjury by signing a sworn statement claiming to be the actual triggerman which Thomas had recanted. (T. 1686). The defense also filed a memorandum of law addressing the juvenile sentencing statutory factors. (1696-1703). The defense memorandum quoted the judge as saying that if Thomas had gone to the police the next day, right after the murder, the chances were Thomas would have been a witness rather than a defendant. (T. 1696-97).

On September 9 and 26, 2016, the state trial court conducted the second *Miller* resentencing. On September 26, 2016, the trial court entered a written sentencing order noting the jury determined that Thomas "was not the shooter." (T. 1704-1712, 1708). The sentencing order also noted that Thomas had made a statement that he was the shooter, thinking it would help his friend Sanchez-Torres, but had since recanted that statement. (T. 1710). The trial court concluded that a life sentence "would not be an appropriate sentence" because Thomas "did not actually kill Colon" and was not "a major participant" in the murder. (T. 1711). The trial court noted, that pursuant to § 921.1402(2)(c), Florida Statutes, Thomas was "entitled to review of his sentence after fifteen years of incarceration." (T. 1712). The trial court sentenced Thomas to 40 years incarceration on Count 1 with review after 15 years and to 30 years incarceration on Count 2. (T. 2038-2049).

On February 5, 2018, the First District affirmed Thomas' sentences from the

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[2] The record cites in this section are to the record on appeal of the second resentencing in the First District Court of Appeal of Florida. *Thomas v. State*, 1D16-4774.

second resentencing. *Thomas v. State*, 239 So. 3d 1193 (Fla. 1st DCA 2018) (1D16-4774). The First District issued the mandate on February 26, 2018.

Earlier, on March 26, 2015, Thomas had confessed to being the shooter in a sworn statement taken by his postconviction attorney. (Pet. at App. C). Thomas's sworn statement, along with the forensic psychological report and facts regarding Thomas' prior bad acts, were known from his 2016 resentencing. Thomas recanted his statement regarding being the actual shooter before the second resentencing in 2016.

Procedural history of the current state successive postconviction motion

On November 24, 2020, Sanchez-Torres, represented by CCRC–N, filed a first successive rule 3.851 postconviction motion in the state trial court. (2022 Succ. PCA 7-154). The successive postconviction motion raised two claims: 1) a claim of newly discovered evidence of relative culpability based on the juvenile coperpetrator's resentencing due to *Miller v. Alabama*, 567 U.S. 460 (2012); and 2) a claim that the Eighth Amendment requires relative culpability analysis among coperpetrators.

On December 14, 2020, the State filed an answer to the state successive postconviction motion asserting the claims were untimely and should be summarily denied. (2022 Succ. PCA 171-196). The State also argued that relative culpability analysis was precluded by the Florida Supreme Court's precedent of *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 142 S. Ct. 188 (2021) (No. 20-8341). The State also asserted that the coperpetrator's sentence was not relevant or admissible to the defendant's sentence. The State additionally argued that the coperpetrator's recanted confession to being the triggerman was inadmissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973), due to its unreliability. Coperpetrator Thomas "confessed" to being the triggerman after he was sentenced to life but then he recanted that confession once he was granted a juvenile resentencing where his previous confession could hurt his prospects of a

lesser sentence. Alternatively, the State argued, even if the coperpetrator's recanted confession would be admissible at a new penalty phase, the recanted confession would not be likely to result in a life sentence, as required by *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), in light of Sanchez-Torres' criminal history. Sanchez-Torres had a prior conviction for murder that he committed a couple of months before this murder which was used to establish the prior violent felony aggravating factor in the capital case. Sanchez-Torres was a recidivist murderer; coperpetrator Thomas, on the other hand, had no prior criminal history.

On January 13, 2021, the trial court summarily denied the successive postconviction motion. (2022 Succ. PCA 203-279). On January 26, 2021, CCRC-N filed an unopposed motion for rehearing in the state trial court which pointed out that the trial court had denied the postconviction motion without conducting a case management conference, as required by Florida Rule of Criminal Procedure 3.851(f)(5)(B), commonly referred to as a *Huff* hearing. *Huff v. State*, 622 So. 2d 982 (Fla. 1993). Nearly a year later, on January 5, 2022, the trial court conducted a case management conference. On February 13, 2022, the trial court again summarily denied the successive postconviction motion. (2022 Succ. PCA 456-535).

On appeal to the Florida Supreme Court, the court affirmed the summary denial of the successive postconviction motion on the merits. *Sanchez-Torres v. State*, 365 So. 3d 1134 (Fla. 2023).

On October 18, 2023, Sanchez-Torres, represented by CCRC–N, filed a petition for a writ of certiorari in this Court raising two questions.

REASONS FOR DENYING THE WRIT

QUESTION I

Whether this Court Should Grant Review of a Decision of the Florida Supreme Court Rejecting a Claim of Relative Culpability Analysis Which Compares the Death Sentence and Role of the Capital Defendant with the Sentences and Roles of the Coperpetrators in the Particular Crime.

Petitioner Sanchez-Torres seeks review of the Florida Supreme Court's decision rejecting his claim of relative culpability. Pet. at 14. Sanchez-Torres asserts that the Eighth Amendment requires his death sentence be vacated because his juvenile coperpetrator received a lesser sentence despite his assertion that the coperpetrator had a greater role in the murder. He claims the coperpetrator was the actual triggerman based on the coperpetrator's confession, which the coperpetrator later recanted. But the Florida Supreme Court's decision rejecting the claim of relative culpability is solely a matter of state law. Furthermore, there is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's rejection of the relative culpability claim. Neither proportionality review nor its related concept of relative culpability analysis is required by the Eighth Amendment under this Court's precedent of *Pulley v. Harris*, 465 U.S. 37 (1984). There certainly is no conflict with this Court's decisions in *Pulley v. Harris* or *McCleskey v. Kemp*, 481 U.S. 279 (1987). And there is also no conflict between the lower appellate courts and the Florida Supreme Court's decision in this case. The federal courts follow *Pulley v. Harris*. Indeed, the Ninth Circuit recently rejected a relative culpability claim relying on *Pulley v. Harris*, characterizing the claim of relative culpability as being one of "intra-case proportionality review." *Sanchez v. Davis*, 994 F.3d 1129, 1151-52 (9th Cir. 2021). Petitioner cites to no appellate case—federal or state—in the petition holding that relative culpability analysis is required as a matter of federal constitutional law. Review of this state law question should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court rejected the successive postconviction claim of relative culpability. *Sanchez-Torres v. State*, 365 So. 3d 1134, 1136 (Fla. 2023). Sanchez-Torres confessed to the murder but offered inconsistent statements as to who fired the fatal shot. *Id.* at 1135. The state supreme court noted that the juvenile coperpetrator, Thomas, was a "minor at the time of the murder and therefore ineligible for the death penalty." *Id.* The juvenile coperpetrator "was originally sentenced to life without parole but, following changes to juvenile sentencing law, was resentenced to a term of years with periodic review." *Id.* The Court declined to address the issue of the timeliness of the relative culpability claim and instead addressed the claim on the merits. *Id.* at 1135-36. The Florida Supreme Court also declined to address the issue of whether their prior holding in *Lawrence v. State*, 308 So. 3d 544 (Fla. 2020), *cert. denied, Lawrence v. Florida*, 142 S. Ct. 188 (2021), which had abolished proportionality review of capital cases in Florida, included claims of relative culpability. *Id.* at 1136 ("We do not need to resolve how far *Lawrence* extends because we have long held that relative culpability analysis does not apply when a coperpetrator is legally ineligible for the death penalty" citing *Sanchez-Torres*, 130 So. 3d at 675, n.5).

The Florida Supreme Court explained that Sanchez-Torres was asserting that his death sentence was not proportionate to the juvenile coperperator's 40-year sentence based on the coperperator's recanted confession to being the actual triggerman, the coperperator's prior violent fight, and the coperperator's diagnosis of antisocial personality disorder. *Sanchez-Torres*, 365 So. 3d at 1136. The state supreme court rejected the relative culpability claim on the merits explaining that their traditional relative culpability analysis does not apply "when a coperpetrator is legally ineligible for the death penalty, including because of his age." *Id.* (citing *Sanchez-Torres*, 130 So. 3d at 675 n.5; *Bargo v. State*, 331 So. 3d

653, 665 n.6 (Fla. 2021), *cert. denied, Bargo v. Florida*, 143 S. Ct. 193 (2022); *Archer v. State*, 293 So. 3d 455, 457 (Fla. 2020); and *Farina v. State*, 937 So. 2d 612, 619 (Fla. 2006)). The Florida Supreme Court affirmed the state trial court's summary denial of the successive postconviction motion. *Id.* at 1136.

Solely a matter of state law

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). This Court lacks jurisdiction to review a state court judgment if that judgment rests solely on state law. *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

Relative culpability analysis among coperpetrators is purely a matter of state law. *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996) (explaining that proportionality review is not required by the federal constitution "only by Florida law"); *Mendoza v. Sec'y, Fla. Dep't of Corr.*, 659 Fed. Appx. 974, 981 & n.3 (11th Cir. 2016) (explaining that there is no federal constitutional right to proportionality review; rather, Florida's proportionality review was a matter of state law). The Florida Supreme Court's self-imposed requirement of both proportionality review and relative culpability analysis was based on their prior caselaw and a state rule of court. *Lawrence v. State*, 308 So. 3d 544, 548 (Fla. 2020) (referring to their precedent as "our state-law precedent requiring comparative proportionality review" as arising from their prior reading of Florida's death penalty statute, and their prior reading of two provisions of the state constitution in *Yacob v. State*, 136 So. 3d 539, 546-49 (Fla. 2014)), *cert. denied, Lawrence v. Florida*, 142 S. Ct. 188 (2021) (No. 20-8341); Fla. R. App. P. 9.142(a)(5) (providing that the Court shall review proportionality on direct appeal whether or not the issue is presented by the parties). In *Lawrence*, the Florida Supreme Court overruled *Yacob*, however, and held the state constitution's

conformity clause regarding the Eighth Amendment prohibits proportionality review relying on this Court's decision in *Pulley v. Harris*, 465 U.S. 37 (1984). The Florida Supreme Court in the wake of *Lawrence*, however, left open the issue of whether relative culpability was also abolished by that decision, including in this case. *Bargo v. State*, 331 So. 3d 653, 665 (Fla. 2021) (stating that the Court "need not decide" whether 'relative culpability' analysis survived *Lawrence* because the claim failed under the Court's pre-*Lawrence* caselaw), *cert. denied*, *Bargo v. Florida*, 143 S. Ct. 193 (2022). Relative culpability analysis is purely an issue of state law.[3]

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[3] The Florida Supreme Court recently addressed the question left open after *Lawrence*. The Florida Supreme Court, a few months after deciding this case, abolished relative culpability analysis, as being a "corollary of our obsolete comparative proportionality review." *Cruz v. State*, 2023 WL 4359497 (Fla. July 6, 2023). Pet. at 20. This case highlights the flaws in Florida's traditional relative culpability analysis, which only considered the respective roles of the coperpetrators, identified by the Florida Supreme Court in *Cruz*. *Cruz*, 2023 WL 4359497 at *5 (noting that one reason for imposing different sentences on codefendants who appear to share equal culpability is the mitigation, or lack of mitigation, applicable to each codefendant). Sanchez-Torres had a prior conviction for another murder whereas the coperpetrator did not have a prior criminal record. So, Sanchez-Torres had significant additional aggravation that coperpetrator Thomas lacked. But the Florida Supreme Court would not have considered those facts in its traditional relative culpability analysis. Florida's traditional relative culpability analysis would have only considered the coperpetrators' roles in the murder, not any of their differences in aggravation or mitigation. It would be, in the Florida Supreme Court's own words, a "farce" to consider Sanchez-Torres and coperpetrator Thomas to be entitled to the same sentence when Sanchez-Torres is a recidivist murderer. *Id.* at *5 (explaining it would be a "farce" to consider two coperpetrators to be equally culpable, if one perpetrator had only a single aggravator that applied to him but the other perpetrator had numerous aggravators that applied to him, even if they had equal roles in a murder).
In the wake of *Cruz*, current Florida law regarding proportionality review and relative culpability analysis is now coextensive with this Court's Eighth Amendment law. Neither proportionality review nor relative culpability analysis are recognized as valid claims in either Florida state courts or federal habeas courts. But the first question in this petition remains solely a matter of state law because this case was decided before *Cruz*. Pet. at 20.

No conflict with this Court's jurisprudence

There is no conflict between this Court's Eighth Amendment jurisprudence and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). There certainly is no conflict with either *Pulley v. Harris*, 465 U.S. 37 (1984), or *McCleskey v. Kemp*, 481 U.S. 279 (1987).

In *Pulley v. Harris*, this Court concluded that the Ninth Circuit had erred in holding that *Gregg v. Georgia*, 428 U.S. 153 (1976), required proportionality review of death sentences. *Harris*, 465 U.S. at 46. This Court stated that there was "no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it." *Id.* at 50-51. This Court explained that proportionality review is not a constitutional necessity but instead is simply an "additional safeguard against arbitrarily imposed death sentences." *Id.* at 50; *see also Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (noting this Court has "declined to hold that the Eighth Amendment required appellate courts to perform proportionality review of death sentences" citing *Pulley v. Harris*).

And, in *McCleskey*, this Court again stated that "where the statutory procedures adequately channel the sentencer's discretion, such proportionality review is not constitutionally required." *McCleskey*, 481 U.S. at 306. This Court stated that a capital defendant cannot "prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." *Id.* at 306-07.

Relative culpability analysis is merely a subset of general proportionality review. Instead of comparing the death sentence of a particular capital defendant to the death sentences of all the other capital defendants within the jurisdiction, as proportionality review does, relative culpability analysis looks at the respective

sentences of the perpetrators involved in that one particular crime. One is "inter-case" proportionality review and the other is "intra-case" proportionality review. But both are types of comparative proportionality review performed in capital cases. There certainly is no conflict with this Court's decisions in *Pulley v. Harris* or *McCleskey*.

The petition does not acknowledge or attempt to distinguish *Pulley v. Harris* or *McCleskey*. Petitions for writs of certiorari that do not account for this Court's existing caselaw in an area do not warrant this Court's serious consideration.

Instead, the petition improperly relies on *Sumner v. Shuman*, 483 U.S. 66 (1987). Pet. at 19. In *Shuman*, this Court noted that it "has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime." *Shuman*, 483 U.S. at 79. This Court observed that whether the *defendant* was the primary force in that incident or a nontriggerman would be relevant to his sentence. *Id.* at 87. At no point did this Court compare Shuman's role to that of any other persons. Indeed, there were no coperpetrators involved the murder. *Id.* at 79, n.7. Shuman alone burned the victim to death. *Id.* at 79, n.7 (citing *Shuman v. State*, 578 P.2d 1183, 1184 (Nev. 1978)). *Shuman* certainly did not overrule *Pulley v. Harris*. Indeed, *Pulley v. Harris* was not cited even in passing in the *Shuman* opinion. *Shuman* has nothing to say regarding whether the Eighth Amendment requires relative culpability analysis in every capital case with multiple perpetrators.

There is no conflict with this Court's jurisprudence holding general proportionality review is not required and the Florida Supreme Court's decision in this case regarding relative culpability analysis.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state court of last resort and the Florida Supreme Court's decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to

resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184

n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

There is no conflict with the federal appellate courts and the Florida Supreme Court's decision in this case. The federal circuit courts, of course, follow *Pulley v. Harris* and *McCleskey*. *See e.g.*, *Hatch v. Oklahoma*, 58 F.3d 1447, 1466-67 (10th Cir. 1995) (holding that the Eighth Amendment does not require coperpetrators' sentences to be proportional citing *Pulley v. Harris* and *McCleskey*); *United States v. Higgs*, 353 F.3d 281, 327 (4th Cir. 2003) (rejecting, in an appeal of a Federal Death Penalty Act prosecution, a claim of relative culpability where the co-perpetrator, who was the actual triggerman, received a life sentence); *Kearse v. Sec'y, Fla. Dep't of Corr.*, 2022 WL 3661526, at *28 (11th Cir. Aug. 25, 2022) (rejecting a proportionality claim because the Supreme Court has never held that the "death penalty was not a proportional punishment" for an adult defendant who, during a traffic stop, takes a police officer's gun and shoots him thirteen times), *cert. denied*, *Kearse v. Dixon*, 143 S. Ct. 2439 (2023); *but see Kearse*, 2022 WL 3661526, at 28 (Wilson, J., dissenting) (advocating that the death sentence be vacated in federal habeas review in a single perpetrator case based on a misreading of *Pulley v. Harris*, despite this Court's repeated statements that capital punishment is proportional for the crime of first-degree murder, such as in *Glossip v. Gross*, 576 U.S. 863, 869 (2015) ("it is settled that capital punishment

is constitutional")).[4]

The Ninth Circuit recently rejected an argument that the Eighth Amendment required relative culpability analysis, which the panel characterized as "intra-case proportionality review." *Sanchez v. Davis*, 994 F.3d 1129, 1151-1152 (9th Cir. 2021). Sanchez argued that the Eighth Amendment required his death sentence be vacated where one of the coperpetrators received a 25-year sentence and the charges were dropped altogether against another coperpetrator. *Sanchez*, 994 F.3d at 1151. He argued that his role in two of the three murders was less than that of the coperpetrator against whom the charges were dropped. The California Supreme Court had denied the claim on direct appeal determining that the Eighth Amendment did not require an intra-case comparison of a defendant's sentence with the coperpetrators, whether charged or uncharged. *Id.* (citing *People v. Sanchez*, 906 P.2d 1129, 1183 (Cal. 1995)). The federal district court denied habeas relief as being foreclosed by *Pulley v. Harris*. On appeal, Sanchez argued that *Pulley v. Harris* did not control because he was making a claim for "intra-case proportionality" review which compares the sentences of coperpetrators in the same case rather than a claim for "inter-case proportionality" review which compares the sentences of similarly situated capital defendants in other capital cases. The Ninth Circuit affirmed the denial of habeas relief relying on *Pulley v. Harris* and *McCleskey v. Kemp* noting that this Court's precedent does not draw any distinction between "intra-case proportionality review" and "inter-case proportionality review." *Id.* at 1152.

Petitioner cites no federal circuit court case in the petition even hinting, much

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[4] Kearse did not raise the proportionality claim in the petition for writ of certiorari that he filed in this Court, despite Judge Wilson's dissent regarding proportionality. *Kearse v. Dixon*, 143 S. Ct. 2439 (2023) (No. 22-6868). Instead, the petition only raised a claim of ineffective assistance of trial counsel at the penalty phase under *Strickland v. Washington*, 466 U.S. 668 (1984), even though Judge Wilson concurred regarding that issue.

less holding, that relative culpability analysis among coperpetrators is constitutionally required by the Eighth Amendment.

Nor is there any conflict between the Florida Supreme Court's decision in this case and any decision of any other state supreme court. The state supreme courts that require proportionality review, including review of coperpetrator's sentences, do so as required by a state statute or as a matter of state caselaw. *See e.g.*, *People v. Cage*, 362 P.3d 376, 405 (Cal. 2015) (stating that while "intercase proportionality review is not required by the due process, equal protection, fair trial, or cruel and unusual punishment clauses of the federal Constitution, intra-case proportionality review is required by the California Constitution upon request citing state cases and Art. I, § 17 of the Cal. Const.). While many state supreme courts conduct proportionality review of all the capital cases within their jurisdiction, as well as relative culpability analysis of coperpetrators' sentences, those state courts do so as a matter of their respective state law, not as a matter of Eighth Amendment law. Petitioner cites no case from any state court of last resort in the petition that requires relative culpability analysis as a matter of federal constitutional law.

Furthermore, the questions presented do not match the questions raised in the body of the petition. The first question presented does not use the terms such as "proportionate," "disproportionate," "relative culpability", or any synonym of any of those terms but later in the petition, the question presented becomes whether the "disproportionate sentence" of a coperpetrator violates the Eighth Amendment. *Compare* Pet. at i *with* Pet. at 14. The first question also refers to equal protection but the argument in the body of the petition contains only one passing reference to equal protection supported by a single citation without any further discussion. *Compare* Pet. at i *with* Pet. at 16 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). The lack of accuracy regarding the question presented and the lack of clarity in the petition is an additional reason to deny review of the question. Sup. Ct. R. 14.4.

(providing a petitioner's failure to set out the essential points with accuracy and clarity is an independent reason to deny certiorari).

There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, review should be denied.

Because the question of relative culpability analysis is a matter of state law only, as well as there being no conflict with this Court's jurisprudence or among the lower appellate courts and the Florida Supreme Court's decision in this case, review of this question should be denied.

QUESTION II

Whether this Court Should Grant Review of a Decision of the Florida Supreme Court Rejecting a Successive Postconviction Claim of Newly Discovered Evidence of Mitigation Relating to the Coperpetrator.

Petitioner Sanchez-Torres seeks review of the Florida Supreme Court's decision rejecting a successive postconviction claim of newly discovered evidence of mitigation related to the juvenile coperpetrator. Pet. at 21. At the juvenile coperpetrator's resentencing, information regarding the coperpetrator's diagnosis of antisocial personality disorder, his prior bad act of being in a brass-knuckle fight, and the fact that he had previously confessed to being the triggerman, which he later recanted, came to light. Sanchez-Torres asserted that the new information regarding the coperpetrator's background as well as the coperpetrator's lesser sentence was newly discovered evidence of mitigation of his own death sentence. But a claim of newly discovered evidence of mitigation is solely a matter of state law. There is no federal constitutional provision that requires a state to reconsider a defendant's death sentence based on new information regarding the coperpetrator that comes to light many years later. And the second question presented in the petition raises a threshold issue regarding whether a coperpetrator's lesser sentence, recantation, juvenile offense, or mental diagnosis can even be considered as mitigation under the constitutional definition of mitigation. Mitigation is traditionally defined as the background and characteristics of the defendant himself, not the background and characteristics of another person, such as a coperpetrator. And the traditional definition of mitigation does not include sentences imposed on other defendants. Moreover, there is no conflict with the Court's jurisprudence and the Florida Supreme Court decision in this case rejecting this claim of newly discovered evidence. This Court does not currently recognize claims of newly discovered evidence of innocence, much less claims of newly discovered evidence of innocence of the death penalty, and certainly not claims of newly discovered evidence of mitigation. Nor is there any conflict between the Florida

Supreme Court's decision in this case and that of the lower appellate courts. Therefore, review of this question of state law should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court rejected the successive postconviction claim of newly discovered evidence of mitigation. *Sanchez-Torres v. State*, 365 So. 3d 1134, 1136 (Fla. 2023). Again, the Florida Supreme Court declined to address the issue of the timeliness of the claim and instead addressed the claim on the merits, despite the state trial court finding that the claim was untimely. *Id.* at 1135-36. The Florida Supreme Court rejected the claim because the sentencing court had not based Sanchez-Torres' death sentence on his triggerman status but on other factors including Sanchez-Torres' prior conviction for another murder. *Id.* at 1136. The Florida Supreme Court affirmed the state trial court's summary denial of the successive postconviction motion. *Id.* at 1136.[5]

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[5]While the Florida Supreme Court declined to address the timeliness of this claim of newly discovered evidence, the state postconviction court found the claim was untimely. *Sanchez-Torres*, 365 So. 3d at 1135 (noting that the state postconviction court had "concluded that the motion was untimely because the information was not, in fact, newly discovered evidence"). Thomas' "confession" regarding possessing the gun and shooting the victim was given in 2015, and his juvenile resentencing occurred on September 9, 2016, where this new evidence regarding his diagnosis, the brass-knuckle fight as a juvenile, and the recantation of his prior confession to being the triggerman came to light. But the successive postconviction motion raising this claim of newly discovered evidence of mitigation was not filed in the state trial court until November 24, 2020, which was five years after the "confession" and over four years after the 2016 juvenile resentencing. Under Florida law, all claims of newly discovered evidence must be filed within one year of the discovery of the new evidence that is the basis of the claim. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008) (holding any claim of newly discovered evidence must be brought within one year of the date the new evidence is discoverable with diligence). The Florida Supreme Court routinely enforces this timely filing requirement. *See e.g.*, *Melton v. State*, 367 So. 3d 1175, 1176-77 (Fla. 2023) (concluding that a successive postconviction claim of newly discovered evidence was untimely because it was not filed within one year citing *Jimenez*); *Sliney v. State*, 362 So. 3d 186 (Fla. 2023) (concluding that a successive postconviction claim of newly discovered evidence was untimely because

Solely a matter of state law

This Court lacks jurisdiction over cases that do not present federal questions. 28 U.S.C. § 1257; *Johnson v. Williams*, 568 U.S. 289, 309 (2013) (Scalia, J., concurring) (noting that 28 U.S.C. § 1257 imposes a federal-question requirement as a condition of this Court's appellate jurisdiction). This Court lacks jurisdiction to review a state court judgment if that judgment rests on state law. *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)).

The entire concept of newly discovered evidence is solely a matter of state law. *Green v. Sec'y, Dep't of Corr.*, 28 F.4th 1089, 1148 (11th Cir. 2022) (concluding a claim of newly discovered evidence was a "pure state law claim" that was not cognizable in federal habeas), *cert. denied, Green v. Dixon*, 143 S. Ct. 982 (2023) (No. 22-686); *Baker v. Att'y Gen. of Fla.*, 2019 WL 3216850, at *1 (11th Cir. Feb. 13, 2019) (stating that a postconviction claim of newly discovered evidence "is not cognizable in a § 2254 proceeding" because a federal habeas court "may not reexamine state court determinations on issues of state law" citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)).

The test for claims of newly discovered evidence in Florida was established in *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998). A claim of newly discovered

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it was not filed within one year citing *Jimenez*)), *pet. for cert. filed, Sliney v. Florida*, No. 23-5630 (U.S. Sept. 21, 2023) (No. 23-5630).

If this Court remanded this case to the Florida Supreme Court, the Florida Supreme Court would ultimately just agree with the state trial court that the claim of newly discovered evidence of mitigation was untimely. Sanchez-Torres would not be granted any relief by the state courts regardless of this Court's decision regarding this question. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (stating this Court's power is the power "to correct wrong judgments, not to revise opinions" and explaining if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would be nothing more than an advisory opinion). The issue of the untimeliness of this claim under state law is yet another reason for this Court to deny review of the second question.

evidence of mitigation requires that the new evidence of mitigation would probably result in a life sentence at a new penalty phase. *Damren v. State*, 2023 WL 5968167, at *2 (Fla. Sept. 14, 2023) (explaining to vacate a death sentence rather than the conviction based on a claim of newly discovered evidence, the second prong of *Jones* requires that the newly discovered mitigation would probably result in a life sentence at a resentencing citing *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018), and *Swafford v. State*, 125 So. 3d 760, 767 (Fla. 2013)). But there is no federal constitutional equivalent to the concept of newly discovered evidence or newly discovered evidence of mitigation. Nor is there any case from this Court that is equivalent to the Florida Supreme Court's case of *Jones* and its progeny. The question is purely a matter of state law over which this Court lacks jurisdiction.

Threshold issue of the definition of mitigation

There is a threshold issue regarding whether the constitutional definition of mitigation includes evidence relating to a coperpetrator. This Court typically declines to review questions that require resolution of antecedent issues. *N.C.P. Mktg. Group, Inc. v. BG Star Productions, Inc.*, 556 U.S. 1145 (2009) (statement of Kennedy, J., respecting the denial of certiorari) (explaining that the petition for writ of certiorari was properly denied by the Court, despite the question being a significant one that is worthy of review, because the case might require the Court to first resolve antecedent questions of state law and trademark-protection principles); *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (denying a motion to vacate a stay, despite the serious constitutional questions involved, because the issue presented complex and novel antecedent questions of Texas law).

Sanchez-Torres argues evidence of a coperpetrator's diagnosis of anti-social personality disorder, the coperpetrator being in a brass-knuckle fight in high school, the coperpetrator's confession to being the actual shooter, despite his subsequent recantation, as well as the coperpetrator's lesser sentence of 40 years incarceration

is mitigating evidence as to his death sentence. But that raises the threshold issue of whether evidence related to the coperpetrator falls within this Court's Eighth Amendment definition of mitigation as established in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

It does not. Information related to different defendants is not mitigating. Mitigation is personal, not comparative. This Court has repeatedly defined mitigation as "any aspect of a *defendant's* character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis added); *Id.* at 605; *Eddings*, 455 U.S. at 112 (defining mitigation as "the circumstances of the offense together with the character and propensities of the offender"); *Enmund v. Florida*, 458 U.S. 782, 789, 801 (1982) (stating that courts must focus on the relevant facets of the character and record of the individual offender and the defendant's "punishment must be tailored to *his* personal responsibility and moral guilt."). But a coperpetrator's mental diagnosis, fights in school, recanted confession, or lesser sentence is not an "aspect of a *defendant's* character or record." Nor is it a circumstance of the offense. Individual sentencing required in capital cases focuses on the defendant himself, not others. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (explaining that a mandatory death sentence that accords no significance to "the character and record of the individual offender or the circumstances of the particular offense" improperly treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass). Mitigation is limited to the defendant himself and his role in the offense and does not include the character, history, or record of the coperpetrators or their sentences. *Cf. Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996) (noting that even if the coperpetrator was sentenced to life, such information fails "to establish that *his* culpability had in any way been diminished") (emphasis in original). Therefore, a coperpetrator's lesser sentence,

recantation of a prior confession, juvenile fights, or mental diagnosis does not meet the Eighth Amendment definition of mitigation. The new evidence regarding the juvenile coperpetrator in this case is not mitigating as a matter of law as to Sanchez-Torres. *Cf. Oregon v. Guzek*, 546 U.S. 517 (2006) (refusing to recognize residual or lingering doubt as constitutionally mandated mitigation); *Franklin v. Lynaugh*, 487 U.S. 164 (1988).

As this Court recently held, in the Boston Marathon Bomber capital case, the Federal Death Penalty Act, 18 U.S.C. § 3593(c), which permits a trial court to exclude mitigating evidence, does "not offend the Eighth Amendment." *United States v. Tsarnaev*, 595 U.S. 302, 320 (2022). Tsarnaev sought to admit evidence in his penalty phase regarding a triple homicide committed previously by the coperpetrator of the bombings. Specifically, he sought to admit evidence that his elder brother, who was the suspected triggerman in the prior triple homicide, to establish that it was his brother was the ringleader "who pressured others to commit violence" as mitigation. *Id.* at 302, 320. Tsarnaev argued that exclusion of any even marginally relevant mitigating evidence violated *Lockett* and its progeny but this Court rejected that "extreme" reading of *Lockett*. *Tsarnaev*, 595 U.S. at 318. The *Tsarnaev* Court explained that penalty phases "are not evidentiary free-for-alls." *Id.* at 317. Rather, trial courts retain their "traditional authority" to exclude evidence in capital cases at the penalty phase. *Id.* at 320 (citing *Lockett*, 438 U.S. at 604, n. 12). The Eighth Amendment does <u>not</u> demand the admission of "marginally relevant mitigating evidence." *Id.* at 319. This Court would have to address the threshold issue of whether the constitutional definition of mitigation extends to evidence regarding a coperpetrator's background and lesser sentence before reaching the question of whether claims of newly discovered evidence of mitigation are recognized. This threshold issue is another reason to deny review of this question.

No conflict with this Court's jurisprudence

There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision in this case. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). This Court's current Eighth Amendment jurisprudence does not include the concept of newly discovered evidence of mitigation. There is no case from this Court extending *Lockett* or its progeny to new evidence of mitigation, discovered years after the penalty phase was completed and after the death sentence was imposed. Indeed, there is no case from this Court even hinting in any manner that the Eighth Amendment requires state courts to reconsider a death sentence any time new mitigation arises, much less when new mitigation regarding the coperpetrator arises.

This Court has repeatedly declined to formally recognize freestanding claims of innocence in capital cases based on new evidence regarding guilt and has never addressed, even in dicta, freestanding claims of innocence of the death penalty, much less freestanding claims of innocence of the death penalty based on new evidence of mitigation. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (noting it is an "open question" whether there is a federal constitutional right to be released upon proof of actual innocence); *House v. Bell*, 547 U.S. 518, 553-55 (2006) (declining to resolve the issue of whether a freestanding innocence claim exists as a matter of federal constitutional law but noting that if such a claim existed it would require an "extraordinarily high" showing of innocence amounting to a case of "conclusive exoneration"); *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming, in a capital case, a "truly persuasive demonstration" of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief "if there were no state avenue open to process such a claim.").[6]

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[6] Florida has avenues open. Florida allows both claims of newly discovered evidence regarding the conviction and claims of newly discovered evidence regarding the

This Court currently considers new compelling evidence of mitigation, discovered after the death sentence was imposed, to be a matter for executive clemency. *Herrera v. Collins*, 506 U.S. 390, 412 (1993) (observing that historically clemency provided the principal avenue of relief after conviction in capital cases because there was no right of appeal until 1907); *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (noting clemency's role as a "fail safe in our criminal justice system" quoting *Herrera*, 506 U.S. at 415); *Cavazos v. Smith*, 565 U.S. 1, 9 (2011) (observing that clemency is "a prerogative granted to executive authorities" and "is not for the Judicial Branch to determine the standards for discretion in clemency" and if the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention). The newly discovered evidence of mitigation regarding coperpetrator Thomas should be presented, if at all, in Sanchez-Torres' clemency proceedings, not to the courts.[7]

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sentence. And such claims can be raised decades after the conviction was entered or the sentence was imposed. There are no time limitations on claims of newly discovered evidence provided such claims are raised within one-year of being discovered. *Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008). So, even if this Court ultimately recognizes freestanding claims of innocence or freestanding claims of innocence of the death penalty, that new rule would not apply to Florida capital cases.

[7] This Court has permitted claims of innocence to lift procedural hurdles in federal habeas proceedings, but this is not a § 2254 case. *McQuiggin v. Perkins*, 569 U.S. 383 (2013); *Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992). While *Sawyer* involved a claim of innocence of the death penalty, *Sawyer* is limited to claims of ineligibility for the death penalty and does not include new mitigation. *Sawyer*, 505 U.S. at 345-47 (explaining that additional mitigation is not a proper basis for a claim of innocence of the death penalty). And *Sawyer* was a pre-AEDPA case that was superseded by that statute anyway. *Bowles v. Sec'y, Fla. Dep't of Corr.*, 935 F.3d 1176, 1182 (11th Cir. 2019) (stating the AEDPA forecloses the *Sawyer* exception in all circumstances citing *In re Hill*, 715 F.3d 284, 301 (11th Cir. 2013), and *In re Hill*, 777 F.3d 1214, 1225 (11th Cir. 2015)); *Thompson v. Calderon*, 151 F.3d 918, 923-24 (9th Cir. 1998) (en banc) (recognizing that *Sawyer* was subsumed by § 2244(b)(2)). So, even in federal habeas litigation before the AEDPA was enacted, this claim of newly discovered evidence of mitigation would not be

There is no conflict with this Court's jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state court of last resort and the Florida Supreme Court's decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

Petitioner does not cite any federal circuit court or state supreme court decision in the petition holding that the Eighth Amendment requires a death sentence be vacated based on newly discovered evidence of mitigation regarding the coperpetrator and certainly not to any case decided after *Tsarnaev*. While other states may have some cases that have granted a new penalty phase based on new mitigation based on their own expansive view of mitigation, petitioner points to no decision from a state court of last resort that does so as a matter of Eighth Amendment law after this Court's recent clarification of the scope of mitigation in *Tsarnaev*.

There is no conflict between the Florida Supreme Court's decision in this case and that of any federal circuit court of appeals or that of any state court of last resort. Because there is no conflict among the lower appellate courts, review should be denied.

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recognizable.

Additionally, the second question presented does not match the question raised in the body of the petition. The second question in the body of the petition is rewritten to the point it is not a matter of degree, but of kind. *Compare* Pet. at i *with* Pet. at 21. The second question presented does not convey the critical information that the new mitigation regarding the coperpetrator arose years after Sanchez-Torres' sentence was final. And, while the petition refers to "new" information, it does not make it clear that the new mitigating information came to light many years later. So, the real question in this case becomes whether there is an Eighth Amendment claim of innocence of the death penalty based on new evidence that arises after the death sentence is final and whether such a claim, if recognized, would extend to new mitigation evidence. *Cf. Sawyer*, 505 U.S. at 345-47 (explaining that additional mitigation is not a proper basis for a claim of innocence of the death penalty). But the real question actually raised by the facts of this case is only vaguely hinted at in the petition. That lack of accuracy regarding the second question is an additional reason to deny review. Sup. Ct. R. 14.4. (providing a petitioner's failure to set out the essential points with accuracy and clarity is an independent reason to deny certiorari). In sum, the petition presents two questions that are matters of state law that do not involve any conflict with this Court's jurisprudence or any conflict among the lower appellate courts.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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