No. 24-7365

In the
Supreme Court of the United States

ANTHONY FLOYD WAINWRIGHT, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

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

BRIEF IN OPPOSITION
EXECUTION SCHEDULED FOR JUNE 10, 2025, AT 6:00 P.M.

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Capital Case

QUESTIONS PRESENTED

I. Whether this Court should grant review of a decision of the Florida Supreme Court holding the claim of newly discovered evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), was not material?

II. Whether this Court should grant review of a decision of the Florida Supreme Court holding the claim of new discovered evidence of mitigation was untimely and meritless as a matter of state law?

III. Whether this Court should grant review of a decision of the Florida Supreme Court holding the Eighth Amendment issue involving new mitigation claim was "without merit"?

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The Florida Supreme Court's opinion is published at *Wainwright v. State*, 2025 WL 1561151 (Fla. June 3, 2025).

JURISDICTION

On June 3, 2025, the Florida Supreme Court affirmed the state postconviction court's summary denial of the amended eighth successive postconviction motion. The Florida Supreme Court also denied a stay and issued the mandate immediately, due to the active warrant.

On June 5, 2025, Wainwright, represented by pro bono second-chair counsel, Terri Backhus, filed a petition for a writ of certiorari in this Court. The petition is timely. See Sup. Ct. R. 13.3; 28 U.S.C. § 2101(d). Jurisdiction exists pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Eighth Amendment to the United States Constitution, which

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, section one, which 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 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, § 1.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The litigation in this case spans over 30 years.

Facts of the crime

Anthony Wainwright and co-perpetrator Richard Hamilton escaped from prison in Newport, North Carolina. They stole a green Cadillac and then burglarized a home, taking guns from the home, including a Winchester rifle and a Remington .22 rifle. They then drove to Florida in the stolen car. On April 27, 1994, in Lake City, Florida, they decided to steal another car because the stolen Cadillac was overheating. They drove to a Winn-Dixie parking lot and saw Carmen Gayheart, a young mother of two, loading her groceries into her blue Ford Bronco. Hamilton forced

her into her own car at gunpoint and Wainwright followed in the Cadillac. They abandoned the Cadillac, after transferring the stolen guns and ammunition to the Bronco. They headed north on I-75 in the Bronco, but drove off the highway into a wooded area. They both raped the victim, then strangled and executed her by shooting her twice in the back of the head with the stolen .22 rifle. They were arrested the next day in Mississippi following a chase and shootout with a Mississippi State Trooper.

Procedural history in state court

The jury convicted Wainwright of first-degree murder, robbery, kidnapping, and sexual battery, as charged. *Wainwright v. State*, 704 So.2d 511, 512 (Fla. 1997). Wainwright's mother was the sole witness presented by the defense at the penalty phase. The jury unanimously recommended a death sentence. *Id.* at 512. The trial court found six aggravating circumstances: (1) under sentence of imprisonment; (2) prior violent felony; (3) felony murder based on the robbery, kidnapping, and sexual battery; (4) committed to effect escape; (5) the murder was especially heinous, atrocious or cruel (HAC); and (6) the murder was committed in a cold, calculated, and premeditated manner (CCP). *Id.* at 512, n.2. The trial court found no statutory mitigating circumstances, but found nonstatutory mitigation regarding his difficulties in school and adjustment problems. *Id.* at 512-13, n.3.

In the direct appeal to the Florida Supreme Court, Wainwright, represented by Steve Seliger, raised nine issues. *Wainwright v. State*, 704 So. 2d 511, 513, n.4 (Fla. 1997). The Florida Supreme Court affirmed the convictions and the death

sentence, concluding the death sentence was proportionate. *Id.* at 516.

On May 14, 1999, Wainwright, represented by registry counsel Glenn Arnold, filed the initial postconviction motion raising 14 claims. *Wainwright v. State*, 896 So. 2d 695, 697, n.1 (Fla. 2004). The state postconviction court held an evidentiary hearing on five of the claims and it was stipulated that original trial counsel Africano was unable to testify due to his health. *Id.* at 697 & n.6. The state postconviction court denied the initial postconviction motion.

On appeal to the Florida Supreme Court, Wainwright, now represented by registry counsel Joseph Hobson, raised eight issues. *Wainwright*, 896 So.2d at 697. Wainwright also filed a state habeas petition in the Florida Supreme Court raising four issues. *Wainwright v. State*, 896 So.2d 695, 703-04 (Fla. 2004). The Court addressed the claim based on *Ring v. Arizona*, 536 U.S. 584 (2002), noting that one of the aggravators was the prior violent felony aggravator, which does not need to be found by a jury. *Id.* at 703-04.

Wainwright filed a petition for writ of certiorari in this Court which was denied on October 3, 2005. *Wainwright v. Florida*, 546 U.S. 878 (1998).

Wainwright then filed numerous successive postconviction motions, including both pro se motions and counseled motions, over the years. *Wainwright v. State*, 2 So 3d 948, 949 (Fla. 2008); *Wainwright v. State*, 43 So.3d 45 (Fla. 2010); *Wainwright v. State*, 2011 WL 955603 (Fla. 2011); *Wainwright v. State*, 2017 WL 394509 (Fla. Jan. 30, 2017).

Procedural history in federal court

On March 29, 2005, Wainwright, represented by Joseph Hobson and Cameron P. Moyer, filed a § 2254 petition in the Middle District of Florida. *Wainwright v. McDonough*, 2006 WL 8449862, 3:05-cv-00276 (M.D Fla. Mar. 10, 2006). The petition was six days late. *Wainwright v. Sec'y, Dep't of Corr.*, 537 F.3d 1282, 1284 (11th Cir. 2007). The Secretary moved to dismiss the petition as untimely. On March 10, 2006, the federal district court dismissed the petition as untimely, rejecting a claim of equitable tolling. *Wainwright*, 2006 WL 8449862, at *3-*4.

Wainwright appealed to the Eleventh Circuit. The Eleventh Circuit concluded that equitable tolling did not apply and affirmed the district court's dismissal of the habeas petition as untimely. *Wainwright*, 537 F.3d at 1287.

On June 22, 2018, the federal district court granted a motion, filed by the Capital Habeas Unit of the Office of the Federal Public Defender of the Northen District of Florida (CHU-N), to be appointed as Wainwright's federal habeas counsel. Nearly one year after the appointment, on June 21, 2019, CHU-N filed a Rule 60(b)(6) motion to reopen the closed habeas case in the district court. The motion to reopen asserted the district court should reconsider its prior ruling regarding equitable tolling. Wainwright also raised a gateway claim of actual innocence based on *McQuiggin v. Perkins*, 569 U.S. 383 (2013). The claim of innocence was premised on an affidavit, dated June 19, 2019, from DNA analyst Candy Zuleger criticizing the testing methods and testimony of the State's two DNA experts at trial. The motion to reopen also raised numerous new grounds for habeas relief that were not

raised in the original habeas petition filed in 2005.

The Secretary argued that the Rule 60(b)(6) motion was an unauthorized successive habeas petition over which the district court lacked jurisdiction because it raised numerous new grounds that were not raised in the original habeas petition.

The district court denied the Rule 60(b) motion concluding that the motion to reopen was an unauthorized successive habeas petition over which it lacked jurisdiction.

The Eleventh Circuit granted a certificate of appealability (COA) on the denial of the motion to reopen. The Eleventh Circuit affirmed the district court's denial of the Rule 60(b)(6) motion to reopen and the denial of an evidentiary hearing on the issue of equitable tolling. *Wainwright v. Sec'y, Fla. Dep't of Corr.*, 2023 WL 4582786 (11th Cir. July 18, 2023).

On February 10, 2024, Wainwright, represented by CHU-N, filed a petition for a writ of certiorari in this Court raising two questions related to the Rule 60(b)(6) motion. On April 15, 2024, this Court denied review. *Wainwright v. Dixon*, 144 S. Ct. 1363 (2024) (No. 23-6737).

Current warrant litigation

On May 9, 2025, Governor DeSantis signed a death warrant scheduling Wainwright's execution for June 10, 2025, at 6:00 p.m.

On May 15, 2025, Wainwright, represented by lead state postconviction counsel, registry counsel Baya Harrison III, and *pro bono*, second-chair counsel, Terri Backhus, retired from the Capital Habeas Unit of the Office of the Public Defender of

the Northern District of Florida (CHU-N), filed an amended eighth successive postconviction motion. (8th Succ. PC ROA at 181-205). The amended motion raised three claims: (1) a claim that the death sentence violated the Sixth Amendment right-to-a-jury trial relying on *Erlinger v. United States*, 602 U.S. 821 (2024); (2) a claim of newly discovered evidence of mitigation of neurodevelopmental effects due to Agent Orange exposure; and (3) a claim of newly discovered evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), regarding a State's witness, Robert Allen Murphy, receiving probation in exchange for his trial testimony against Wainwright. The appendix included an expert report regarding neurodevelopmental effects of Agent Orange, based on a 2023 study of Vietnamese children as well as a recent affidavit from Murphy, dated May 13, 2025. *Id.* at 219-233; 239-241.

On May 16, 2025, the State filed an answer to the amended eighth successive postconviction motion. (8th Succ. PC ROA at 335-361). The State asserted the first claim based on *Erlinger* was procedurally barred and meritless as a matter of law under controlling United States Supreme Court and Florida Supreme Court precedent and therefore, should be summarily denied. *Id.* at 338-48. The State asserted the second claim of newly discovered evidence of mitigation regarding Agent Orange was untimely and meritless as a matter of law and therefore, should be summarily denied. *Id.* at 349-54. The State additionally asserted that the third claim of newly discovered evidence of a *Brady* violation was untimely and meritless as a matter of law, both as to the newly discovered evidence aspect of the claim and as to the *Brady* aspect of the claim and therefore, should be summarily denied. *Id.* at 354-

59. The State urged the postconviction court to summarily deny the amended eighth successive postconviction motion. *Id.* at 359.

On May 20, 2025, the postconviction court summarily denied the amended eighth successive postconviction motion. (8th Succ. ROA at 441-460).

Wainwright appealed to the Florida Supreme Court. On June 3, 2025, the Florida Supreme Court affirmed the summary denial of the amended eighth successive postconviction motion. *Wainwright v. State*, 2025 WL 1561151 (Fla. June 3, 2025).

On June 5, 2025, Wainwright, represented solely by second-chair pro bono counsel, Terri Backhus, filed a petition for a writ of certiorari in this Court raising three questions related to the Florida Supreme Court's affirmance of the summary denial of the amended eighth successive postconviction motion.

REASONS FOR DENYING THE PETITION

ISSUE I

Whether this Court should grant review of a decision of the Florida Supreme Court holding the claim of newly discovered evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963),was not material?

Petitioner Wainwright seeks review of the Florida Supreme Court's decision regarding a claim of newly discovered evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Pet.at 16. He asserts that the prosecution violated *Brady* by not disclosing that a State's witness, Robert Allen Murphy, expected a benefit from his testimony. But this was not merely a *Brady* claim. Rather, it was a claim of newly discovered evidence of a *Brady* violation and the newly discovered evidence aspect of

the claim is a state law matter. There is no conflict with this Court's *Brady* jurisprudence. The cumulative impeachment of Murphy is simply "too little" and "too weak" under *Turner v. United States*, 582 U.S. 313, 326 (2017), to be material to either the convictions or death sentence. Because the question involves a preliminary matter of state law and does not present any conflict with this Court or the other appellate courts regarding the materiality prong of *Brady*, this Court should deny review of the question.[1]

The Florida Supreme Court's decision

The Florida Supreme Court rejected the *Brady* claim, concluding that Wainwright was not diligent, that the prosecution did not suppress the information, and that the cumulative impeachment of Murphy was not material. *Wainwright v. State*, 2025 WL 1561151, *8-*9 (Fla. June 3, 2025). The Court first found that Wainwright was not reasonably diligent because it was a matter of public record that Murphy was released on probation shortly after his testimony. *Id.* at *8. "All of the

[1] The petition itself is improper as it was filed without state postconviction lead counsel's signature, The state postconviction court viewed "pro bono" counsel Terri Backus as a front for the Capital Habeas Unit of the Public Defender's Office for the Northern District of Florida's involvement in the state court warrant litigation. (ROA 8th succ PC at 396). The state court did not believe that Terri Backhus had written the substitute successive postconviction motion she filed that quickly. The expert reports supporting the claims raised in that motion and attached to the motion were explicitly prepared for CHU-N, not Terri Backhus. Allowing the retired chief of CHU-N to appear in state court as "pro bono" counsel acting as a front for CHU-N's interference in state court undermines 18 U.S.C. § 3599(a)(2), which requires a showing that current state postconviction counsel is inadequate before federal habeas counsel may appear in state court and before federal funds are spent. *Harbison v. Bell*, 556 U.S. 180, 189 (2009) (stating subsection (a)(2) provides for counsel only when a state petitioner is unable to obtain adequate representation). This Court should deny the petition on that basis alone.

information necessary for this claim to be raised was readily available to postconviction counsel decades ago." *Id.* Alternatively, the Florida Supreme Court determined that the prosecution did not suppress the impeachment evidence. *Id.* at 9. The Court observed that Murphy's recent affidavit did not claim that Murphy had received a promise from the State, only that Murphy had a "clear understanding and expectation on his part that he would get a benefit." *Id.* at *8. The Court additionally concluded that the cumulative impeachment of Murphy was not material due to the "significant evidence introduced against Wainwright." *Id.* at *9. The Florida Supreme Court affirmed the lower court's summary denial of the *Brady* claim. *Id*

Threshold issues

Any decision from this Court regarding the matters Wainwright seeks to explore, such as the diligence requirement for a *Brady* claim and the duty to disclose a witness' expectation of a benefit, would not matter to the ultimate outcome of this case. The *Brady* claim would still be denied under the materiality prong of *Brady* and this Court's decision in *Turner*. This Court does not grant review of questions that are theoretical or academic in the sense that the question presented does not effect the actual outcome of the case, *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); *Herb v. Pitcarn*, 324 U.S. 117, 125-26 (1945) (explaining that if the same judgment would be rendered by the state court, this Court's review would be nothing more than an advisory opinion). The Florida Supreme Court's alternative holding was that the proposed cumulative impeachment was not material. *Wainwright*, 2025 WL 1561151, at *9. The petition simply ignores the Florida Supreme Court's alternative

conclusion that the impeachment was not material. Any decision on the matters raised in the petition would be purely academic because the *Brady* claim would still be denied under the materiality prong.

This case also presents a very poor vehicle to address a *Brady* claim because it comes to this Court from the denial of Wainwright's Eighth Amended Successive motion for post-conviction relief. Florida's well established newly discovered evidence rules require a Defendant to bring such a claim within one year of the time it could have been discovered through the exercise of reasonable diligence.[2] The Florida Supreme Court found this claim could have been brought "decades" ago with reasonable diligence. This case would be uncertworthy under routine review from the denial of an initial motion for post-conviction relief. It is even more uncertworthy on review of an Eighth Successive motion under an active warrant. See *McCleskey v. Zant*, 499 U.S. 467, 492 (1991) (noting the "disrespect" for "finality" that successive collateral review imposes on society and our justice system).

No conflict with this Court

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

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[2] The Florida Supreme Court explained: "As the circuit court determined, it was clear from the trial testimony that Murphy had a motion for modification of sentence pending at the time of Wainwright's trial. And it was a matter of public record that Murphy was released on probation shortly after his testimony. Murphy's recent affidavit was not necessary to pursue this claim. So as the circuit court observed, his recent affidavit really adds "nothing" to this claim. All of the information necessary for this claim to be raised was readily available to postconviction counsel decades ago. Wainwright, No. SC2025-0708, 2025 WL 1561151, at *8 (Fla. June 3, 2025).

as a consideration in the decision to grant review).

On recross examination, defense counsel asked Murphy if he knew of anything that would preclude his attorney at his upcoming modification hearing from bringing to the court's attention that he had testified for the State in this capital case and Murphy responded: "No." (DAR Vol. 20 2726). Wainwright's jury knew from this testimony that Wainwright's attorney could inform the presiding judge at his upcoming sentence modification hearing that he had testified for the State in a capital case and his sentence could be reduced as a result. There can be no meaningful violation of *Brady* from failing to disclose information if the jury learns much the same information from cross-examination. Wainwright points to no case from this Court finding a violation of *Brady* when the jury knew from the testimony they heard that there was a possibility of the witness obtaining a benefit from his testimony.

Additionally, the cumulative impeachment of Murphy is not material to either the convictions or death sentence under *Turner v. United States*, 582 U.S. 313 (2017). In *Turner,* this Court held the withheld information was not material to the kidnapping, robbery, and murder convictions. This Court stated that "evidence that is too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards is not material." *Id.* at 326.

Wainwright confessed to premeditated murder to Sheriff Reid in the presence of both a FDLE Special Agent and an Investigator with the Hamilton County Sheriff's Office, all of whom took notes. Wainwright told the Sheriff that they disposed of the victim's jewelry because they were planning on killing her. *Wainwright v. State*, 2

So.3d 948, 951 (Fla. 2008). And Wainwright's DNA matched the semen from the back of the victim's stolen Bronco at 1 in 6 billion Caucasians. (DAR Vol. 7 at 1027). And Wainwright and Hamilton were caught by a Mississippi State Trooper the next day after the murder hundreds of miles away from the victim's home in Central Florida driving the victim's Bronco.

None of this damning evidence depends on Murphy's testimony. Any cumulative impeachment of Murphy pales in comparison to the sheer amount of evidence of Wainwright's guilt and of the aggravation.[3] Any impeachment of Murphy, in a case where the jury was aware that there was a possibility of his receiving benefit from his testimony, is simply "too little" and "too weak" to be material. *Turner,* 582 U.S. at 326. There is no conflict with this Court.

No conflict with the federal appellate courts or state supreme courts

There is also no conflict with either the federal circuit courts or the state courts of last resort and the Florida Supreme Court's decision. 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

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[3] Any impeachment of Murphy would be cumulative because another inmate, Gary Gunter, also testified that Wainwright also confessed to him. (DAR Vol.21 at 2736-76). Gunter testified that Wainwright was the actual triggerman. Gunter, who was dying of AIDS, testified that he expected to die in prison and did not want to leave prison because he believed he was better off in prison. Additionally, Murphy was impeached in other ways, including with his numerous prior felony convictions.

consideration in the decision to grant review). Issues that have not divided 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).

Wainwright points to no federal circuit court or state supreme court case holding that cumulative impeachment of a witness in a case with both DNA evidence of the rape and a confession to three law enforcement officers to premediated murder is material that was decided after *Turner* (or even before *Turner*).

Nor is there any conflict regarding the Florida Supreme Court's conclusion that the impeachment information was not suppressed. Both federal circuits courts and state supreme courts have held that the prosecution has no obligation under *Brady* to disclose a witness' own expectations of receiving a benefit from his testimony. *State v. Absolu*, 13 N.W.3d 764, 773 (S.D. 2024) (explaining that a witness "might hope for, or even expect, favorable treatment in exchange" for their testimony "but that hope alone does not implicate *Brady*" citing *Moore-El v. Luebbers*, 446 F.3d 890, 900 (8th Cir. 2006)); *Moore-El v. Luebbers*, 446 F.3d 890, 900 (8th Cir. 2006) (stating "a nebulous expectation of help from the State is not *Brady* material"); *Knox v. Johnson*, 224 F.3d 470, 482 (5th Cir. 2000) (stating that a "nebulous expectation of help from the state is not *Brady* material").

Because the question involves a threshold issue as well as a state law aspect and does not present any conflict with this Court or the other appellate courts, this Court should deny review of the question.

ISSUE II

Whether this Court should grant review of a decision of the Florida Supreme Court holding the claim of new discovered evidence of mitigation of neurodevelopmental effects due to Agent Orange was untimely and meritless as a matter of state law?

Petitioner Wainwright seeks review of the Florida Supreme Court's decision affirming the state postconviction court's summary denial of his claim of newly discovered evidence of mitigation. Pet.at 23. Wainwright raised a claim of newly discovered evidence of mitigation of neurodevelopmental effects due to his father's exposure to Agent Orange during the Vietnam War, relying mainly on a 2023 study of Vietnamese children. The issue of the timeliness of a claim of newly discovered evidence of mitigation, filed in state court, pursuant to a state rule of court, raising a state law claim is solely a matter of state law. Indeed, the entire concept of newly discovered evidence of mitigation is a state law concept, not a federal constitutional matter. This Court does not review matters of state law. Alternatively, there is no conflict between this Court and the Florida Supreme Court's decision. Federal courts do not even recognize the concept of newly discovered evidence of mitigation, discovered years after the sentence was final, as a basis for granting a new penalty phase. There is also no conflict with either the federal circuit courts or the state courts of last resort regarding the timeliness of a claim of newly discovered evidence of mitigation as a federal constitutional matter. Because the question involves two matters of state law and there is no conflict with this Court or the other appellate courts, this Court should deny review of this question.

The Florida Supreme Court's decision

The Florida Supreme Court affirmed the state postconviction court's summary denial of the claim of newly discovered evidence of mitigation regarding Agent Orange. *Wainwright*, 2025 WL 1561151, at *6-*7, The Court explained that under state law for a claim of newly discovered evidence to be considered timely, the claim "must be filed within one year of the date on which the claim became discoverable through due diligence." *Id.* at *6 (citing *Dillbeck v. State*, 304 So.3d 286, 288 (Fla. 2020); *Jimenez v. State*, 997 So.2d 1056, 1064 (Fla. 2008)); Fla. R. Crim. P. 3.851(e)(2)).

The Florida Supreme Court agreed with the lower court that the mitigation was "not newly discovered evidence." *Wainwright*, 2025 WL 1561151, at *7 (citing *Barwick v. State*, 361 So.3d 785, 793 (Fla. 2023)). The Court explained that the claim was untimely because the expert report cited studies from 1996 and 2001 and relied "in large part on a study from 2023," which under their precedent, was "insufficient to support a newly discovered evidence claim." *Id.* at *7 (citing *Sliney v. State*, 362 So.3d 186, 189 (Fla. 2023), *cert. denied*, 144 S. Ct. 501 (2023)).

Alternatively, on the merits, the Court concluded that a causal explanation for Wainwright's issues and behaviors was unlikely to result in a life sentence at a new penalty phase. *Wainwright*, 2025 WL 1561151, at *7 (citing *Hutchinson v. State*, 2025 WL 1155717, at *3 (Fla. Apr. 21, 2025), *cert. denied*, 2025 WL 1261215 (U.S. May 1, 2025)). The new mitigation was unlikely to result in a life sentence, the Florida Supreme Court concluded, due to the six statutory aggravators which included "three

of the most serious and weighty aggravators in the capital sentencing scheme." *Id.* at *7. The Florida Supreme Court affirmed the postconviction court's summary denial of the newly discovered evidence of mitigation claim.

Matters of state law

The sufficiency and timeliness of a claim of newly discovered evidence of mitigation is solely a matter of state law. The Florida Supreme Court's decision regarding the sufficiency of the claim was based exclusively on their own caselaw and a Florida rule of court governing this state law claim. *Wainwright*, 2025 WL 1561151, at *6 (citing *Dillbeck*, 304 So.3d at 288; *Jimenez*, 997 So.2d at 1064; Fla. R. Crim. P. 3.851(e)(2)). Indeed, the entire concept of newly discovered evidence of mitigation under *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), is also solely a matter of state law.

Both the timeliness of a claim of newly discovered evidence of mitigation and the entire concept of newly discovered evidence of mitigation are "adequate and independent state law grounds," precluding this Court's review. This Court has explained that if "the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). This Court's jurisdiction "fails" if the non-federal ground is independent and adequate to support the judgment. *Long*, 463 U.S. at 1038, n.4 (quoting *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)). A decision "is independent only when it does not depend on a federal holding" and "is not intertwined with questions of federal

law." *Glossip v. Oklahoma*, 145 S. Ct 612, 624 (Feb. 25, 2025). The Florida Supreme Court's analysis regarding the timeliness of the claim mentioned only state law; it was not intertwined with federal law in any manner. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* at 624 (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). There is no federal question presented in the petition and therefore, this Court lacks jurisdiction.

No equivalent constitutional concept

Federal courts do not recognize the concept of newly discovered evidence of mitigation as a basis for ordering a new penalty phase. There simply is no constitutional equivalent to the state law concept of newly discovered evidence of mitigation. There is no precedent from this Court requiring a new sentencing proceeding based on new mitigation discovered years after the sentence was final. Wainwright cites no federal case entertaining such a concept in a capital case as a matter of federal constitutional law, much less granting the relief of a new penalty phase based on such a claim.

No conflict with this Court

There is no conflict between this Court 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 is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision finding the claim of newly discovered evidence of mitigation

to be untimely and meritless. This Court does not recognize the concept of newly discovered evidence of mitigation, discovered years after the sentence is final, as a basis for ordering a new penalty phase, much less dictate time requirements regarding such a claim. Petitioner cites to no case from this Court discussing newly discovered evidence of mitigation discovered for the first time at the postconviction stage, as a constitutional matter and certainly does not cite a case from this Court holding a state court requiring threshold showings regarding such a claim violates some provision of the U.S. Constitution.

Wainwright quotes from a smorgasbord of Eighth Amendment cases and asserts that his execution would be "disproportionate, excessive and cruel as applied to his individual circumstances." Pet. at 25-26. This seems to be an argument that this Court should require proportionality review of capital cases as a matter of Eighth Amendment law. That would, of course, would require this Court to overrule its decades-old precedent of *Pulley v. Harris*, 465 U.S. 37 (1984). This Court in *Pulley* 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," *Id.* at 50. This Court explained that such a holding would "effectively overrule" *Jurek v. Texas*, 428 U.S. 262 (1976), and would "substantially depart" from both *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976). *Id.* at 51. The petition is implicitly advocating that this Court overrule both *Pulley* and *Jurek* but without even acknowledging either case. A petition raising a question that refuses to acknowledge this Court's existing precedent

regarding the question should be denied on that basis alone.

Any reliance on *Porter v. McCollum*, 558 U.S. 30 (2009), is misplaced. Pet. at 26, 29. *Porter* was a Sixth Amendment right to the effective assistance of counsel case, not an Eighth Amendment proportionality case. *Porter* does not even cite *Pulley*, much less overrule it. *Porter* does not support an assertion that the Eighth Amendment requires proportionality review.

There is no conflict between this Court and the Florida Supreme Court's decision finding the claim of newly discovered evidence of mitigation to be untimely, insufficient, and meritless as a matter of state law.

No conflict with the federal appellate courts or state supreme courts

There is also no conflict with either the federal circuit courts or the state courts of last resort and the Florida Supreme Court's decision. 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 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).

There is no identified conflict between the Florida Supreme Court's decision in this case and any decision of any federal circuit court of appeal. Wainwright cites no decision from any federal circuit court even addressing the concept of newly

discovered mitigation, much less a decision holding that some provision of the federal constitution mandates that states grant new penalty phases, based on new evidence of mitigation, discovered years after the sentence was final. There is no conflict between federal circuit courts and the Florida Supreme Court's decision.

There is also no identified conflict between any decision of any other state court of last resort and the Florida Supreme Court's decision. Petitioner cites no decision from any state supreme court addressing the concept of new mitigation as a federal constitutional issue. While other states, like Florida, permit claims of newly discovered evidence of mitigation to be raised, they do so as a matter of state law, not as a matter of Eighth Amendment law. *See, e.g. Matter of Frazier*, 558 P.3d 451 (Wash. 2024) (citing RCW 10.73.100(1)). There is no conflict between the other state supreme courts and the Florida Supreme Court's decision.

The entire concept of newly discovered evidence of mitigation is purely a matter of state law and the timeliness and sufficiency of such a claim is also matters of state law. Because the question is a matter of state law over which there is no conflict with this Court or among lower courts, review of the question should be denied.

ISSUE III

Whether this Court should grant review of a decision of the Florida Supreme Court holding the Eighth Amendment issue involving new mitigation was "without merit"?

Petitioner Wainwright seeks review of the Florida Supreme Court's decision regarding his claim of newly discovered evidence of mitigation as a matter of Eighth Amendment law. Pet. at 30. He argues The Florida Supreme Court found the Eighth

Amendment claim was without merit. There is no conflict between this Court's jurisprudence and the Florida Supreme Court's decision in this case. There is no constitutional right to present new mitigation discovered years after the sentence is final in postconviction proceedings. The Eighth Amendment right to present mitigation is limited to trial and does not extend into the postconviction stage, much less into the successive postconviction stage. There is no conflict with the Court's Eighth Amendment jurisprudence. There is also no conflict with the federal circuit courts because federal courts do not recognize the concept of newly discovered evidence of mitigation, discovered years after the sentence was final, as a federal constitutional claim. Nor is there any conflict with the state courts of last resort. Because the question is solely a matter of state law which does not present any conflict with this Court or other appellate courts, this Court should deny review of the question.

The Florida Supreme Court's decision

The Florida Supreme Court found the Eighth Amendment claim was "inadequately briefed and without merit." *Wainwright*, 2025 WL 1561151, at *7, n.16, The Florida Supreme Court relied on its prior decision in *Hutchinson v. State*, 2025 WL 1198037, at *5 (Fla. Apr. 25, 2025) (noting that despite Hutchinson's "invocation of vague constitutional principles, Hutchinson has not cited any authority holding that the Eighth Amendment provides an absolute right to present mitigating evidence at any time, regardless of its availability, regardless of the defendant's diligence in locating and presenting it, and regardless of its strength or force."), *cert.*

denied, Hutchinson v. Florida, 2025 WL 1261217 (U.S. May 1, 2025) (No. 24-7087).

Threshold issues

First, this exact issue regarding whether execution claims may be denied on procedural grounds was not raised in the state postconviction court or in the Florida Supreme Court. While Wainwright raised an Eighth Amendment claim, he did not raise this exact issue. Petitioners may not raise questions for the first time in this Court because this Court "is one of final review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001). Ordinarily, this Court does "not decide in the first instance issues not decided below." *City of Austin, Texas v. Reagan Nat'l Advert. Of Austin, LLC*, 596 U.S. 61, 76 (2022) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)). This Court does not normally address arguments that were "neither pressed nor passed upon below." *Babcock v. Kijakazi*, 595 U.S. 77, 82, n.3 (2022)). This Court should not grant review of a question that was not raised below.

Second, any decision from this Court regarding whether the Eighth Amendment claim was adequately briefed would not matter to the ultimate outcome of this case. This Court does not grant review of questions that are theoretical or academic in the sense that the question presented does not effect the actual outcome of the case, *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); *Herb v. Pitcarn*, 324 U.S. 117, 125-26 (1945) (explaining that if the same judgment would be rendered by the state court, this Court's review would be nothing more than an advisory opinion). The Florida Supreme Court's alternative holding was that the

Eighth Amendment issue was "without merit." *Wainwright*, 2025 WL 1561151, at *7, n.16. The petition raising a question regarding whether an Eighth Amendment claim can be rejected due to procedural hurdles simply ignores the Florida Supreme Court's alternative holding that the Eighth Amendment claim was meritless. Any decision on the matter raised in the petition regarding procedural hurdles on execution claims would be purely academic because the Eighth Amendment claim would still be denied by this Court on the merits, as it was by the Florida Supreme Court.

No conflict with this Court

There is no conflict between this Court 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 is no conflict with the Court's Eighth Amendment jurisprudence because this Court's precedent does not support the view that the Eighth Amendment right to present mitigation extends to the postconviction stage. While this Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and *Eddings v. Oklahoma*, 455 U.S.104 (1982), are Eighth Amendment cases concerning the right to present mitigation, both cases are limited to the right to present mitigation at the original penalty phase. Neither *Lockett* nor *Eddings* apply to postconviction proceedings, much less to successive postconviction proceedings. There is no precedent from this Court requiring a new sentencing proceeding based on new mitigation, discovered years after the sentence was final, as a matter of Eighth Amendment law.

This Court has held that Eighth Amendment execution claims can be waived

and procedurally defaulted. *Stewart v. LaGrand*, 526 U.S. 115, 117-120 (1999), This Court reversed the Ninth Circuit which had held "Eighth Amendment protections may not be waived, at least in the area of capital punishment." *Id.* at 117-118 (quoting *LaGrand v. Stewart*, 173 F.3d 1144, 1148 (1999)). The petition does not cite or attempt to distinguish this Court's decision in *LaGrand*. *See also Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (permitting a capital defendant to waive his right to appeal and lifting the stay of execution).

Furthermore, this Court has repeatedly denied petitions raising the question of whether execution claims may be denied on procedural hurdles, such as timeliness and procedural bars. *Dillbeck v. Florida*, 143 S. Ct. 856 (2023) (denying petition) (No. 22-6819); *cf. Ford v. Florida*, 145 S. Ct. 1161 (2023) (denying petition) (No. 24-6510).

This Court, in habeas litigation, permitted claims of innocence of death penalty to lift procedural bars to reach the merits of a habeas claim. *Sawyer v. Whitley*, 505 U.S. 333 (1992)). *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (noting the Court has applied the miscarriage of justice exception to overcome various procedural defaults citing cases, including *Sawyer*). *Sawyer*, however, did this under the miscarriage of justice exception applicable to federal habeas litigation, not as a matter of Eighth Amendment law, and did so only to lift procedural hurdles, not as a basis for independent relief. And, even under *Sawyer*, claims of innocence of the death penalty "must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced." *Sawyer*, 505 U.S. at 347. *Sawyer* itself focused on aggravation and

eligibility. *Sawyer*, 505 U.S. at 345 ("Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met."). This is not a valid claim of innocence of the death penalty under *Sawyer* because the focus of Wainwright's claim is solely on mitigation rather than on the aggravation and new mitigation at that. Entirely new mitigation is not even mentioned in *Sawyer*. There is no conflict between this Court and the Florida Supreme Court's decision concluding the Eighth Amendment claim was "without merit."

No conflict with the federal appellate courts or state supreme courts

There is also no conflict with either the federal circuit courts or the state courts of last resort and the Florida Supreme Court's decision. 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 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).

There is no identified conflict between the Florida Supreme Court's decision in this case and any decision of any federal circuit court of appeal. *See, e.g., United States v. Jones*, 758 F.3d 579, 586 (4th Cir. 2014) (concluding that *McQuiggin v. Perkins* does

not extend to claims of innocence of sentence and noting the panel had "found no case" where a defendant was granted a resentencing based on such a claim). Wainwright cites no decision from any federal circuit court even addressing the issue of whether the Eighth Amendment right to present mitigation extends to the postconviction stage and he certainly does not cite any case granting a new penalty phase based on new evidence of mitigation, discovered years after the sentence was final on direct appeal, as a matter of Eighth Amendment law.

There is also no conflict with the federal appellate courts regarding procedural hurdles to execution claims. *United States v. Roof*, 10 F.4th 314, 357 (4th Cir. 2021) (rejecting an argument that, under the Eighth Amendment, a defendant cannot waive procedural safeguards out of a desire to obtain a death sentence), *cert. denied*, 143 S. Ct. 303 (2022); *Prieto v. Zook*, 791 F.3d 465, 469-71 (4th Cir. 2015) (procedural bar of a claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002)); *In re Burton*, 111 F.4th 664, 666 (5th Cir. 2024) (time bar of an *Atkins* claim); *In re Soliz*, 938 F.3d 200, 203 (5th Cir. 2019) (procedural bar of an *Atkins* claim); *In re Johnson*, 325 Fed. Appx. 337, 338, 341 (5th Cir. 2009) (time bar of an *Atkins* claim); *Fulks v. Watson*, 4 F.4th 586, 587, 589-95 (7th Cir. 2021) (successive bar of an *Atkins* claim); *Davis v. Kelley*, 854 F.3d 967, 971 (8th Cir. 2017) (successive bar of an *Atkins* claim); *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (time bar of an *Atkins* claim). There is no conflict between federal circuit courts and the Florida Supreme Court's decision.[4]

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[4] Again, Wainwright would not be entitled to any relief in habeas litigation under *Sawyer*, even if *Sawyer* survived the AEDPA. *In re Richardson*, 802 Fed. Appx. 750, 758 (4th Cir. 2020) ("*Sawyer* did not survive Congressional enactment of AEDPA);

There is also no identified conflict between any decision of any other state court of last resort and the Florida Supreme Court's decision. Petitioner cites no decision from any state supreme court even addressing the issue of whether the Eighth Amendment extends to the postconviction stage, much less a decision from a state supreme court holding that the Eighth Amendment mandates that states grant new penalty phases, based on new evidence of mitigation, discovered years after the sentence was final. While other states, like Florida, permit claims of newly discovered evidence of mitigation to be raised, they do so as a matter of state law, not as a matter of Eighth Amendment law. *See, e.g. Matter of Frazier*, 558 P.3d 451 (Wash. 2024) (citing RCW 10.73.100(1)).

There is also no conflict with the state supreme courts regarding procedural hurdles to execution claims. *State ex rel. Johnson v. Blair*, 628 S.W.3d 375, 388 (Mo. 2021) (procedural bar of an *Atkins* claim); *State v. Lotter*, 976 N.W.2d 721, 740-47

Bowles v. Sec., 935 F.3d 1176, 1182 (11th Cir. 2019) ("AEDPA forecloses the *Sawyer* exception in all circumstances"); *In re Hill*, 715 F.3d 284, 299-301 (11th Cir. 2013) (holding *Sawyer* did not survive the AEDPA); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir. 1997) (holding *Sawyer* did not survive the AEDPA); *but see Perkins*, 569 U.S. at 393.

A claim of "innocence of the death penalty" under *Sawyer* required that the new evidence negate every aggravating factor. *Johnson v. Singletary*, 938 F.2d 1166, 1183 (11th Cir. 1991) (en banc) (holding claim of innocence of the death penalty requires a showing negating all of the aggravating factors) (emphasis in original). The focus of innocence of the death penalty claims is exclusively on the aggravation, not the mitigation. *See, e.g., Irick v. Bell*, 2010 WL 4238768, at *5 (E.D. Tenn. Oct. 21, 2010) (stating that actual innocence of the death penalty "must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence" citing *Sawyer*, 505 U.S. at 347. Mitigation is not even considered in the analysis but Wainwright's claim focuses solely on mitigation. The new Agent Orange mitigation does not negate any of the six aggravators. This is not a valid claim of innocence of the death penalty under *Sawyer*.

(Neb. 2022) (time bar and procedural bar of an *Atkins* claim); *McMillan v. State*, 258 So. 3d 1154, 1198 (Ala. Crim. App. 2017) (procedural bar of an *Atkins* claim). There is also no conflict between the other state supreme courts and the Florida Supreme Court's decision.

Because the entire concept of newly discovered evidence of mitigation is a state law concept with no Eighth Amendment equivalent and because there is no conflict that procedural hurdles to Eighth Amendment execution claims are permissible, review of this question should be denied.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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