No. 17-8228 & 17A-1030

IN THE

Supreme Court of the United States

In re ROSENDO RODRIGUEZ, III,
Petitioner,

On Original Petition for Writ of Habeas Corpus

RESPONDENT'S BRIEF IN OPPOSITION TO ORIGINAL PETITION FOR A WRIT OF HABEAS CORPUS AND APPLICATION FOR A STAY OF EXECUTION

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This is a capital case.

QUESTION PRESENTED

Whether transfer to the district court pursuant to the Court's original habeas jurisdiction is warranted where the Fifth Circuit Court of Appeals has already denied permission to file a successive writ pursuant to 28 U.S.C. § 2244 (b)(2)(B), where the petition is plainly an attempt to circumvent AEDPA, and where the underlying claim of actual innocence is not cognizable in federal court and fails to make a truly persuasive showing of innocence.

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BRIEF IN OPPOSITION

Petitioner Rosendo Rodriguez, III, **is scheduled for execution after 6:00 p.m. on March 27, 2018,** for the capital murder of Summer Baldwin, committed while in course of committing and attempting to commit the aggravated sexual assault of Baldwin.

Rodriguez was convicted and sentenced to death in March 2008. Since that time, Rodriguez has exhaustively litigated his case. Direct appeal became final in 2011. *See Rodriguez v. State,* No. 75,901, 2011 WL 1196871 (Tex. Crim. App.), *cert. denied*, 132 S. Ct. 814 (2011). During state habeas corpus review, Rodriguez received a six-day evidentiary hearing in which presented evidence in support of many of his twenty-one claims for relief; he was ultimately unsuccessful and relief was denied. *Ex parte Rodriguez,* No. WR-78,127-01, 2013 WL 1920737 (Tex. Crim. App. May 8, 2013). During federal habeas proceedings, Rodriguez received funding to investigate an unexhausted claim regarding trial counsel's cross-examination of the medical examiner's testimony regarding the victim's cause of death. His investigative efforts were fruitless and, after hearing oral argument, the district court denied federal habeas relief in 2016 on all twenty-five federal habeas claims. *Rodriguez v. Davis,* Civ. Act. No. 5:13-cv-233, 2016 WL 4098339 (N.D. Tex., Aug. 1, 2016). The Fifth Circuit denied a certificate of appealability (COA), *see Rodriguez v.*

Davis, 693 F. App'x 276 (5th Cir. May 24, 2017) (unpublished), and his federal habeas proceedings concluded in 2017 when this Court denied his petition for a writ of certiorari, *Rodriguez v. Davis,* 138 S. Ct. 389 (2017). An execution was set in November 2017.

On February 20, 2018, Rodriguez filed in the state district court a motion for stay of execution, asking the court to withdraw his execution date. The court denied the motion on March 6, 2018. Rodriguez filed a successive habeas application in the state court on March 12, 2018, pursuant to Texas Code of Criminal Procedure Article 11.071 § 5 and Article 11.073; and a motion for discovery on March 14, 2018. On March 16, he filed a motion for stay of execution pending the outcome of his successive writ. The Court of Criminal Appeals (CCA) dismissed his application as an abuse of the writ, without reviewing its merits, and denied his motion for stay of execution. *Ex parte Rodriguez,* WR-78,127-02 (Tex. Crim. App. March 19, 2018). The CCA dismissed his motion for discovery without written order.

Rodriguez filed in the district court a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) on March 19, 2018. seeking reconsideration of the merits of a claim raised in his initial federal habeas petition. On March 22, 2018, the district court construed this motion as a successive habeas petition, transferred it to the Fifth Circuit, and, alternatively denied the motion. The court also denied a COA. *See* Docket

Entry 54 (Memorandum Opinion and Order Transferring Successive Habeas Petition) and 55 (Judgment). Rodriguez immediately filed a notice of appeal, *see* DE 56, but then filed a motion to dismiss his appeal shortly thereafter.

While the Rule 60(b) motion was pending in the district court, Rodriguez asked the court of appeals, on March 20, 2018, for authorization to file a successive federal habeas petition raising four new claims related to his recent discovery of a wrongful-termination lawsuit initiated on August 19, 2015, by Dr. Luisa Florez against the Lubbock County Medical Examiner's Office. *See* Motion for Order Authorizing Filing and Consideration of Second Petition for a Writ of Habeas Corpus Under 28 U.S.C. §2254 (First Motion). He also filed the Second Petition Second Petition for Writ of Habeas Corpus (Second Petition), and an Opposed Motion to Stay Execution (Motion to Stay). On March 23, 2018, the Fifth Circuit denied Rodriguez's request to file a successive petition and denied his motion for a stay. *In re Rodriguez,* No. 18-10337 (Petitioner's Appendix B).

Rodriguez now asks this Court to exercise its original habeas jurisdiction and to order the district court to hold an evidentiary hearing on his claim of actual innocence. Rodriguez is not entitled to the extraordinary relief he requests. His petition is nothing more than an end-run around the Fifth Circuit, which already denied his request for permission to pursue habeas relief in the district court because he failed to meet the requirements of 28

U.S.C. § 2244 (b)(2)(B). That decision is not appealable. § 2244 (b)(3)(E). Rodriguez's attempt to circumvent the plain language of AEDPA should not be condoned, and his petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider original writs of habeas corpus under 28 U.S.C. § 2241(a). *See Felker v. Turpin,* 518 U.S. 651, 660-62 (1996).

STATEMENT OF THE CASE

I. Facts of the Crime

The federal district court summarized the applicable facts from Rodriguez's trial as follows:

> **I. Pretrial**
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> On September 13, 2005, workers using heavy equipment to spread and compact garbage in a Lubbock city landfill found the body of Summer Baldwin in a suitcase. Baldwin, a prostitute, had been a witness in a federal counterfeiting case, which triggered FBI involvement in the investigation of her death. Financial records obtained via federal grand jury subpoena revealed that Rodriguez's debit card was used to purchase an identical suitcase at Walmart the day before. The store's surveillance video showed that Rodriguez matched the description of the man last seen with Baldwin alive. Hotel and bank records indicated that Rodriguez's debit card was also used to rent a hotel room in Lubbock under the name "Thomas" Rodriguez. Based on the foregoing information, Rodriguez was arrested at his parents' home in San Antonio.
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> Rodriguez retained Albert Rodriguez ("Albert") as counsel. Albert is not related to Rodriguez but was an acquaintance of Rodriguez's father, a well-known criminal defense attorney from Wichita Falls. Three weeks after his arrest, Rodriguez gave a recorded statement to the police, with Albert present, admitting that he had engaged in consensual sex with Baldwin but killed her in self-defense after

she attacked him with a knife. The ongoing police investigation also linked Rodriguez to the disappearance of 16-year-old Joanna Rogers, who had been missing for more than a year.

In the summer of 2006, Rodriguez negotiated a plea bargain with the assistance of new counsel, Jeff Blackburn. Rodriguez agreed to plead guilty to Baldwin's murder and disclose his involvement in Rogers's murder. If his information could be corroborated by the recovery of Rogers's body, the State would reduce the capital murder charge to murder, offer a sentence of life imprisonment, and grant Rodriguez immunity from prosecution for Rogers's murder. Rodriguez confessed to Rogers's murder, and her body, like Baldwin's, was found in a suitcase in the Lubbock city landfill.

The plea agreement did not go forward as planned, however. On the scheduled day in October of 2006, Mr. Blackburn regretfully informed the trial court of a bizarre series of events, the likes of which he had never encountered in his law practice. For the preceding twenty-four hours, Rodriguez had maintained that he did not understand anything he was being told. Rodriguez told the trial judge he did not understand his questions. As a result, the plea did not go forward, Mr. Blackburn withdrew from the case, and the State gave notice of its intent to seek the death penalty. Richard Wardroup and Fred Stangl were appointed as new counsel. The trial court granted a change of venue because of publicity surrounding the search for Rogers's body; in March of 2008, the parties proceeded to trial.

II. Trial

The prosecution alleged two different theories of capital murder: (1) intentionally or knowingly causing Baldwin's death while in the course of committing or attempting to commit aggravated sexual assault, and (2) intentionally or knowingly causing the death of more than one person in the same criminal transaction, specifically, Baldwin and her child in utero. *See* Tex. Penal Code Ann. § 19.03 (a)(2), (7). The State presented evidence showing that Rodriguez had been in Lubbock for training with the United States Marine Corps Reserve when he picked up Baldwin in the early morning hours of September 12, 2005, and took her to his hotel room where he beat, strangled, and sexually assaulted her. He then purchased the suitcase, placed her body in it, and threw it in

> a dumpster. The defense argued that the sex was consensual, that Rodriguez had no knowledge of the pregnancy, and that his Marine combat instincts took over and he killed Baldwin accidentally in self-defense after she wielded a knife at him. The jury returned separate guilty verdicts on each theory.
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> At the punishment phase, the State introduced evidence of five other sexual assaults committed by Rodriguez and a misdemeanor theft charge for which he had served probation. The jurors received evidence connecting Rodriguez to the disappearance of Rogers, but they did not receive his confession to her murder. The defense introduced evidence and argument that Rodriguez could safely serve a life sentence in prison, that Rodriguez was a respectful, intelligent person, and that Rodriguez grew up in a home with an abusive, domineering, alcoholic father. The jury answered two special issues in a way that required a death sentence under Texas law. *See* Tex. Code Crim. Proc. Ann. Art. 37.071, §§ 2(b)(1) and (e)(1).

Rodriguez v. Davis, No. 5:13-cv-233, 2016 WL 4098339, at *1-2 (N.D. Tex., Aug. 8, 2016) (internal footnote omitted).

II. The State-Court and Federal Appellate Proceedings.

The CCA affirmed Rodriguez's conviction and sentence on direct appeal. *Rodriguez v. State,* No. 75,901, 2011 WL 1196871 (Tex. Crim. App.), *cert. denied*, 132 S. Ct. 814 (2011). The CCA also denied state habeas relief, adopting the trial court's findings made following a lengthy evidentiary hearing. *Ex parte Rodriguez,* No. WR-78,127-01, 2013 WL 1920737 (Tex. Crim. App. May 8, 2013); *see also* 5 SHCR[1] 1416-98.

[1] "SHCR" refers to the State Habeas Clerk's Record, preceded by volume number and followed by page reference.

After hearing oral argument, the federal district court denied habeas relief and COA. *Rodriguez v. Davis,* Civ. Act. No. 5:13-cv-233, 2016 WL 4098339 (N.D. Tex., Aug. 1, 2016). The Fifth Circuit Court of Appeals also denied COA, *Rodriguez v. Davis,* 693 F. App'x 276 (5th Cir. May 24, 2017) (unpublished), and, on October 30, 2017, this Court denied certiorari review, *Rodriguez v. Davis,* 138 S. Ct. 389 (2017). On November 8, 2017, the 140th District Court of Lubbock County, Texas, set Rodriguez's execution date.

On February 20, 2018, Rodriguez filed in the state district court a motion for stay of execution, asking the court to withdraw his execution date pursuant to Texas Code of Criminal Procedure Article 43.141(d)(1), so that he could prepare and file a successive habeas application under Article 11.071. The court denied the motion on March 6, 2018. Rodriguez filed a successive writ in the state court on March 12, 2018, pursuant to Texas Code of Criminal Procedure Article 11.071 § 5 and Article 11.073; and a motion for discovery on March 14, 2018. On March 16, he filed a motion for stay of execution. On March 19, 2018, the CCA dismissed his application as an abuse of the writ, without reviewing its merits, and denied his motion for stay of execution. *Ex parte Rodriguez,* WR-78,127-02. The CCA dismissed his motion for discovery without written order.

Rodriguez filed in the district court a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) on March 19, 2018. On

March 20, 2018, while the district court motion was still pending, Rodriguez filed in the Fifth Circuit a motion for authorization to file a successive federal habeas petition raising four new claims. *See* First Motion. He also filed the Second Petition for Writ of Habeas Corpus (Second Petition), and an Opposed Motion to Stay Execution (Motion to Stay).

On March 22, 2018, the district court construed the Rule 60(b) motion as a successive habeas petition, transferred it to the Fifth Circuit, and, alternatively denied the motion. The court also denied a COA. *See* DE 54, 55. Rodriguez immediately filed a notice of appeal, DE 56, but withdrew it in the Fifth Circuit shortly thereafter, opting to proceed only on pending motion for authorization. The Fifth Circuit denied Rodriguez's request to file a successive habeas petition, and denied his motion for stay on March 23, 2018. *See* Petitioner's Appendix B.

ARGUMENT

Rodriguez asks the Court to exercise its power to grant an extraordinary writ and order the district court to hold an evidentiary hearing on his claim that he is actually innocent. Petition at 8-9. But he fails to justify the extraordinary remedy that he seeks.

Supreme Court Rule 20.4(a) provides that, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate

relief cannot be obtained in any other form or from any other court. This writ is rarely granted." *See Felker*, 518 U.S. at 665 (explaining that Rule 20.4(a) delineates the standards under which the Court grants such writs). For the reasons explained below, Rodriguez fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

I. Rodriguez is Not Entitled to the Extraordinary Remedy He Seeks.

Rodriguez's request that the Court transfer his petition to the district court should be refused. *See* Petition at 1. While the Court ordinarily has the statutory authority to transfer a petition for a writ of habeas corpus to a district court with jurisdiction to hear it, 28 U.S.C. § 2241(b), the district court does not have such jurisdiction. Rodriguez's claim could now only be presented to the circuit court because it is plainly successive. 28 U.S.C. § 2244(b)(3)(A). The relief Rodriguez requests is, consequently, statutorily impermissible. And the Fifth Circuit has already denied his request for permission to file in the district court because he failed to meet 28 U.S.C. § 2241(b)(2)(B). *See* Petitioner's Appendix B. This decision is not appealable. 28 U.S.C. § 2244(b)(3)(E). Rodriguez is thus attempting to circumvent the plain language of AEDPA, and his attempt to do so should not be condoned; his petition should be denied.

While § 2244(b)(3)(E) did not repeal the Court's authority to entertain original habeas petitions, § 2244(b)(1)–(2) "inform [the Court's] consideration of original habeas petitions. *Felker*, 518 U.S. at 662–63; *see also In re Davis,* 557 U.S. 952 (2009) ("Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the [AEDPA]") (Scalia, J., dissenting). As found by the Fifth Circuit, Rodriguez cannot meet the § 2244(b) requirements. *See* Petitioner's Appendix B.

Rodriguez's actual innocence claim is plainly successive and does not satisfy § 2244(b)(2). First, the claim does not rely on a new retroactive rule of constitutional law. *Tyler v. Cain*, 533 U.S. 656, 662–63 (2001) ("We thus conclude that a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive."). Therefore, his claim is impermissibly successive under § 2244(b)(2)(A).

The claim is also impermissibly successive under § 2244(b)(2)(B) because Rodriguez lacked diligence in raising it. The factual predicate for all the claims he sought permission to file—the 2015 lawsuit—came into existence while his federal habeas petition was pending. This lawsuit was a matter of public record, and was reported on the local news as early as August 19, 2015—the day the suit was filed.[2] To the extent Rodriguez argues that he could not have

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[2] *See* http://www.lubbockonline.com/article/20150819/NEWS/308199733

learned of the lawsuit without being told about it, and that the prosecutor had a *Brady* obligation to inform him of this evidence filed seven years after his trial, this Court has held that *Brady* does not extend to the postconviction context. *See District Attorney's Office for the Third Judicial District v. Osborne,* 557 U.S. 52, 68-69 (2009). Therefore, the prosecutor had no duty to notify Rodriguez of this information. And there exists no *Brady* obligation where evidence is fully available to the defendant through the exercise of due diligence. *Kutzner v. Cockrell,* 303 F.3d 333, 336 (5th Cir. 2002) (government need not "furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence."). The Fifth Circuit fond that the information was discoverable during the pendency of his initial federal writ, and that the prosecutor had no duty to inform Rodriguez of the pending lawsuit. *See* Petition Appendix B, at 5-6, 8. Consequently, Rodriguez's IATC claims are impermissibly successive under § 2244(b)(2)(B).

Finally, the new evidence does not demonstrate a prima facie showing of actual innocence. § 2244(b)(2)(B)(ii). As will be discussed at length in the next section, the lawsuit evidence would provide marginal impeachment at best, but would not undermine the doctor's actual testimony or finding. Rodriguez has never presented a controverting opinion—despite receiving a pretrial expert, a state-court evidentiary hearing, and federal funding for a forensic pathologist. The jury rejected his self-serving claim of self-defense. This new evidence fails

to undermine the medical examiner's actual findings and testimony, and would not demonstrate Rodriguez's innocence. The Fifth Circuit agreed, concluding Rodriguez failed to satisfy § 2244(b)(2)(B)(ii). Petitioner's Appendix B, at 6-8.

Rule 20.4(a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth "reasons for not making application to the district court." In this case, the reasons are clear: Rodriguez is actually seeking to appeal the Fifth Circuit's denial of authorization despite failing to meet the successive petition requirements of 28 U.S.C § 2244 in that court. Rodriguez has not shown any "exceptional circumstances" to warrant the exercise of this Court's discretionary power.

II. Rodriguez Fails to Demonstrate He is Actually Innocent.

This Court has never held that claims of actual innocence are cognizable on federal habeas review. A claim of innocence is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)); *see also Reed v. Stephens,* 739 F.3d 753, 766 (5th Cir. 2014) (Fifth Circuit does not recognize freestanding actual innocence claims). Therefore, neither the district court nor the Fifth Circuit could "entertain [Rodriguez's] stand-alone claim." *Foster*, 466 F.3d at 368.

And while a "truly persuasive showing" of actual innocence may act as a "gateway" to review of an otherwise procedurally barred claim, *see Herrera,* 506 U.S. at 404, 417; *Schlup,* 513 U.S. at 315; only in a "rare" and "extraordinary case" may an inmate overcome a procedural default by demonstrating a miscarriage of justice, *Schlup*, 513 U.S. at 321. This requires an inmate to demonstrate "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id*. at 327. This standard cannot be met by "merely . . . showing that a reasonable doubt exists in light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id*. at 329. Importantly, "[t]o be credible, such a claim requires petitioner to support his allegations with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id*. at 324. Thereafter, "the habeas court must consider 'all of the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup*, 513 U.S. at 327–28). Then, the habeas "court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *Id*. (quoting *Schlup,* 513 U.S. at 329).

Rodriguez fails to make a "truly persuasive showing" of actual innocence. Rodriguez's new evidence—a lawsuit filed seven years after his trial alleging possible improprieties in the way Dr. Natarajan ran the Lubbock County Medical Examiner's Office from 2013 to 2015—provides, at best, marginal impeachment of the medical examiner on how he *might* have practiced in 2005 when he performed Baldwin's autopsy. But merely impeaching the medical examiner does not exonerate Rodriguez.

Initially, Dr. Florez's allegations regarding Dr. Natarajan's handling of the Medical Examiner's Office from 2013 to 2015 provide no relevant information about Dr. Natarajan's performance of Summer Baldwin's autopsy in 2005. Dr. Florez did not begin working for Dr. Natarajan until 2013. Therefore, any allegations within the lawsuit do not address how Dr. Natarajan ran the Medical Examiner's Office on September 13-14, 2005—the days he performed Baldwin's autopsy. In fact, the office Dr. Florez worked for from 2013 to 2015 was under a different organizational structure than the one Dr. Natarajan operated in September of 2005. In September of 2005, the Medical Examiner's Office was "under the Texas Tech organizational structure, and [he] was the director of the division of forensic pathology for the

Texas Tech School of Medicine." Respondent's Appendix B.[3] It was not until February of 2009 that the Medical Examiner's Office became its own entity separate from Texas Tech University—which was when Dr. Natarajan returned to Lubbock to head up the new Lubbock County Medical Examiner's Office after having previously left Lubbock to work for a private company from August of 2006 to February of 2009. Respondent's Appendix B. It was also during 2009 that Honey Haney Smith was hired by the new Lubbock County Medical Examiner's Office, *see* Respondent's Appendix C, so any allegations in Dr. Florez's lawsuit about delegating responsibility to Nurse Smith are not relevant to determining how the office was run in 2005. Furthermore, as noted, Dr. Florez nonsuited the case with prejudice in 2016, acknowledging that the lawsuit was based on an employment dispute and not on a belief that Dr. Natarajan's medical findings or the scientific validity thereof were in question. *See* Respondent's Appendix A and E.

And any suggestion that Dr. Natarajan did not actually perform Baldwin's autopsy is rebutted by the record. Dr. Natarajan's testimony makes clear that he personally performed the autopsy in this case. 34 Reporter's Record (RR) 175-76, 181-83; 35 RR 64, 74-75. The trial record also reveals three

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[3] The exhibits attached to this pleading were filed by the State in response to Rodriguez's motion for a stay of execution, filed in the state district court on February 20, 2018.

sworn Affidavits for Search Warrant from police officers who asserted that Dr. Natarajan performed the autopsy on Baldwin. *See* 43 RR Defense Exhibit (DX) 2; 43 RR DX 3; 43 RR DX 6. And in response to Rodriguez's Motion for Stay of Execution before the state court, the State submitted an affidavit from Detective Garland Timms who indicated that he was present for and actually witnessed Dr. Natarajan performing the autopsy. Respondent's Appendix D.

Any effort to impeach Dr. Natarajan's performance in 2005 with the accusation of a former employee regarding his practices from 2013 through 2015 would be largely unpersuasive. Any misdeeds Dr. Natarajan may have committed ten years after the performance of Summer Baldwin's autopsy do not warrant granting Rodriguez habeas relief, and certainly do not demonstrate that he is actually innocent of capital murder. *Cf. In re Masterson,* 638 F. App'x 320, 327-28 (5th Cir. 2016) ("Masterson's theory essentially is that if a witness who testifies for the State ever lies or commits other misdeeds thereafter, the defendant is entitled to a new trial. Masterson provides no case that reaches that broadly, nor would such a rule make sense.")

Furthermore, Rodriguez has been given every opportunity to thoroughly and extensively investigate Dr. Natarajan's autopsy findings and trial testimony—prior to trial, during state habeas proceedings, and on federal habeas review—but consistently came up short in his efforts to discredit the doctor's findings. Prior to trial, counsel consulted an expert—Dr. Norton—to

evaluate the forensic work done on the case. *See* 7 EHRR DX 12 (email from trial counsel dated October 17, 2007). Dr. Norton stated that the forensic work done in this case "was very good," and opined that the defense could not reasonably argue against sexual assault given the extent of the injuries; she stated that the offense did not occur as Rodriguez said it did, and that the extent of the injuries was "way more than would have been necessary to defend himself;" and she stated, "it is laughable that this is self defense." Finally, she opined that Rodriguez "is a psychopath and should never hope to see the light of day;" she did not want to see him have the possibility of parole, and she wondered if there were other victims not yet discovered. Trial counsel Wardroup stated in the email, "needless to say, we won't be calling her to testify."

During a state habeas evidentiary hearing, Rodriguez questioned Dr. Natarajan in support of an ineffective-assistance-of-trial-counsel (IATC) claim[4] but could not discredit Dr. Natarajan and provided no new evidence in support of his claim. The trial court noted that Dr. Natarajan's testimony during the state habeas hearing was essentially unchanged from his testimony at trial,

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[4] Rodriguez complained he was denied his right to effective assistance when trial counsel failed to investigate, cross-examine or otherwise challenge the evidence that Summer Baldwin was still alive when she was placed in the suitcase. *See* DE 15, at 180-84.

and found Dr. Natarajan's testimony credible and true. 5 SHCR 1443-44. And because habeas counsel did not present any independent forensic evidence in support of his claim—even with more time to investigate and prepare—and accomplished no more on cross-examination than trial counsel did at trial, the trial court concluded that trial counsel was not deficient for failing to do more at trial. 5 SHCR 1444.

And prior to filing his federal habeas application, Rodriguez sought and was granted funds to hire forensic pathologist Dr. Amy Gruszecki, to review the autopsy findings and render an opinion with respect to the origin of blunt-force-trauma injuries and whether they occurred before Baldwin's death (and were thus inflicted by Rodriguez) or after her body was placed in the dumpster, where it was picked up by a garbage truck, crushed in the compactor, and transported to a landfill. DE 6 at 2-3; DE 8.[5] In spite of this investigative assistance, Rodriguez presented no new evidence. *See* DE 38, at 77, 85-86.

While Rodriguez now seeks another evidentiary hearing where he believes he could obtain a recantation by cross-examining Dr. Natarajan with this lawsuit evidence, Petition at 10-11, any additional challenge to the doctor's credibility would accomplish little. Despite numerous opportunities to

[5] Rodriguez raised an unexhausted claim that trial counsel should have contested the testimony that Baldwin was dead, arguing that her blunt-force-trauma injuries could have been caused by the trash compactor, not Rodriguez. DE 15, at 218-23.

discredit Dr. Natarajan's findings, Rodriguez has presented no controverting testimony or reports, either during trial or during the postconviction proceeding, and Dr. Natarajan's testimony has remained consistent. Any effort to discredit Dr. Natarajan with evidence of this lawsuit falls short because there is no contrary opinion for the Court to consider.

Dr. Natarajan testified that the cause of death was both blunt force trauma and asphyxia. 35 RR 65. Dr. Natarajan did not speculate whether Baldwin was alive or dead when she went into the suitcase, and did not speculate as to whether the blunt-force-trauma injuries happened because the victim was "tossed around in a suitcase in a dumpster, or a compact truck, or anything else like that" or whether they happened "before she died and was put in that suitcase;" the doctor stated only, "They're antemortem injuries," meaning prior to death. 34 RR 200; 35 RR 100-01. The doctor would not state whether she died from manual strangulation, as Rodriguez confessed, or "positional asphyxia" from her placement in the suitcase; but agreed that, if she was alive, given the position of her neck in the suitcase, she would have died very shortly thereafter from positional asphyxiation. 35 RR 65-68. The doctor did not see injuries consistent with an arm bar strangulation, as suggested by Rodriguez. 35 RR 59-61.

The evidence from trial simply does not support the assumption that Baldwin was still alive when she was compacted like trash. Rodriguez

confessed to strangling Baldwin, checking for but finding no pulse, and making no effort to revive her. He left her lifeless body in the hotel room while he drove to Walmart where he purchased a suitcase; he returned to the hotel and stuffed her still-lifeless body into that suitcase, in such a position that, if she was alive, she would have died soon thereafter from positional asphyxia; and he transported the suitcase to a dumpster where it was later picked up by the trash-compactor truck. *See Rodriguez v. State,* 2011 WL 1196871, at *1-3 (summation of facts). Even assuming the truck picked up her body immediately after it was placed in the dumpster, it is unlikely she would have survived long enough to be injured by the trash compactor. *See* 35 RR 68.

Regardless, even if Rodriguez could proffer evidence that the garbage compactor could have caused some of Baldwin's blunt-force-trauma injuries, it does not prove his innocence by clear and convincing evidence. The jury heard similar evidence through the medical examiner's testimony. Specifically, when asked if the injuries happened because the victim was "tossed around in a suitcase in a dumpster, or a compact truck, or anything else like that" or whether they happened "before she died and was put in that suitcase," the doctor responded only, "They're antemortem injuries," meaning prior to death, *see* 34 RR 200, and he could not confirm that she was *not* alive when placed in the suitcase. 35 RR 100-01. The doctor opined, in part, that the cause of death was a combination of blunt-force trauma and asphyxiation, 34 RR 189; 35 RR

65, 96-97, and that he could not rule out the possibility that the victim was alive when placed in the suitcase, 35 RR 67-69, 93, 100-01.

And demonstrating that the trash compactor caused some of her injuries does not demonstrate Rodriguez's innocence. The evidence still showed that he intentionally strangled her,[6] and the jury had only Rodriguez's self-serving claim of self-defense to refute it. The jury would be left to weigh his questionable self-defense claim against the fact that he failed to render aid or seek medical attention for Baldwin. Instead, he left her alone in the hotel room while he calmly purchased a suitcase with the intent to dispose of her body, placed her possibly-still-alive body into a necessarily-fatal position, and dumped her body with the garbage. He returned to the same hotel room— where he had just killed someone— slept, and then contacted a friend; the two laughed about how much they had had to drink the night before, and made plans to socialize. *See Rodriguez v. State,* 2011 WL 1196871, at *1-3. These are not the actions of someone who accidentally killed someone and disposed of the

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[6] Rodriguez confessed that he strangled her, in self-defense, with a choke hold across her throat, *see* 34 RR 21-23, and Dr. Natarajan described the sort of injuries he might see if someone strangled a person using an arm bar or a "v" formation across the throat. *See* 35 RR 58-59. But the doctor did not see injuries consistent with an arm bar. 35 RR 59-61. Instead, the doctor testified that her neck injuries were consistent with someone coming from behind, grasping the front of the neck by putting his fingers on the left front side of the neck and his thumb on the right side of the neck. 35 RR 17-18, 62-63.

body in a panic. Demonstrating that Rodriguez did not cause all of the blunt-force injuries does not negate this evidence that he intentionally killed her.

Nor could he negate the rape evidence. Rodriguez has suggested that the crushing action of the trash compactor could have caused the sexual assault injuries. But it is unlikely that a jury could be convinced that the trash compactor was responsible for internal and external hemorrhaging, abrasions, and contusions to the victim's vaginal and anal areas, with some of the injury extending all the way inside to the victim's cervix. 35 RR 46-52. Especially when the victim was found zipped inside the suitcase.

As noted, previously, Rodriguez has attempted to discredit the medical examiner's testimony before trial, on state habeas, and on federal habeas review, with no success. Rodriguez has been unable to find any expert to support a definitive conclusion that Baldwin was either alive or dead when she went into the trash compactor. The jury heard evidence in support of both equally-horrendous possibilities, as well as Rodriguez's self-serving claim of self-defense. The jury rejected his defense.

Finally, when considering a gateway claim of actual innocence in federal court, this Court has held that "the habeas court must consider 'all of the evidence,' old and new, incriminating and exculpatory, *without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial*.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at

327-28) (emphasis added). Applying this standard, the Court must consider the punishment phase evidence that Rodriguez was connected to the disappearance of sixteen-year-old Joanna Rogers, and ultimately led the police to the discovery of her body—also in a suitcase in the same landfill. A second dead girl found in the same circumstances, in the same landfill, soundly and credibly refutes any claim that Rodriguez killed Baldwin in self-defense and disposed of her body in a panic.

Nothing contained in Dr. Florez's lawsuit affects the scientific validity of Dr. Natarajan's findings in the Summer Baldwin autopsy. And cross-examination of Dr. Natarajan with the accusations in this lawsuit would not lead to Rodriguez's exoneration. Rodriguez's motions are nothing more than a last-ditch effort to undermine Dr. Natarajan's scientific findings, an effort which has previously been tried on both state and federal habeas review, with negative results for Rodriguez. Rodriguez cannot make a "truly persuasive" showing of actual innocence, even if he were given yet another opportunity to present evidence against the credibility of Dr. Natarajan.

III. Rodriguez Is Not Entitled to a Stay of Execution.

A request for a stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough,* 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637,

649–50 (2004)). Rather, the inmate must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id*. (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When the requested relief is a stay of execution, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceed; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). A federal court must consider "the State's strong interest in proceeding with its judgment" and "attempt[s] at manipulation." *Nelson*, 541 U.S. at 649–50 ((citing *Gomez v. U.S. Dist. Court for Northern Dist of California,* 503 U.S. 653, 654 (1992)).

As demonstrated above, Rodriguez's claim is plainly successive, not cognizable, and without merit. Thus, Rodriguez cannot demonstrate the likelihood of success on the merits of his claim on appeal; nor can he demonstrate that his ground for relief amounts to a substantial case on the merits that would justify the granting of relief.

Further, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Rodriguez's challenges to his death sentence have persisted since 2008, and he seeks further unjustifiable delay through his litigation here. Indeed, Rodriguez

has sought to discredit the medical examiner's findings prior to trial and on appeal, received an evidentiary hearing in state court, and even received funding in federal court but presented no new evidence. Rodriguez cannot overcome the strong presumption against granting a stay or demonstrate that the balance of equities entitles him to a stay of execution. Under the circumstances of this case, a stay of execution would be inappropriate.

CONCLUSION

The Court should deny Rodriguez's request to transfer his original petition for writ of habeas corpus to the district court, deny his petition, and deny his motion for stay.

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