No. 21-1411

IN THE

Supreme Court of the United States

JAMES MILTON DAILEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General of Florida

OFFICE OF THE ATTORNEY GENERAL
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
henry.whitaker@myfloridalegal.com

HENRY C. WHITAKER
Solicitor General
**Counsel of Record*
JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General
CHRISTOPHER J. BAUM
Senior Deputy Solicitor General

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

In 2019, the Florida Supreme Court affirmed the denial of petitioner's second successive state-court motion for postconviction relief, rejecting petitioner's claim that the state knowingly presented false testimony in violation of *Giglio v. United States*, 405 U.S. 150 (1972). Below, the Florida Supreme Court affirmed the denial of petitioner's fourth successive state-court postconviction motion, which asserted a second *Giglio* claim based on the very same allegedly false testimony. The questions presented are:

1. Whether the Florida Supreme Court's holding that petitioner's second *Giglio* claim is procedurally barred and untimely under the Florida Rules of Criminal Procedure is an adequate and independent state-law ground supporting the judgment.

2. Whether the Florida Supreme Court correctly concluded that, considering all the facts, petitioner's newly discovered evidence regarding the prosecutor's alleged knowledge of purportedly false testimony did not warrant changing its 2019 conclusion that petitioner had no valid *Giglio* claim.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE PETITION 8

I. THIS COURT LACKS JURISDICTION. 8

II. THIS CASE IMPLICATES NO CIRCUIT SPLIT. 11

A. The Florida Supreme Court did not hold that a prosecutor's actual knowledge is never relevant to whether false testimony is material under *Giglio*. 11

B. The lower courts, including the Florida Supreme Court, agree on the standard for assessing materiality under *Giglio* in cases involving the knowing use of perjury. 13

III. THE FLORIDA SUPREME COURT'S DECISION IS CORRECT. 18

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Byrd v. State,
14 So. 3d 921 (Fla. 2009) 16
Coleman v. Thompson,
501 U.S. 722 (1991).....9
Dailey v. State,
279 So. 3d 1208 (Fla. 2019) ..... passim
Dailey v. Florida,
141 S. Ct. 234 (2020).....5
Dailey v. Florida,
141 S. Ct. 689 (2020).....5, 6, 7
Dailey v. Sec'y, Fla. Dep't of Corrs.,
2011 WL 1230812 (M.D. Fla. 2011) 1, 3
Dailey v. Sec'y, Fla. Dep't of Corrs.,
2019 WL 6716073 (M.D. Fla. 2019) 2, 4, 19
Dailey v. State,
594 So. 2d 254 (Fla. 1991) ..... passim
Dailey v. State,
659 So. 2d 246 (Fla. 1995) 1
Dailey v. State,
965 So. 2d 38 (Fla. 2007) 2, 3, 19
Douglas v. Workman,
560 F.3d 1156 (10th Cir. 2009).....14
Dugger v. Adams,
489 U.S. 401 (1989).....9
Ferrell v. State,
29 So. 3d 959 (Fla. 2010) 16
Foster v. Chatman,
578 U.S. 488 (2016).....8
Franqui v. State,
59 So. 3d 82 (Fla. 2011) 16

Giglio v. United States,
405 U.S. 150 (1972).....i, 5, 8
Green v. Addison,
613 F. App'x 704 (10th Cir. 2015) 14
Griffin v. Pierce,
622 F.3d 831 (7th Cir. 2010).....13
Guzman v. Sec'y, Dep't of Corrs.,
663 F.3d 1336 (11th Cir. 2011).....12
Guzman v. State,
868 So. 2d 498 (Fla. 2003) 15, 16
Hannon v. State,
941 So. 2d 1109 (Fla. 2006) 16
Hunter v. State,
29 So. 3d 256 (Fla. 2008) 16
Hurst v. State,
18 So. 3d 975 (Fla. 2009) 16
In re Dailey,
949 F.3d 553 (11th Cir. 2020).....1, 2, 5, 19
Johnson v. State,
135 So. 3d 1002 (Fla. 2014) 16
Knighton v. Mullin,
293 F.3d 1165 (10th Cir. 2002).....14
Kyles v. Whitley,
514 U.S. 419 (1995).....18
Long v. Hooks,
972 F.3d 442 (4th Cir. 2020).....12
Martin v. State,
311 So. 3d 778 (Fla. 2020) 16
Merck v. State,
260 So. 3d 184 (Fla. 2018) 16
Mills v. State,
684 So. 2d 801 (Fla. 1996) 9
Moore v. State,
132 So. 3d 718 (Fla. 2013) 16

Mordenti v. State,
894 So. 2d 161 (Fla. 2004) 16
People v. Chenault,
845 N.W.2d 731 (Mich. 2014) 15
People v. Smith,
870 N.W.2d 299 (Mich. 2015) 14
People v. Wiese,
389 N.W.2d 866 (Mich. 1986) 14
Rhodes v. State,
986 So. 2d 501 (Fla. 2008) 16
Ruiz v. State,
249 N.W.2d 277 (Wis. 1977) 15
Shellito v. State,
121 So. 3d 445 (Fla. 2013) 16
Silva v. Brown,
416 F.3d 980 (9th Cir. 2005).....12, 20
State v. Harris,
680 N.W.2d 737 (Wis. 2004) 15
State v. Nerison,
401 N.W.2d 1 (Wis. 1987) 15
State v. Woodel,
145 So. 3d 782 (Fla. 2014) 16
Tayborn v. Scott,
251 F.3d 1125 (7th Cir. 2001).....14
Taylor v. State,
62 So. 3d 1101 (Fla. 2011) 16
Thomas v. State,
260 So. 3d 226 (Fla. 2018) 16
Tompkins v. State,
994 So. 2d 1072 (Fla. 2008) 16
United States v. Agurs,
427 U.S. 97 (1976).....14, 18, 19
United States v. Boyd,
55 F.3d 239 (7th Cir. 1995).....13

United States v. Jackson,
780 F.2d 1305 (7th Cir. 1986).....12, 20
United States v. Mitchell,
365 F.3d 215 (3d Cir. 2004) 12
Walker v. Martin,
562 U.S. 307 (2011).....9
Wickham v. State,
124 So. 3d 841 (Fla. 2013) 16

Rules

Fla. R. Crim. P. 3.851.....9, 10

STATEMENT

1. On May 5, 1985, Shelly Boggio, her twin sister, and a friend were hitchhiking near St. Petersburg, Florida. *Dailey v. State*, 594 So. 2d 254, 255 (Fla. 1991). Petitioner and two friends, Jack Pearcy and Dwaine Shaw, picked them up and took them to a bar. *Id*. At some point, Shelly's sister and friend left; Gayle Bailey, who was Pearcy's girlfriend, met up with the group; and Bailey, Shelly, and the three men went to another bar, where they stayed until around midnight. *Id*.

Over the course of the evening, petitioner made advances on Shelly and tried to dance with her, but she rebuffed him. *Id*. at 258; *In re Dailey*, 949 F.3d 553, 561 (11th Cir. 2020). Shelly was a fourteen-year-old in seventh grade, and petitioner was thirty-eight years old. *Dailey v. State*, 659 So. 2d 246, 246 (Fla. 1995); Arrest Affidavit, *State v. Dailey*, No. 1985-CF-007084 (Fla. Cir. Ct. Feb. 12, 1986). After the bars, petitioner, Shelly, and the rest of the group went to Pearcy's house. *Dailey*, 594 So. 2d at 255. Shaw and Bailey stayed there for the rest of the night, but petitioner and Pearcy took Shelly back out. *See id.* They drove her "to a deserted beach." *Dailey*, 659 So. 2d at 246.

At the beach, "[petitioner] tortured [Shelly] with a knife" and "attempted to sexually assault her." *Id.* at 246-47. When Shelly fought back, petitioner "stabbed [her] over thirty times." *Dailey v. Sec'y, Fla. Dep't of Corrs.*, 2011 WL 1230812, at *16 (M.D. Fla. 2011), *amended in part, vacated in part on other grounds*, 2012 WL 1069224 (M.D. Fla. 2012). He then "grabbed [her] and threw her into the waterway." *Id.* "He

choked her and held her head under water until she quit struggling and died." *Id.* Shelly's naked body was left "floating in the water." *Dailey*, 594 So. 2d at 256.

Afterward, petitioner and Pearcy returned to Pearcy's house. *Id.* at 255; *Dailey v. State*, 965 So. 2d 38, 42 (Fla. 2007). Petitioner entered the house "carrying a bundle" and "wearing only a pair of wet pants." *Dailey*, 594 So. 2d at 255. A few hours later, he and Pearcy went to a self-service laundromat. *Id.* at 255-56. Meanwhile, Shelly's body was discovered in the water. *Id.* "[H]er underwear was found 140 feet from her other clothing, with a trail of blood leading from the clothing to the underwear." *Id.* at 258. She "had been stabbed both prior to and after removal of her shirt," and her "jeans had been removed and thrown in the waterway." *Id.*

Hours after the murder, petitioner, Pearcy, Shaw, and Bailey fled to Miami "without any forewarning or planning." *In re Dailey*, 949 F.3d at 563. Petitioner "was acting bizarre"; "he was unusually quiet, and he spoke alone with Pearcy in hushed tones." *Id.* Petitioner spent "only a single night in Miami before taking a bus to Arizona." *Id.* at 564.

In June 1985, a month after the murder, Pearcy gave a 40-page sworn statement to police. *Dailey v. Sec'y, Fla. Dep't of Corrs.*, 2019 WL 6716073, at *2 (M.D. Fla. 2019). "He explained in detail how [Petitioner] butchered and drown[ed] the 7th-grade girl during a rape." *Id.* His account was "consistent with physical facts of the case, even down to the vomit that he emitted upon seeing the slaughter, which was found the next day near where [Shelly] bled." *Id.*; *see also id.* at *2 n.2 (noting that the "Medical Examiner

testified that the vomit did not match the contents of [Shelly's] stomach").

2. The State tried and convicted Pearcy for his role in the murder and then tried petitioner. *Dailey*, 594 So. 2d at 256. At petitioner's trial, the State offered testimony from Shaw and Bailey, who saw petitioner, Pearcy, and Shelly the night of the murder. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9. The State also offered testimony from three inmates who were at the same jail as petitioner while he was awaiting trial. *Dailey*, 965 So. 2d at 42. They testified that petitioner had confessed to them and that he and Pearcy had devised a scheme to evade responsibility for killing Shelly: Pearcy would refuse to testify in petitioner's case, and after petitioner was acquitted, petitioner would confess, providing Pearcy a basis for attacking his conviction on appeal. *Dailey*, 594 So. 2d at 256.

In an exchange that petitioner has keyed on in a previous postconviction motion and in this case, petitioner's trial counsel asked one of the inmates, Paul Skalnik, about whether it was "common knowledge" that "if you testify, you get consideration for that." After Skalnik responded that he did not think he had received "a good deal" as to his four grand theft charges because he received maximum sentences in three out of the four cases and spent time in a maximum-security prison where he was assaulted, counsel asked, "how bad were your charges?" Pet. App. 35a. Skalnik responded that "[t]hey were grand theft, counselor, not murder, not rape, no physical violence in my life. Does that sound like a good deal?" *Id.* In describing his grand theft

charges, Skalnik did not mention that he had previously been arrested on a charge of lewd and lascivious assault—a charge that had been dismissed. Pet. App. 5a.

The State corroborated the inmates' testimony with notes that petitioner and Pearcy passed to each other in jail. *Dailey*, 2019 WL 6716073, at *2. The notes were "consistent with co-actors ('partners' as [petitioner] says in one note) who [we]re trying to game their respective trials," and "[o]ne of Pearcy's notes expressly implicate[d] [petitioner] as [Shelly's] murderer, consistent with Pearcy's [1985 sworn] statement." *Id.* In line with the scheme, Pearcy refused to testify at petitioner's trial. *Dailey*, 594 So. 2d at 256; Order, *State v. Dailey*, No. 1985-CF-007084 (Fla. Cir. Ct. Jan. 26, 1987) (holding Pearcy in contempt for refusing to testify).

Petitioner "presented no evidence during the guilt phase" of the trial, and the jury found him "guilty of first-degree murder and unanimously recommended" the death penalty. *Dailey*, 594 So. 2d at 256. "At sentencing, [petitioner] requested the death penalty and the court complied." *Id.* Based on the evidence presented during the guilt and penalty phases, the court found beyond a reasonable doubt that petitioner's motive for taking Shelly to the deserted beach was sexual battery. *Id.* at 258.

Petitioner appealed. The Florida Supreme Court rejected petitioner's challenges to his conviction and concluded that the State offered "substantial evidence of guilt" at trial, but remanded for resentencing based on state-law sentencing errors not relevant here. 594 So. 2d at 258, 259. On remand, the trial court

resentenced petitioner to death; the Florida Supreme Court affirmed, *Dailey*, 659 So. 2d at 246; and this Court denied certiorari, *Dailey v. Florida*, 516 U.S. 1095 (1996).

3. Since then, petitioner has filed "four state postconviction motions, two state habeas petitions, two federal habeas petitions, one Rule 60(b) motion, and one Rule 60(d) motion." *Dailey*, 949 F.3d at 556. "In none of them did he succeed in convincing a court to vacate his conviction." *Id.* This Court also recently denied two petitions for certiorari from petitioner. *Dailey v. Florida*, 141 S. Ct. 689 (2020); *Dailey v. Florida*, 141 S. Ct. 234 (2020). One of his postconviction motions, though, is relevant here.

In 2017, petitioner filed a second successive postconviction motion in state court, asserting a claim under *Giglio v. United States*, 405 U.S. 150 (1972), which held that a prosecutor's knowing failure to disclose exculpatory evidence violated due process. Petitioner argued that Skalnik had lied about his criminal history, that the prosecutor knew he was lying and failed to correct that lie, and that the lie was material. *Dailey v. State*, 279 So. 3d 1208, 1212, 1217 (Fla. 2019). As here, petitioner asserted that "Skalnik significantly understated his criminal history under oath" by stating, in response to a question about the grand theft charges he had discussed in a previous answer, that "[t]hey were grand theft, counselor, not murder, not rape, no physical violence in my life." Pet. App. 35a. As here, petitioner argued that the State knew Skalnik was purportedly lying because "the same state attorney's office filed" and later dismissed

a charge of lewd and lascivious assault against Skalnik.

The trial court rejected petitioner's *Giglio* claim, and the Florida Supreme Court affirmed. *Dailey*, 279 So. 3d at 1208. In doing so, the court assumed that petitioner "could establish the first two prongs of *Giglio*"—i.e., that Skalnik's testimony was false and that the prosecutor knew the testimony was false—and held that his claim failed "because Skalnik's testimony about his criminal history was not material." *Id.* at 1217. After all, "Skalnik's credibility was already compromised because the jury was aware that he had committed multiple crimes," and "two other inmates also testified that [petitioner] confessed to the murder." *Id.* As a result, "there [wa]s no reasonable possibility that information regarding Skalnik's lewd and lascivious assault charge would have affected the jury's verdict." *Id.* Petitioner again sought this Court's review, and this Court again denied certiorari. *Dailey*, 141 S. Ct. at 689.

4. In 2019, petitioner filed a fourth successive postconviction motion in state court, again bringing a *Giglio* claim based on the assertion that Skalnik lied about his criminal history, that the prosecutor knew Skalnik was lying and failed to correct him, and that the lie was material to petitioner's conviction. Pet. App. 34a. Petitioner styled this as a new claim, arguing that it was now supported by the prosecutor's notes from his 1987 trial. *Id.* In his view, the notes, which had the words "sexual assault" repeatedly crossed out, indicated that the prosecutor knew Skalnik was lying about his criminal history and failed to correct it. *Id.*

The trial court rejected petitioner's claim as untimely and procedurally barred, concluding that "for all practical purposes," it was "identical to [petitioner's] prior claims regarding Mr. Skalnik." Pet. App. 36a.

Petitioner appealed, and the Florida Supreme Court affirmed. The court first agreed that petitioner's claim was "untimely and procedurally barred," as it was "merely a repackaging of the claim in [petitioner's] 2017 successive motion." Pet. App. 6a. "Both *Giglio* claims allege that the same testimony is false." Pet. App. 7a. And it was "irrelevant whether [the prosecutor] had actual knowledge that Skalnik's testimony was false because that knowledge would have been imputed to [the prosecutor] even if he did not have actual knowledge." *Id.* Indeed, in rejecting petitioner's 2017 *Giglio* claim, the Florida Supreme Court had *assumed* that the prosecutor knew that Skalnik's testimony was false. *Dailey*, 279 So. 3d at 1217.

After holding that petitioner's claim was untimely and procedurally barred, the Florida Supreme Court addressed the merits in the alternative. Pet. App. 7a-8a ("Even if this claim were timely and not barred, it is without merit . . . ."). The court concluded—as it had in 2017—that "information regarding Skalnik's lewd and lascivious assault charge is immaterial under *Giglio*." Pet. App. 7a. After all, "Skalnik's credibility was already compromised because the jury was aware that he had committed multiple crimes." Pet. App. 8a. Moreover, "Skalnik was not the only witness against [petitioner]; two other inmates also testified that [petitioner] confessed to the murder." *Id.*

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

Petitioner contends that the Florida Supreme Court erred in rejecting his claim that the prosecution knowingly presented testimony petitioner believes to be false, in violation of the rule of *Giglio v. United States*, 405 U.S. 150 (1972). This Court lacks jurisdiction to consider that contention because the decision below is supported by an adequate and independent state law ground. The Florida Supreme Court affirmed the denial of petitioner's fourth postconviction motion as untimely and barred under Florida Rule of Criminal Procedure Rule 3.851, as the motion was based on the same testimony that undergirded the *Giglio* claim the Florida Supreme Court rejected in 2019 in petitioner's second state postconviction proceedings. In any event, the Florida Supreme Court's alternative holding that petitioner's *Giglio* claim fails on the merits is correct, factbound, and does not conflict with any decision of this Court or any other court. Further review is unwarranted.

I. THIS COURT LACKS JURISDICTION.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision." *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (cleaned up). The adequate and independent state ground doctrine applies when a "state law determination" is "sufficient to support" a prisoner's state court judgment, such as when a state gatekeeping requirement bars the

prisoner's postconviction claims. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see Walker v. Martin*, 562 U.S. 307, 310-11 (2011) (holding that California's time bar on postconviction claims is an adequate and independent state ground); *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (analyzing one of Florida's gatekeeping requirements and concluding that it is an adequate and independent state ground).

The Florida Supreme Court "held [petitioner's] claim procedurally barred under Florida Rule of Criminal Procedure 3.851(e)(2)." Pet. 12. Under Rule 3.851(e)(2), a prisoner filing a successive postconviction motion must "allege new or different grounds for relief" from those raised in previous postconviction motions. Fla. R. Crim. P. 3.851(e)(2). If a prisoner does not satisfy this threshold requirement, his postconviction claims are procedurally barred under state law. *See Mills v. State*, 684 So. 2d 801, 804-05 (Fla. 1996).

Petitioner's claim, the Florida Supreme Court explained, is "merely a repackaging of the claim in [petitioner's] 2017 successive motion that *Giglio* was violated based on Skalnik's false testimony about his criminal history." Pet. App. 6a. Indeed, "[t]he alleged false testimony in the 2017 claim and the instant claim is the same: Skalnik testified that his charges were 'grand theft, . . . not murder, not rape, no physical violence in my life.'" Pet. App. 7a. Thus, "[b]oth *Giglio* claims allege that the same testimony is false." *Id.* And for purposes of Florida's procedural rule dictating when successive postconviction claims may be filed, the court held that petitioner's repackaged *Giglio* claim was insufficiently "new or

different" to warrant reopening his case. Fla. R. Crim. P. 3.851(e)(2).

Petitioner responds that, in reaching its conclusion that his two claims were the same as a matter of state law, the Florida Supreme Court also necessarily concluded "that a prosecutor's actual knowledge of perjury is irrelevant for *Giglio* purposes"—"a matter of federal law." Pet. 13. It did not. Instead, the Florida Supreme Court held such knowledge "irrelevant" for the different purpose of determining whether petitioner was entitled to bring a successive habeas petition under Florida Rule of Criminal Procedure 3.851(e)(2) because the claims were "new or different." *See* Pet. App. 6a-7a. The Florida Supreme Court expressly distinguished that analysis of the Florida rule from its discussion of whether the prosecutor's supposed actual knowledge was material for *Giglio* purposes. *See* Pet. App. 7a-8a (separately discussing whether the evidence was "immaterial under *Giglio*"). Petitioner cannot transform that state-law procedural ruling into a federal constitutional case simply by saying that he has new evidence to support what the Florida Supreme Court permissibly concluded was the same claim for purposes of Florida procedural rules. And to the extent petitioner is contending that the two claims were in fact "different," *see* Pet. 13 (identifying a "contrast" between the two claims), that is really an argument that the Florida Supreme Court mistakenly applied the Florida rule to the facts of this case, which this Court lacks jurisdiction to consider.

II. THIS CASE IMPLICATES NO CIRCUIT SPLIT.

Even if the Court had jurisdiction, neither of petitioner's questions presented warrants review. Among other reasons, the lower courts are not divided on either of them.

A. The Florida Supreme Court did not hold that a prosecutor's actual knowledge is never relevant to whether false testimony is material under *Giglio*.

Petitioner's first question presented is "[w]hether the State's knowing use of perjury is relevant to determining whether the perjured testimony was material to the verdict." Pet. i. Petitioner claims that the Florida Supreme Court's decision created a split on that question. Pet. 18-20. Petitioner cites cases that, he says, hold that a prosecutor's knowledge of "bears on the materiality analysis" under *Giglio*. Pet. 18.

But the Florida Supreme Court did not hold that the prosecution's knowledge is *never* relevant to materiality. In a single sentence, the court concluded that, on the facts of this case, "Heyman's notes have no impact on the materiality of Skalnik's testimony." Pet. App. 8a. It reached that conclusion not in the abstract, but against the backdrop of its prior conclusion that there was no reasonable likelihood, on the facts of this case, that Skalnik's testimony was material. *See Dailey*, 279 So. 3d at 1217.

That factbound conclusion does not warrant this Court's review; nor does it conflict with the decisions petitioner identifies. All but one of those decisions address *Brady* claims, *not* involving the knowing use

of false testimony or analyzing the materiality of such false testimony. *United States v. Mitchell*, 365 F.3d 215, 255 (3d Cir. 2004); *Long v. Hooks*, 972 F.3d 442, 465-66 (4th Cir. 2020); *United States v. Jackson*, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986); *Silva v. Brown*, 416 F.3d 980, 990 (9th Cir. 2005). And even those cases stand only for the proposition that a prosecutor's bad faith or assessment of withheld evidence is a factor that can be probative of materiality. *Mitchell*, 365 F.3d at 255 (prosecution's bad faith is a factor to consider when analyzing materiality); *Long*, 972 F.3d at 466 (describing detective as believing that withheld evidence was material enough to hide); *Jackson*, 780 F.2d at 1311 n.4 (when materiality is a close call, prosecution's bad faith may be relevant); *Silva*, 416 F.3d at 990 (prosecutor's assessment of undisclosed evidence can be relevant to materiality); *see also Guzman v. Sec'y, Dep't of Corrs.*, 663 F.3d 1336, 1350 (11th Cir. 2011) (detective's denials regarding withheld evidence supported materiality). Contrary to petitioner's characterization, those cases do not represent a consensus view that the mere fact that a prosecutor actually knew that testimony was false is always material.

In short, the Florida Supreme Court held no more than that, on these facts, the prosecutor's alleged actual knowledge did not alter the court's materiality analysis. That ruling does not create a split of authority, and review of petitioner's first question presented is unwarranted.

B. The lower courts, including the Florida Supreme Court, agree on the standard for assessing materiality under *Giglio* in cases involving the knowing use of perjury.

Petitioner's asserted split in the lower courts on the second question he says is presented—the proper standard for determining materiality in cases involving the knowing use of perjury—is a mirage. Pet. 25-27. Courts nationwide assess materiality for *Brady* purposes by asking whether disclosure of the suppressed evidence "would" have resulted in a different outcome at trial, while those same courts assess the materiality of false testimony under *Giglio* by asking whether the false testimony "could" have affected the outcome. And in any event, the Florida Supreme Court in fact applied the test petitioner says is correct.

Discussing the approach of the federal courts of appeals, petitioner contends that the Seventh and Tenth Circuits apply the "would" standard "for materiality to all *Giglio* . . . claims, including claims involving knowing use of perjury." Pet. 26. Untrue. As for the Seventh Circuit, *United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995), on which petitioner relies and which only arguably set forth the "would" standard, was decided well before more recent Seventh Circuit cases applying the correct "could" standard. *Griffin v. Pierce*, 622 F.3d 831, 842 (7th Cir. 2010) ("When a conviction is obtained through the knowing use of false testimony, it must be set aside 'if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury.'" (quoting

United States v. Agurs, 427 U.S. 97, 103 (1976) (emphasis added))); *Tayborn v. Scott*, 251 F.3d 1125, 1131 (7th Cir. 2001) (citing *Agurs* and *Giglio* and explaining that a "falsehood is deemed to be material only 'if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury'" (emphasis added)).

The Tenth Circuit likewise does not contribute to any purported split. While *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), contains some language indicating that the "could" and "would" standard are the same, the court was describing the standard required to obtain federal habeas relief based on a *Brady* violation—not a *Giglio* violation—and other Tenth Circuit cases belie petitioner's claim. *Knighton v. Mullin*, 293 F.3d 1165, 1174 (10th Cir. 2002) ("The prosecutor's knowing use of perjured testimony, or the knowing failure to disclose that testimony used to obtain a conviction was false, requires the reversal of a conviction if there is any reasonable likelihood that the false testimony *could* have affected the jury's decision." (emphasis added)); *Green v. Addison*, 613 F. App'x 704, 708 (10th Cir. 2015) (same).

Turning to state courts of last resort, petitioner contends that the Supreme Courts of Michigan and Wisconsin apply the "would" standard to *Giglio* claims. Pet. 26. Again untrue. Those courts, when confronting *Giglio* claims, have asked whether the false testimony "could" have affected the verdict. *People v. Wiese*, 389 N.W.2d 866, 870 (Mich. 1986) (citing *Giglio* and concluding that failure to correct false testimony "reasonably *could* have affected the judgment of the jury" (emphasis added)); *People v.*

Smith, 870 N.W.2d 299, 309 (Mich. 2015) (relying on *Wiese*'s use of "reasonably *could* have affected the judgment of the jury" standard (emphasis added)); *State v. Nerison*, 401 N.W.2d 1, 8 (Wis. 1987) ("Due process requires a new trial if the prosecutor in fact used false testimony which, in any reasonable likelihood, *could* have affected the judgment of the jury." (emphasis added)); *Ruiz v. State*, 249 N.W.2d 277, 284 n.3 (Wis. 1977) (same). The state cases on which petitioner relies, *People v. Chenault*, 845 N.W.2d 731, 736 (Mich. 2014) and *State v. Harris*, 680 N.W.2d 737, 746 (Wis. 2004), did not address *Giglio* violations; they addressed *Brady* violations not involving the knowing use of perjured testimony. Their formulations of the standard for determining materiality were simultaneously correct and irrelevant.

What's left after dispelling petitioner's claim of a split is a clear consensus that the proper standard for assessing the materiality of perjured testimony that is knowingly used is the "could" test. And that is precisely what the Florida Supreme Court used below. In fact, it has done so since at least 2003. In *Guzman v. State*, the court recognized that its precedent on the materiality standard applicable to *Giglio* and *Brady* claims "lacked clarity." 868 So. 2d 498, 506 (Fla. 2003). So the court "clarif[ied] the two standards and the important distinction between them." *Id.* Under *Brady*, the court explained, a defendant must "show a reasonable probability that the undisclosed evidence *would* have produced a different verdict." *Id.* (emphasis added). "By contrast," under *Giglio*, "the false evidence is material if there is any reasonable likelihood that the false testimony *could* have affected

the judgment of the jury." *Id.* (emphasis added). "The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." *Id.* Ever since, the Florida Supreme Court has consistently applied this standard to *Giglio* claims.[1]

This is the consensus standard that petitioner himself insists is correct. Pet. 21-24. Citing two stray uses of the word "would," however, petitioner strains to characterize the Florida Supreme Court as departing from its settled approach to *Giglio* materiality in the decision below. Pet. 23-24. He overlooks two points.

First, the Florida Supreme Court applied the "could" standard in its 2019 opinion finding the purportedly false testimony to be immaterial, and the decision below simply reiterates that holding. The 2019 opinion explained that for *Giglio* claims, the standard for assessing materiality is whether "there is any reasonable possibility that [the false statement]

---

[1] *E.g.*, *Martin v. State*, 311 So. 3d 778, 808 (Fla. 2020); *Thomas v. State*, 260 So. 3d 226, 227 (Fla. 2018); *Merck v. State*, 260 So. 3d 184, 192 (Fla. 2018); *State v. Woodel*, 145 So. 3d 782, 805-06 (Fla. 2014); *Johnson v. State*, 135 So. 3d 1002, 1028 n.10 (Fla. 2014); *Moore v. State*, 132 So. 3d 718, 724 (Fla. 2013); *Wickham v. State*, 124 So. 3d 841, 851 (Fla. 2013); *Shellito v. State*, 121 So. 3d 445, 460 (Fla. 2013); *Taylor v. State*, 62 So. 3d 1101, 1114-15 (Fla. 2011); *Franqui v. State*, 59 So. 3d 82, 102 (Fla. 2011); *Ferrell v. State*, 29 So. 3d 959, 977 (Fla. 2010); *Hurst v. State*, 18 So. 3d 975, 991 (Fla. 2009); *Byrd v. State*, 14 So. 3d 921, 925 (Fla. 2009); *Tompkins v. State*, 994 So. 2d 1072, 1092 (Fla. 2008); *Rhodes v. State*, 986 So. 2d 501, 509 (Fla. 2008); *Hunter v. State*, 29 So. 3d 256, 270 (Fla. 2008); *Hannon v. State*, 941 So. 2d 1109, 1124 (Fla. 2006); *Mordenti v. State*, 894 So. 2d 161, 175 (Fla. 2004).

could have affected the judgment of the factfinder." *Dailey*, 279 So. 3d at 1217 (emphasis added). The court rejected such a possibility because "Skalnik's credibility was already compromised" due to the jury's awareness of his other criminal activity, and because "two other inmates also testified that [petitioner] confessed to the murder." *Id.*

Here, in reaching its alternative merits holding, the Florida Supreme Court concluded that the prosecutor's actual knowledge—as opposed to assumed or imputed knowledge—did not affect the materiality of Skalnik's testimony. Pet. App. 8a. In effect, it simply echoed its previous holding that the testimony was not material. It wrote: "There is *still* no *reasonable possibility* that information regarding Skalnik's lewd and lascivious assault charge would have affected the jury's verdict." Pet. App. 8a (emphasis added). Like the court's 2019 finding that any false testimony was immaterial, this conclusion, too, was based on the "could" standard.

Second, petitioner's argument fails on its own terms. According to him, "could" is distinct from "would" in that it entails only an "objective possibility," rather than "inevitability." Pet. 24. But in rejecting petitioner's *Giglio* claim, the Florida Supreme Court did not ask whether a different result at trial "would" have occurred; it asked whether a different result was a "reasonable possibility." Pet. App. 8a. In other words, the substance of the court's analysis reflects the test petitioner claims was required.

At bottom, petitioner is mistaken that Florida Supreme Court's use of the word "would" itself in the

opinion below indicates that the court sub silentio abandoned decades of its own precedent in the course of reaching an alternative holding expressed in a single paragraph rejecting a claim it had rejected only a few years prior.

III. THE FLORIDA SUPREME COURT'S DECISION IS CORRECT.

There is no error in the decision below.

1. The Florida Supreme Court correctly concluded—twice—that there is no reasonable possibility that information regarding Skalnik's lewd and lascivious assault charge could have affected the judgment of the jury.

Materiality "must be evaluated in the context of the entire record." *Agurs*, 427 U.S. at 112; *see also Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (explaining that *Brady* is violated when the withheld "evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). Here, petitioner homes in on new evidence that, he contends, shows that the prosecutor had actual knowledge that one of their witnesses—Skalnik, who implicated petitioner in the crime—lied to the jury about committing lewd and lascivious assault. But as the Florida Supreme Court noted, "Skalnik's credibility was already compromised" with the jury even without them knowing of the lewd-and-lascivious-assault charge. *Dailey*, 279 So. 3d at 1217. The jury knew that he was incarcerated at the time of petitioner's trial and had: (1) been convicted of at least five or six felonies; (2) served time in prison; (3) testified against other defendants; (4) violated parole

for four prior theft charges; (5) testified in six to eight prior criminal cases; and (6) been a police officer before becoming a thief.

Even setting aside Skalnik's credibility, though, two other inmates also testified that petitioner confessed to the murder. *Dailey*, 965 So. 2d at 42. That testimony was corroborated by inculpatory notes written in petitioner's and Pearcy's handwriting. *Dailey*, 2019 WL 6716073, at *2. The notes were "consistent with co-actors ('partners' as [Petitioner] says in one note) who [we]re trying to game their respective trials," and "[o]ne of Pearcy's notes expressly implicate[d] [petitioner] as [Shelly's] murderer, consistent with Pearcy's [1985 sworn] statement." *Id.* Other evidence supported the jury's verdict as well: Pearcy gave a sworn statement in 1985 in which he explained the details of the murder, describing how petitioner butchered and drowned Shelly during a rape, and his statements were consistent with the physical facts of the case. *Id.* When petitioner returned to Pearcy's house the night of the murder, he was shirtless and his pants were wet. *Dailey*, 594 So. 2d at 255. And the day after the murder, he fled to Miami for a day before disappearing from Florida altogether. *Dailey*, 949 F.3d at 563.

In light of all this, whether the prosecutor's knowledge of the allegedly false statement was actual, assumed, or imputed was immaterial. As this Court has explained, "[i]f the [presentation] of [false] evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Agurs*, 427 U.S. at 110. That is not to say that a prosecutor's actual knowledge is never

relevant. But to the extent that factor matters, it is the least important of a reviewing court's considerations. Actual knowledge may, in an otherwise "close" case on materiality, *Jackson*, 780 F.2d at 1331 n.4, "underscor[e]" the "importance" of a false statement, *Silva*, 416 F.3d at 990. But it will rarely, if ever, be enough to convince a reviewing court that a false statement that otherwise appears immaterial was in fact material.

The Florida Supreme Court therefore correctly concluded that there was no reasonable possibility that petitioner's new evidence affected the jury's verdict.

2. In reaching that conclusion, the Florida Supreme Court did not address whether Skalnik's testimony was false or whether the prosecutor knew it was false—which are key premises of petitioner's claim. But its judgment is supportable on the alternative grounds that both of those premises are false.

Consider first whether Skalnik's testimony was false. Petitioner's thesis is that Skalnik lied about his criminal history. But when one reads the full exchange with counsel, it becomes clear that Skalnik was not even purporting to describe every criminal charge he had ever faced:

> Q. Mr. Skalnik, it's pretty common knowledge if you testify, you get consideration for that; isn't it?
>
> A. You and I are going to differ on that. Counselor, if I faced four grand theft charges, three of them carried a

maximum of five years in the State Penitentiary, I testified and after I had finished, spent two and a half years of which two years were in isolation, I received a maximum sentence of three out of the four cases. After two and a half years, I would have thought DOC would have ended my time. Instead, I was ten months in a maximum security prison in the State of Arizona 3000 miles away, where I was assaulted on September of '84. Does that sound to you like a good deal?

Q. Sir, how bad were your charges?

A. They were grand theft, counselor, not murder, not rape, no physical violence in my life. Does that sound like a good deal?

Q. I am saying whether it's a good deal or not, it's pretty common knowledge over in Pinellas County Jail, that if you testify, you get a deal; right?

A. I am an example to prove that's not common knowledge. I am sorry. I differ with you.

Q. You don't believe that people are over in that jail right now, getting a good deal because they testify?

…

A. Counselor, I don't worry about what people think or say. I am telling you in my opinion, I got no deal and didn't ask

> for a deal. I was abused and have been continuously since my testimony but that does not stop me from helping them.

Trial Tr. 582:7-583:14.

Skalnik first disputed that it was common knowledge that inmates who testify receive deals in exchange, citing his own experience of being charged with four counts of grand theft and not receiving what he considered to be a good deal in exchange for testifying. Likely seeking to explain why he did not receive a good deal, counsel asked, "how bad were your charges?" Skalnik specifically tied his answer to his previous response about the grand theft charges by asking whether it "soun[d]ed like a good deal" when the charges were "grand theft, counselor, not murder, not rape, no physical violence in my life." Put differently, Skalnik was explaining that he didn't think that he received a good deal for testifying *as it related to his grand theft charges*.

Skalnik, in short, was not asked to list every charge he had ever faced or to describe his criminal history. In response to a line of questioning about specific charges for which he thought he should have received leniency in exchange for testifying, omitting that he once faced a lewd and lascivious assault charge that was later dismissed hardly qualifies as false testimony.

The substantial questions regarding whether Skalnik's testimony was in fact false in context also cast doubt on whether the prosecutor knew it was false. Even assuming the prosecutor's notes, with the words "sexual assault" crossed out repeatedly on

them, establish that the prosecutor knew of Skalnik's dismissed charge for lewd and lascivious assault, the prosecutor may well have interpreted the exchange between Skalnik and counsel as not calling for a complete recitation of Skalnik's criminal history. It would have been at least reasonable for the prosecutor to have believed that Skalnik's testimony needed no correction because, in his view, it was not false.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ASHLEY MOODY
Attorney General of Florida

OFFICE OF THE ATTORNEY GENERAL
State of Florida
PL-01, The Capitol
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
henry.whitaker@myfloridalegal.com

HENRY C. WHITAKER
Solicitor General
**Counsel of Record*
JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General
CHRISTOPHER J. BAUM
Senior Deputy Solicitor General

August 4, 2022