DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

HARRY FRANKLIN PHILLIPS
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

More than 30 years ago, this Court held that the *Kotteakos*[1] substantial and injurious influence harmless-error standard applies in habeas cases raising constitutional trial error. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). However, this Court left open "the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer v. Miller,* 483 U.S. 756, 769 [ ] (1987) (Stevens, J., concurring in judgment)." *Brecht*, 507 U.S. at 638, n. 9. Since then, nine federal courts of appeals have issued conflicting rulings on whether *Brecht's* harmless-error standard applies to claims of constitutional trial error in cases marred by a pattern of prosecutorial misconduct, and another has wavered on the question without determining an answer. This Petition presents an ideal vehicle to resolve an entrenched circuit split and answer *Brecht's* open question:

Whether a habeas court must apply *Brecht* harmless-error analysis to *Giglio/Napue*[2] claims intertwined in a proceeding marred by a pattern of egregious prosecutorial misconduct.

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[1] *Kotteakos v. United States*, 328 U.S, 750 (1946).

[2] *Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).

PARTIES TO THE PROCEEDINGS

Petitioner Harry Franklin Phillips was the petitioner/appellant in the United States District Court and the Court of Appeals.

Respondent Secretary, Florida Department of Corrections, was the respondent/appellee in the United States District Court and the Court of Appeals.

RELATED PROCEEDINGS

Underlying Trial:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: February 1, 1984

Direct Appeal:
Florida Supreme Court
Phillips v. State, 476 So. 2d 194 (Fla. 1985)
Judgment Entered: August 30, 1985

Habeas Corpus After Death Warrant Signed:
Florida Supreme Court
Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987)
Judgment Entered: November 19, 1987

First Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: February 13, 1989

Florida Supreme Court
Phillips v. State, 608 So.2d 778 (Fla. 1992)
Judgment Entered: September 24, 1992

Supreme Court of the United States
Phillips v. Florida, 509 U.S. 908 (1993)
Judgment Entered: June 21, 1993 (Affirmed in part and reversed in part; sentence vacated and remanded for resentencing)

Resentencing Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: April 20, 1994

Second Direct Appeal:
Florida Supreme Court
Phillips v. State, 705 So.2d 1320 (Fla. 1997)
Judgement Entered: September 25, 1997

Supreme Court of the United States
Phillips v. Florida, 525 U.S. 880 (1998)
Judgment Entered: October 5, 1998
Second Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: August 28, 2000

Florida Supreme Court
Phillips v. State, 894 So.2d 28 (Fla. 2004)
Judgment Entered: As Revised on Denial of Rehearing, January 27, 2005

Third and Fourth Postconviction proceedings:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: October 23, 2004

Postconviction Proceeding on Intellectual Disability
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: May 5, 2006

Florida Supreme Court
Unpublished order, Case No. SC04-2476
Judgment Entered: June 21, 2007

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: September 24, 2007

Florida Supreme Court
Phillips v. State, 984 So.2d 503 (Fla. 2008)
Judgment Entered: March 20, 2008

Florida Supreme Court
Phillips v. State, 996 So.2d 859 (Fla. 2008)
Judgment Entered: September 23, 2008

Fifth Postconviction Proceeding:
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: January 27, 2011

Florida Supreme Court
Unpublished Order, Case No. SC11-472
Judgment Entered: April 26, 2012

Sixth Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: April 27, 2017

Florida Supreme Court
Phillips v. State, 234 So. 3d 547 (Fla. 2018)
Judgment Entered: January 22, 2018

Supreme Court of the United States
Phillips v. Florida, 139 S. Ct. 187 (2018)
Judgment Entered: October 1, 2018

Seventh Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: June 14, 2018

Florida Supreme Court
Phillips v. State, 299 So. 3d 1013 (Fla. 2020)
Judgment Entered: May 21, 2020

Supreme Court of the United States
Phillips v. Florida, 141 S.Ct. 2676 (2021)
Judgment Entered: May 24, 2021

Federal Habeas Review

United States District Court (S.D. Fla.):
Phillips v. Jones, Civ. No. 08-23420 (November 19, 2015)

United States Court of Appeals (11th Cir.):
Phillips v. Secretary, *Florida Department of Corrections*, No. 15-15714-P
(February 9, 2024) (Rehearing and rehearing en banc denied, April 15, 2024)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Harry Franklin Phillips respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a- 62a) is unreported. The order denying rehearing and rehearing en banc (App., infra, 64a- 67a) is unreported. The opinion of the district court denying habeas relief (App., infra, 181a- 246a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2024. On June 20, 2024, the Honorable Clarence Thomas extended the date for the filing of this petition to

September 12, 2024. (Application - 23A1165) This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law.

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

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254 provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

This case implicates an acknowledged and entrenched conflict between nine courts of appeals regarding the standard of review applicable to claims of constitutional trial error in habeas cases marred by a pattern of prosecutorial

misconduct. In *Brecht*, this Court left open the question of whether habeas courts must apply the *Kotteakos* harmless-error standard in unusual habeas cases evidencing deliberate constitutional error, or where the prosecution has engaged in an egregious pattern of misconduct. This case presents an ideal vehicle for this Court to resolve an entrenched circuit split on an important federal question.

Petitioner was convicted of murder and sentenced to death for the 1982 murder of Bjorn Svenson, the supervisor of the Miami-Dade parole office. There were no eyewitnesses to the shooting and no physical or forensic evidence linked Petitioner to the crime. The State's case rested primarily on the testimony of four jailhouse informants who claimed Petitioner made admissions to them. Petitioner maintained, and continues to maintain, his innocence.

On direct appeal, the Florida Supreme Court affirmed Petitioner's conviction and sentence of death. *See Phillips v. State (Phillips I)*, 476 So. 2d 194 (Fla. 1985). Petitioner timely collaterally challenged his judgment and sentence. Petitioner's post-conviction counsel uncovered and presented evidence that each of the jailhouse informants misled the court and the jury, on some or all of the following circumstances: 1) their prior records, 2) benefits they were to receive, including favorable sentencing outcomes and monetary benefits given to them by the prosecutor and lead detective, 3) the nature of their relationship with the Miami-Dade police as a cooperating witness/informant, and 4) in the case of one of the informants, complete failure to disclose an extensive documented history of severe mental illness, including schizophrenia. One of the witnesses lied about when the detective started recording his interview, a fact which the prosecutor not only knew was false but also relied on to argue to the jury that the witness was credible because there was no way he could have known certain facts about the crime when he gave his initial statement.

At no point during the proceedings did the lead prosecutor, David Waksman, correct the informants' false testimony even though he knew, or should have known, the testimony was false. Waksman admitted to personally altering police reports in a manner which concealed the alteration before turning them over to defense counsel. Waksman and the lead detective on the case, Gregory Smith, fed information about the crime to the informants. Two of the jailhouse informants recanted their testimony entirely in postconviction, while the other two admitted to having been state informants at the time of trial and receiving sentencing and financial benefits.

The state post-conviction court, applying the *Brady* materiality standard, found "that Phillips has failed to establish that any favorable evidence was withheld by the State" and denied Petitioner's claim. (App,. *infra,* 265a- 268a) The Florida Supreme Court affirmed, citing to *Giglio* but relying on its own precedent, *Routley v. State*, 590 So. 2d 397, 400 (Fla. 1991), a case it would later recede from when the court acknowledged that its prior precedent had failed to clearly distinguish between the *Brady* and *Giglio* materiality prongs. (App,. *infra,* 35a; *see Guzman v. State,* 868 So. 2d 498, 505–06 (Fla. 2003)). The Florida Supreme Court also failed to address some of the more egregious forms of misconduct, including the prosecutor's redaction of the police reports. (App., *infra*, 36a -37a)

Petitioner timely filed for habeas relief, which the federal district court denied. The district court was troubled by the prosecutorial misconduct in the case, particularly the prosecutor's routine habit of altering the police reports and concealing the alteration, noting that the lead prosecutor, Waksman, admitted to this and "somewhat incredibly, testified unapologetically to doing so." (App 190a – 210a). The district court applied *Brecht* to its analysis of Petitioner's *Giglio* claims as required by controlling Eleventh Circuit precedent and denied the petition. (App., *infra,* 209a –

210a) ("[B]ecause the harmless error standard [from *Brecht v. Abrahamson*, 507 U.S. 619 (1993)] is more strict from a habeas petitioner's perspective than the *Giglio* materiality standard, federal courts confronted with colorable *Giglio* claims in § 2254 petitions in many instances choose to examine the *Brecht* harmlessness issue first." (App., *infra*, 209a)

The court of appeals, while "condemn[ing] the [prosecutor's] conduct[,]" finding it "dishonest and unethical[,]" (App., *infra*, 56a), nonetheless affirmed the district court's decision finding that Petitioner could not establish that the *Giglio* errors had a substantial and injurious effect on the verdict as required by *Brecht*. (App., *infra*, 46a; 55a) The court of appeals noted binding Eleventh Circuit precedent required that "when a Giglio claim arises on collateral review, a petitioner also must satisfy the more onerous standard set forth in *Brecht[,]*" and denied the claim without addressing whether AEDPA deference applied. (App., *infra*, 42a) Judge Wilson, concurring, noted that the prosecutorial misconduct in Petitioner's case was "so egregious that it can easily cast a shadow on the entire criminal trial and our criminal justice system more broadly." (App., *infra*, 62a) Petitioner timely moved for rehearing *en banc,* (app., *infra*, 67a – 180a) asking the court to overrule its binding precedent requiring the application of *Brecht* to *Giglio* claims on habeas review, which the court denied. (App., *infra*, 63a – 66a)

The First, Eighth and Eleventh Circuits have held that B*recht* applies to *Giglio/Napue* claims. However, the Second, Third, Fourth, and Ninth Circuits have held that *Brecht*'s harmless-error standard should not be applied to *Giglio/Napue* claims. The Sixth Circuit has left the question open of whether *Brecht* applies to cases involving egregious prosecutorial misconduct, while the Tenth Circuit has held that

the *Brecht* harmless-error standard and the *Kyles v. Whitley,* 514 U.S. 419 (1995) reasonable probability standard are functionally identical. The Fifth Circuit has identified the issue but has not yet squarely ruled.

The Eleventh Circuit's approach is erroneous and mistakenly disregards important concerns acknowledged by this Court. The reasoning of the Second, Third, Fourth and Ninth Circuits in finding that in cases with an egregious pattern of prosecutorial misconduct, as is the case here, the justice system's interest in the finality of convictions, of avoiding federal intrusion into a state's good faith attempt to honor constitutional rights and avoiding liberal granting of the writ which degrades the prominence of the trial, are lessened, is the correct approach. When a conviction is obtained in blatant violation of constitutional rights and the state has failed in making good faith efforts to protect those rights, the prominence of the trial and the finality of the conviction carry less weight. This Court's jurisprudence on prosecutorial misconduct supports the Second, Third, Fourth and Ninth Circuits' approach.

This case presents an excellent vehicle for resolving the entrenched circuit conflict, not least because much of the prosecutorial misconduct during Petitioner's trial is undisputed, and the district court and the court of appeals expressly premised their denial of Petitioner's *Giglio* claims on the application of *Brecht*. The question presented also asks this Court to resolve an exceptionally important question affecting hundreds of habeas petitioners, including capital defendants, nationwide. The petition for a writ of certiorari should be granted.

A. Background

This Court has long recognized that the knowing, deliberate presentation of false evidence to a court or jury is incompatible with "rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103 (1935). "[T]he same result obtains when the State, although not

soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Four years later this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio,* 405 U.S. at 154 ((citing *Napue*, 360 U.S. at 269). A "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437-38. The prosecutor's "responsibility for failing to disclose known, favorable evidence . . . is inescapable." *Id*.

Defendants raising a *Brady* or *Giglio* violation must also show "materiality." But the materiality analysis for *Brady* and *Giglio* violations are different. To prevail on a *Brady* claim, e.g. the suppression of favorable evidence, a habeas petitioner must show "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985) (internal quotation marks omitted); see also *Kyles*, 514 U.S. at 433. A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *Id.* at 434, 436-37 n. 10.

"[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." *Kyles,* 514 U.S. at 435. A *Bagley* error could not be treated as harmless because the *Bagley* standard "necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht,* 507 U.S. at 623*, quoting Kotteakos,* 328 U.S. at 776.

The *Giglio/Napue* "materiality" standard is equivalent to the harmless-error standard articulated in *Chapman v. California*, 386 U.S. 18, 24 (1967) (requiring the State to demonstrate the error was harmless beyond a reasonable doubt), *see Bagley*, 473 U.S. at 680 n.9.

A state violates the Fourteenth Amendment's due process guarantee when it knowingly presents or fails to correct false testimony in a criminal proceeding. *See Napue*, 360 U.S. at 269; *Giglio*, 405 U.S. at 153. "[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976), *holding modified by Bagley* at 667. A conviction must be set aside even if the false testimony goes only to a witness's credibility rather than the defendant's guilt. *Napue*, 360 U.S. at 270. The standard of review applicable to perjured testimony claims is "strict." *Agurs*, 427 U.S. at 104. This is so "not just because [those claims] involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *Id*.

In *Brecht*, this Court imposed an actual-prejudice standard on constitutional trial errors raised in habeas proceedings, as opposed to on direct review, holding that a petitioner is generally entitled to relief only if he can show "actual prejudice." *Brecht*, 507 U.S. at 631. *Brecht* error is met when the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Id*. (quoting *Kotteakos v. United States*, 328 U.S., at 776). "[I]f a judge has 'grave doubt' about whether an error affected a jury in this way, the judge must treat the error as if it did so." *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995) (internal quotation marks omitted). However, this Court left open "the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined

with a pattern of prosecutorial misconduct, [constitutional trial error] might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer v. Miller,* 483 U.S. 756, 769 [ ] (1987) (Stevens, J., concurring in judgment)." *Brecht*, 507 U.S. at 638, n. 9. Since this Court's rulings in *Brecht and Kyles*, the courts of appeals have reached different conclusions on the application of *Brecht* to *Giglio* claims raised in habeas proceedings.

B. Facts and Procedural History

Petitioner Harry Franklin Phillips was charged with the murder of Bjorn Thomas Svenson, a parole supervisor in the Miami, Florida Parole and Probation Office. A jury found Phillips guilty and rendered an advisory recommendation of death by a vote of 7 to 5. *Phillips, at* 476 So.2d at 195.. Petitioner denied committing the murder of Mr. Svenson and maintains his innocence to this day.

1. The crime and subsequent investigation

On August 31, 1982, witnesses heard gunshots near the Parole and Probation building in Miami. *Id.* At 8:38 p.m., police found Mr. Svenson's body in the parole building parking lot and determined he "was the victim of multiple gunshot wounds." *Id.* There were no eyewitnesses to the shooting, and no murder weapon was found. *Id.*

As pressure mounted to find and convict the perpetrator, Miami-Dade police brought Phillips in for questioning. Phillips was a suspect in law enforcement's eyes based on his status as a probationer and parolee and on an incident that happened two years prior with his then-assigned parole office, Nanette Brochin. On November 14, 1980, Phillips encountered Ms. Brochin at the Publix grocery store near her home in

Broward County, just over the Dade County line. (II, V. 13, p. 2225).[3] Brochin stated that Phillips followed her to her car and asked her for a kiss, which she rejected. *Id.* Later that night, Brochin noticed a car without its lights on circling her home, an observation which she shared with her then- boyfriend, Michael Russell.[4] *Id.* Even though it was dark, Brochin claimed she could see that Phillips was the driver. *Id.*

Brochin filed a report with the police, but the car left before officers were able to arrive. *Id.* Brochin later told Svenson, her supervisor, she believed the car belonged to Phillips and it was agreed that his conduct should be reported to the Parole Board. (HH, V. 4, pgs. 348-49)

Phillips called Brochin at home the day after the incident – a fact which Brochin found troubling - and told her that the reason he approached her in the grocery store was to warn her that an anonymous woman had gotten into contact with him, offering him money to attack Russell. (II, V. 13, p. 2228). Phillips made clear he had not accepted the money and had no intention of attacking Russell, but wanted to let Brochin know she may be in danger. *Id.* Brochin then told Svenson about Phillips's phone call, a fact which was also presented to the parole board. (HH, V. 4, p. 353)

At the parole hearing, Brochin, Russell and Svenson testified against Phillips. (II, V. 14, pgs. 2280-81). The parole board revoked Phillips' parole. *Id.* Although one of the reasons Phillips had his parole revoked was for operating a motor vehicle without headlights, neither the parole office nor the police verified that Phillips was the one operating the car circling Brochin's residence. *Id.* Phillips spent 20 months in prison

[3] Citations to the record reflect the appendix and documents filed in the district court. These documents do not form part of the appendix submitted with this Petition as the record in the district court comprises thousands of pages.

[4] Brochin and Russell later married but will be referred to as Brochin and Russell for clarity.

and was re-released on parole in August 1982. (II, V. 14, p. 2310). After his release, Svenson warned Phillips to stay away from both Brochin and Russell and assigned Phillips to a different parole officer.

On August 23, 1982, a week before Svenson's murder, someone fired four shots into the home Brochin and Russell shared. (II, V. 14, p. 2317). There were no eyewitnesses to the shooting and police never recovered a weapon from the scene. *Id*. Police brought Phillips in for questioning, but ultimately released him. Phillips denied shooting at the home and consented to submit to a gunshot residue test, the results of which were negative. (HH, V. 5, pgs. 532-33).

Phillips voluntarily agreed to go to the Miami-Dade police homicide office the day after Svenson's murder. (HH, Vol. 6, p. 726). Phillips denied any involvement in the murder of Svenson and provided an alibi, stating that at the time of the murder, he had been running errands. (HH, V. 6, pgs. 727-33). His sister confirmed that Phillips had picked up her and her kids and taken them to a church event and Phillips' mother was able to retrieve out of the garbage a receipt from Winn Dixie showing that Phillips had purchased two containers of Minute Maid orange juice and some meat items at 9:13 p.m. the night of the murders. (HH, V. 8, pgs. 1032-1038 and HH, V. 8, p. 1052). The store manager confirmed the authenticity of the receipt. (HH, V. 6, pgs. 777-79). During his interrogation, Phillips denied committing the offense, but struggled to remember the finer details of his alibi, often confusing times and locations. Phillips's statements to law enforcement were presented at trial, where his confusion as to the exact times of his location were highlighted to suggest they were false. (HH, V. 5, pgs. 482-84). In post-conviction it was established that Phillips' I.Q. is in the Intellectually

Disabled range and he has "significantly sub-average intellectual functioning." [5] (EH, p. 9080-9087)

On September 2, 1982, Vivian Chabrier, Phillips's coworker and fellow probationer, gave a written statement to the probation office that Phillips told her he had been firing a gun in a canal on August 25, 1982. (II, V. 14, p. 2316). Chabrier alleged that Phillips asked her if washing his hands with Comet would remove gunpowder residue. *Id.* Based on Chabrier's statement, police issued an arrest warrant for Phillips for violating his parole by being in possession of a weapon. (II, V. 14, p. 2318).

While being held in the Dade County Jail for the parole violation, Phillips was placed in a cell with William Scott [6], a confidential informant for the Miami-Dade police. Scott alleged that Phillips sua sponte confessed to murdering Svenson. As a result of this information, the State finally had enough evidence to formally charge Phillips with Svenson's murder.

2. The trial

Phillips's trial began on December 12, 1983. The prosecuting attorney on the case, David Waksman, presented the theory that Petitioner killed Svenson in retaliation for Svenson revoking his parole in 1980 over Phillips' improper contact with Brochin. With no physical evidence linking Phillips to the crime, and Phillips' repeated denials of

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[5] This Court has noted that persons with intellectual disability are at risk of wrongful conviction based on the possibility of false confessions. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

[6] After being placed in witness protection, William Scott's legal name was changed to William Smith. For ease of reference, he will be referred to as "Scott" throughout this petition.

involvement in the crime and his alibi, the State's case primarily rested on the testimony of four jailhouse informants.[7]

Each informant's story slightly differed in detail, but they all shared two key facts: Phillips made spontaneous, unsolicited incriminatory admissions, and each informant stressed they had not received any promises or benefits from the State.

a. William Scott

Scott said he and Phillips crossed paths in the Dade County Jail sometime in September of 1982. (HH, V. 5, p. 582). Scott and Phillips were placed in the same cell; Phillips asked Scott what he had done to land himself in jail. (HH, V. 5, p. 583). Scott informed Phillips he was incarcerated pending aggravated battery and violation of parole charges. *Id*. According to Scott, Phillips then volunteered that he had been arrested for "down[ing] one of them motherfuckers." [8] *Id*. Scott further testified that Phillips informed him that the murder weapon was being held by "some woman." (HH, V. 5, p. 584). After Phillips made these admissions, Scott immediately contacted Miami-Dade police via telephone from the jail. (HH, V. 5, p. 585).

Scott denied having received any benefit for his testimony. (HH, V. 5, p. 586). He claimed that the victim in his aggravated battery case had asked for the charges to be dropped on his own accord. *Id*. On cross examination, Scott admitted to having been a paid federal informant for about four years but denied being a current confidential informant for

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[7] The State also presented damaging testimony about Phillips' statements to law enforcement and interactions with Brochin and Russell shortly before the murders, as set out by the court of appeals, but this evidence standing alone would likely have been insufficient to sustain a conviction under Florida law. (App., infra, 5a -12a).

[8] As noted supra, Phillips had not yet been charged with Svenson's murder and had only been arrested for possession of a firearm in violation of parole.

the State. (HH, V. 5, p. 589). Scott said he alerted the detective bureau of Phillips's confession because he simply wanted them to investigate Phillips's claim. (HH, V. 5, p. 594).

b. Malcolm Watson

Phillips also crossed paths with Malcom Watson at the Dade County Jail, where Watson was being held pending an armed robbery charge. (HH, V. 6, p. 695, 704). Phillips and Watson were already familiar with one another. According to Watson's testimony, Watson owned a dry-cleaning store in Carol City, a neighborhood in Miami-Dade County. (HH, V. 6, p. 691). Watson alleged that sometime in 1980, Phillips came into the store asking Watson for a $50 loan, intending to use a firearm as collateral. *Id*. Watson would also testify that in 1980 Phillips spontaneously admitted he was having problems with a parole officer and intended to "get even with them." (HH, V. 6, p. 692).

Two years later, upon first seeing Phillips at the Dade County Jail, Watson claimed he asked Phillips if he "really killed a parole officer," and Phillips said he did. (HH, V. 6, p. 695). Watson then contacted the police regarding Phillips's alleged confession. (HH, V. 6, p. 698). Just like Scott, Watson denied that he had been promised anything in exchange for his testimony, and maintained he contacted the police solely because he was morally opposed to murder. (HH, V. 6, pgs. 698-99). Watson claimed the only time he asked for help from the State was when word had gotten out in Dade County Jail that he had agreed to testify against Phillips. (HH, V. 6, pgs. 700-01). Watson asked to be moved to a different jail, and the prosecution team obliged. *Id*.

On cross examination, Watson admitted that the lead detective on the case, Gregory Smith, had agreed to administer a polygraph examination to test Watson's truthfulness regarding his innocence in his armed robbery case. (HH, V. 6, p. 706). Watson claims this

polygraph test was not in connection to his agreement to testify but was instead offered because Detective Smith genuinely believed in Watson's innocence. *Id*.

The Defense presented Marshall Milney, an inmate, who testified that he met Malcolm Watson in the Dade County jail law library about six months prior to the trial. (HH, V. 8, p. 1021). Milney said that Watson told him that the prosecution had promised him – in exchange for his testimony – that Watson was "'going out to be with [his] ex-wife, or somebody, girlfriend and have some sex with her, and if everything goes right in [the Phillips'] case, [Watson was] going to get his sentence mitigated.'"[9] (HH, V. 8, p. 1024).

c. William Farley

William Farley first met Phillips at the Lake Butler Correctional Institution when they became cellmates on November 3, 1982. (II, Vol. 1, p. 35). A day later, Detective Smith visited Lake Butler to interview Farley. *Id*. The interview focused on whether Phillips had mentioned anything about a murder case. (HH, V. 7, p. 809). Farley stated that Phillips had not told him anything. *Id*. Farley said the detective never asked him to press Phillips about the case. *Id*. When Farley finally returned to his shared cell, he told Phillips that detectives had interviewed him about Phillips's potential involvement in a murder. (HH, V. 7, p. 812). Farley said Phillips took out a newspaper clipping from a manila folder and voluntarily told Farley that he had murdered Svenson. *Id*. Farley claimed Phillips told him, unprompted,

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[9] As incredible as this sounds, in March of 2024 the Miami Police Department's homicide unit was *found to have offered conjugal visits in exchange for testimony* in another decades old Miami death penalty case. In that case, the prosecutor was also found to have committed misconduct from the beginning of the proceedings 24 years ago including through the 2024 resentencing. In 2022 he was recorded on a jail phone line "arranging jailhouse meetings among several witnesses so they could coordinate their testimony." https://www.cbsnews.com/miami/news/veteran-miami-prosecutor-quits-after-judges-rebuke-over-conjugal-visits-for-jailhouse-informants/ (last visited September 10, 2024)

that he shot Svenson "a whole heap of times" because Svenson "sent him back to prison." (HH, V. 7, p. 813). Prior to trial, Farley signed an affidavit admitting that he lied, and Phillips had not confessed, but at trial he disavowed the affidavit. (App. *infra*, 18a)

Farley immediately informed a prison guard about Phillips's confession, and the guard contacted Detective Smith. (HH, V. 7, p. 815). The following day, Farley was transferred from Lake Butler to Polk County Correctional Institution, where he met with Detective Smith to give a tape-recorded statement. (HH, V. 7, p. 816). According to Farley, he had no opportunity to discuss his statement with Detective Smith prior to the tape recording, as Detective Smith chose to start taping the statement immediately. (HH, V. 7, pgs. 822-23). Waksman focused on this alleged fact in closing argument as a reason to find Farley's testimony credible. The prosecutor argued to the jury that Farley was "telling the truth beyond a reasonable doubt." (HH, V. 8, p. 1105). The prosecutor argued the jurors could determine this because Farley knew Svenson was carrying something based on what Phillips had told him, and only the real killer would have known about Svenson carrying phone books. (HH, V. 8, p. 1106). "Farley is telling the truth. Farley couldn't have known [the victim was carrying something] unless the killer told him." (HH, V. 8, p. 1114). "Only the killer could have told Farley that [the victim] had an object in his hand." (HH, V. 8, p. 1115). When defense counsel tried to argue in closing that it is incredulous to believe that the detective just went up to Farley and started to tape record him right away, Waksman objected, saying, "there has been no evidence how anything happened." (HH, V. 8, p. 1153).

Just like Scott and Watson, Farley denied having received any benefit in exchange for his testimony. (HH, V. 8, p. 807). Farley said he was set to be released on parole on November 9, 1984, and although Assistant State Attorney David Waksman told Farley he would write a letter to the parole board on his behalf, Farley denied Waksman's assistance.

(HH, V. 8, p. 807, 837). Farley said he was motivated to testify solely because "[he] wanted to do something to serve society and help humanity." (HH, V. 8, p. 819).

The defense presented Elwood White, an inmate at Polk County Correctional Institution, who had helped Farley draft and sign the affidavit. When pressed about Farley's disavowal of his affidavit, White said," If a man lie as much as Farley, he liable to say anything, he liable to do anything." (HH. V. 8, p. 1010).

d. Larry Hunter

Larry Hunter was also fortuitously present when Phillips again incriminated himself. Hunter and Phillips met on January 19. 1983 in the Dade County Jail library. (HH, V. 6, p. 60). Hunter claimed that upon first meeting Phillips, Phillips immediately told him, in exacting detail that included the date, time, and cardinal directions, how he killed Svenson. (HH, Vol. 6, pgs. 651-53). Hunter also said Phillips asked him to be an alibi witness. (HH, Vol. 6, p. 652). Phillips handwrote a letter with details of his alibi and gave it to Hunter. (HH, Vol. 6, p. 653).

Hunter's roommate was the one who allegedly contacted police, and Hunter turned over the alibi letters. (HH, Vol. 6, pgs. 653-54). Similarly to the other informants, Hunter denied receiving any benefits in exchange for his testimony. (HH, Vol. 6, p. 668, 672). Just like Watson, Hunter asked the prosecution and police teams to move him to a different jail for his safety. (HH, Vol. 6, p. 661). Hunter was not asked about his mental health history.

e. Forensic evidence

The prosecution also presented Detective Steve Alter who interrogated Phillips the day of the shooting at Brochin and Russell's' house. Alter admitted on cross-examination that the test he did on Phillips for the presence of gunshot residue was negative. (HH, Vo.

5, pgs. 529-30). The prosecution also presented the testimony of Crime Scene Technician Melvin Zahn who testified that the projectiles recovered from the shooting at Brochin and Russell's house were "fired .38 special or .357 Magnum spent bullets," (HH, Vol. 5, p. 554), and that he could say with "100 percent" certainty that it was the same weapon that was used in both shootings: "I can say that weapon and *that weapon alone* fired a particular bullet." (HH, Vol. 5, pgs. 552-53) (emphasis added). While not challenged in 1984 at the time of trial, toolmark evidence is now considered unreliable and forensic testimony that purports a 100 percent degree of certainty falls outside the acceptable bounds of science.[10]

The jury found Phillips guilty of first-degree murder and rendered an advisory death recommendation by a simple majority vote of 7 to 5, which the Florida Supreme Court affirmed. *Phillips*, 476 So.2d 194.

3. The evidentiary hearing

Phillips timely collaterally challenged his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850, alleging among other challenges that the State had committed grave *Brady* and *Giglio* violations in connection to the testimony of the jailhouse

[10] The 2016 President's Council of Advisors on Science and Technology report found forensic toolmark analysis "falls short of the scientific criteria for foundational validity." Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, Sept. 2016, p. 104-114 at: https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf (archives.gov) (last visited September 10, 2024); "In 2023, a judge ruled for the first time that this kind of evidence was inadmissible. Researchers at NIST and the Center for Statistics and Applications in Forensic Evidence, or CSAFE, are developing automated, quantifiable methods to improve objectivity." Amber Dance, Scientists are Fixing Flawed Forensics that Can Lead to Wrongful Convictions, Science & Society, June 6, 2024 at https://www.sciencenews.org/article/investigating-crime-science-forensics (last visited September 10, 2024)

informants. The post-conviction court conducted an evidentiary hearing on Phillips' *Brady* and *Giglio* claims.

a. William Scott

Post-conviction trial counsel uncovered records that showed Scott was a confidential informant for both the federal government and the State in the time leading up to his connection with Phillips. Scott's history as a confidential informant for the Miami-Dade Police Department began in 1972, when he assisted with a murder case in exchange for the promise of a vacated sentence. (II, V. 16, p. 2583). Scott denied being a witness with the Miami-Dade police department in his pretrial deposition, although trial counsel asked him numerous questions about his role as an informant. (App., *infra*, 15a, n.5)

Scott was arrested on August 23, 1982 warrant for failing to appear in court which was a parole violation. (II, V. 16, p. 2543). At his preliminary hearing a few days later, Scott told the judge he was a confidential informant for the Miami-Dade Police Department and the reason he was not present at his prior court hearing was because he was placed in witness protection for his role as confidential informant in a prior murder case. (II, Vol. 16, pgs. 2542-43). Detective Hough, the Miami-Dade detective Scott assisted in the 1972 murder case, also appeared at Scott's first appearance to urge the judge to release Scott so he could assist in a pending murder investigation. *Id*.

A few days after the preliminary hearing, Scott was taken from his own cell at 11:00 p.m. and placed in the same cell as Phillips. (Det. Smith's report, October 10, 1982). (II, V. 1, p. 37). Within 24 hours of being placed with Phillips, Scott contacted Detective Hough to give him Phillips's alleged confession. *Id*. Since Detective Hough was not the lead detective on the case, he passed the information along to Detective Smith. *Id*. Soon thereafter, on

September 13, 1982, Detective Smith got in contact with the parole office to ask for Scott's release, so Scott could assist in locating the murder weapon. (II, V. 16, p. 2554).

Upon Scott's release, Scott was instructed by the detective team to visit Phillips's sister, Ida Phillips Stanley, at her residence to get information about a potential murder weapon. (EH, p. 10122). Detective Smith supplied Scott with a wire and $20. (EH, p. 10125). In her evidentiary hearing testimony, Stanley said Scott claimed he was a "trustee" at the jail and flashed a piece of paper as proof of his status. (EH, p. 8787). Scott told Stanley that he liked Phillips and wanted to pass along $20 to him. (EH, p. 8788). Scott admitted that he pressed Stanley and her mother for more information about Phillips, but neither woman had any information to give him. (EH, p. 10123). Eventually, both women asked Scott to leave the property. (EH, p. 8830). Scott explicitly told the women he was not there on police business, but at the collateral evidentiary hearing, Scott admitted he went to Stanley's house at the express instruction of the Miami-Dade police in order to help them locate the murder weapon. (EH, p. 10123, 10126).

Although Waksman was in possession of the transcripts from Scott's preliminary hearing, as well as Detective Smith's letter to Scott's parole officer, Waksman did not provide defense counsel with the transcripts nor the letter. Waksman did not correct Scott during his deposition when he denied working with the Miami-Dade Police Department, nor during his trial testimony to the trial court and jury, even though the prosecutor knew it was false. Additionally, Waksman never told defense counsel Scott was working as a paid confidential informant for the Miami-Dade Police Department.

b. Malcolm Watson

When Watson crossed paths with Phillips in the Dade County Jail, he was serving time for an armed robbery conviction. Watson was considered a "career criminal," having been arrested more than 20 times and placed on probation at least twice. (II, V. 17, pgs. 2772-73). When facing sentencing for his armed robbery conviction, the prosecutor's office was adamant he should not receive less than 25 years in prison for the crime. (EH, p. 9807). On January 21, 1982, Watson was sentenced to life in prison. (II, V. 17, p. 2880). For reasons never documented or recorded, Watson was surreptitiously removed from state prison to the county jail in September of 1982, where he just so happened to cross paths with Phillips. Watson's prior criminal record was never disclosed to trial counsel, and on the stand, Watson said he had never been on probation and had only been convicted of three or four felonies. (HH, V. 6, p. 703). Waksman made no effort to correct Watson's false testimony.

Watson asserted his Fifth Amendment right against self-incrimination at the evidentiary hearing, but Waksman admitted that prior to Phillips's trial, Watson's parole eligibility date would "probably [be] in the next century." (EH, p. 9800). On May 11, 1984, shortly after Phillips trial, Waksman stipulated to vacate Watson's conviction for armed robbery, changing Watson's sentence from life in prison to five years' probation. (II, V. 17, p. 2883). The stipulation was based on "newly discovered evidence," but there was no accompanying motion explaining what the evidence was. *Id.* Most tellingly, there are no transcripts from the stipulation hearing.

c. William Farley

In his evidentiary hearing testimony, Farley admitted that his trial testimony was a lie. (EH, p. 9658). Farley was enticed to testify against Phillips by Detective Smith, who told Farley during their first meeting that he looked "tired of being incarcerated," and that

Farley should get in touch if he came across any information regarding the Svenson murder. (EH, p. 9669). Farley said he knew people who had gotten deals for "snitching," and he interpreted Detective Smith's statement as a *quid pro quo*. (EH, pgs. 9670, 9673-74). Farley said when he returned to their cell, he asked Phillips about the murder. (EH, p. 9675). Phillips showed him the newspaper clipping about the Svenson murder but maintained his innocence. (EH, p. 9676). Farley said he wanted to believe Phillips was responsible for the murder, so Farley got into contact with Detective Smith to give a statement regarding Phillips's purported confession. (EH, p. 9743).

Farley was then moved to Poe Correctional Institution, where he met with Detective Smith for the second time. (EH, pgs. 9683-84). At this meeting, before the tape recording began, Detective Smith instructed Farley to say that the victim had been shot numerous times. (EH, p. 9685). The detective continued to feed Farley information regarding the case for at least 15-20 minutes before beginning the tape recording. (EH, pgs. 9687-88). As noted *supra*, at trial Farley had stated the recording began immediately. Detective Smith's police report documented that an hour and half transpired before he began taping Farley. This, of course, was the section of the report secretly and improperly redacted by Waksman. (App., *infra*, 55a-56) (The court of appeals condemned Waksman's practice of cutting police reports, finding it "dishonest and unethical," but not warranting relief under *Brecht*.) Once the recording was done, Detective Smith informed Farley that Svenson's family had a $1,000 reward for any witness who was willing to testify at trial. (EH, p. 9692). Farley said he believed Detective Smith was insinuating he would help Farley secure the reward money. (EH, p. 9695).

During their third meeting, Detective Smith introduced Farley to Waksman. (EH, p. 9707). Detective Smith said Waksman would help Farley "after the trial." *Id*. Waksman

also told Farley about the $1,000 reward for testifying. (EH, p. 9711). Waksman and Farley met a total of three times before trial, and during one of those meetings, Waksman presented Farley with a list of written questions and corresponding answers. (EH, pgs. 9710, 9714-15). Waksman told Farley that these were the questions he planned on asking during direct examination, and that Farley should memorize the written down answers to be able to say them during trial. *Id*. Farley testified at trial in the way he had been instructed by both Detective Smith and Waksman.

By February of 1984, Farley was still in prison. Frustrated that the prosecution team had not fulfilled their promises, Farley wrote and sent a strongly worded letter to Waksman, stating, "I would appreciate it if you'd fulfill the promises that you made to me and my fiancée and my father. I know… that you are indifferent to my imprisonment or existence. But didn't I help you win Phillips' case and more prestige? Can't you at lease [sic] fulfill your promise if for no other reason than that?" (II, V. 16, p. 2691). Farley threatened to tell the truth if Waksman did not recommend him for release by the end of the month. *Id*. Farley also sent a similar letter to Detective Smith. (EH, p. 9724). Detective Smith personally visited Farley in prison and became "pugnacious," raising his voice at Farley for daring to come forward with the truth. (EH, pgs. 9733-36). In retribution, Farley was moved to a different prison cell, where conditions were much harsher. *Id*.

Still, Waksman gave in. A letter was sent to Probation and Parole on March 14, 1984 and Farley was released from prison on March 21, 1984. (II, V. 16, p. 2697). Later, on May 22, 1984, Farley personally received a check for $175 signed by Waksman. (EH, p. 9732).

d. Larry Hunter

Both Hunter and Waksman testified that Hunter did not involve himself directly with the prosecution team.[11] This fact gave credibility to Hunter's testimony, as Hunter appeared to not want to "rat out" Phillips but was instead forced to because Hunter's cellmate contacted authorities against Hunter's wishes. This proved to be a lie. To secure himself a better deal, Hunter contacted Waksman directly regarding Phillips's alleged alibi letters. Detective Smith notated this in a police report, but Waksman redacted this report also, painstakingly pasting it back together, then copying the document and presenting it as an original to trial counsel. (App., *infra*, 55a-56a)

The prosecution took such great pains to hide this fact because Hunter's entire testimony was false. In a sworn statement, Hunter explained that Phillips not only never confessed to any crime, but never spoke to him about the murder at all. (II, V. 17, p. 2742). Hunter said he was offered five years' probation in exchange for his agreement to testify, and that Detective Smith fed him every detail of the case, including the actual date the crime occurred. *Id*. At the detective's urging, Hunter then approached Phillips and offered to be an alibi witness on his behalf. (II, V. 17, p. 2743). Hunter asked Phillips to write down his alibi multiple times, and each time Phillips did so, Hunter turned the note over to the State. (II, V. 17, p. 2744). Hunter tried to get out of testifying, refusing at one point to attend his deposition, but ultimately testified against Phillips after his mother urged him to. (II, V. 17, p. 2745).

Further, the State withheld other crucial facts that would have severely discredited Hunter's testimony at trial. Hunter had been tried and convicted in 1971, and again in

[11] In his December 8, 1983 deposition, Waksman said the police department contacted him regarding Hunter possibly being a witness against Phillips. Waksman said he could not recall how Hunter got into contact with the police department.

1972, and found not guilty both times by reason of insanity. 1264. Hunter had been confined to Florida State Hospital and declared criminally insane. (II, V. 7, p. 1262). At various times during his stay, Hunter experienced moments of psychosis, caused by extreme schizophrenia. (II, V. 7, p. 1289). Hunter also had a history of working as a police informant, and had heard rumors of the State offering deals in connection with testifying against Phillips. (II, V. 17, p. 2744). None of this information was disclosed to defense counsel pretrial.

4. The postconviction and habeas ruling

The state post-conviction court, applying the *Brady* materiality standard, found "that Phillips has failed to establish that any favorable evidence was withheld by the State" and denied Petitioner's claim. (App., *infra,* 265a- 268a) The Florida Supreme Court affirmed, citing to *Giglio* but relying on its own precedent, *Routley*, 590 So. 2d at 400, a case it would later recede from when the court acknowledged that its prior precedent had failed to clearly distinguish between the *Brady* and *Giglio* materiality prongs. (App., *infra,* 35a; *see Guzman,* 868 So. 2d at 505–06.). The Florida Supreme Court also failed to address some of the more egregious forms of misconduct, including the prosecutor's redaction of the police reports. (App., *infra*, 36a -37a)

Phillips timely filed for habeas relief, which the federal district court denied. The district court was troubled by the prosecutorial misconduct in the case, particularly the prosecutor's routine habit of altering the police reports and concealing the alteration so they appeared to be an "unaltered document," noting that Waksman admitted to this and "somewhat incredibly, testified unapologetically to doing so." (App 190a – 210a). The district court applied *Brecht* to its analysis as required by controlling Eleventh Circuit precedent and denied the petition. (App., *infra*, 209a –

210a) ("[B]ecause the harmless error standard [from *Brecht v. Abrahamson*, 507 U.S. 619 (1993)] is more strict from a habeas petitioner's perspective than the *Giglio* materiality standard, federal courts confronted with colorable *Giglio* claims in § 2254 petitions in many instances choose to examine the *Brecht* harmlessness issue first." (App., *infra*, 209a)

The Court of Appeals, while "condemn[ing] the [prosecutor's] conduct[,]" finding it "dishonest and unethical[,]" (App., *infra*, 56a), nonetheless affirmed the district court's decision finding that Petitioner could not establish that the *Giglio* errors had a substantial and injurious effect on the verdict as required by *Brecht*. (App., *infra*, 46a; 55a) The Court of Appeals noted binding Eleventh Circuit precedent required that "when a *Giglio* claim arises on collateral review, a petitioner also must satisfy the more onerous standard set forth in *Brecht[,]*."and denied the claim without addressing whether AEDPA deference applied. (App., *infra*, 42a) Judge Wilson, concurring, noted that the prosecutorial misconduct in Petitioner's case was "so egregious that it can easily cast a shadow on the entire criminal trial and our criminal justice system more broadly." (App., *infra*, 62a) Petitioner timely moved for rehearing *en banc,* (app., *infra*, 67a – 180a) asking the court to overrule its binding precedent requiring the application of *Brecht* to *Giglio* claims on habeas review, which the court denied. (App., *infra*, 63a – 66a)

REASONS FOR GRANTING THE PETITION

Since this Court in *Brecht* left open the question of whether the *Kotteakos* harmless-error standard applies in cases with a pattern of prosecutorial misconduct, and declined to address in *Kyles* whether the harmless-error standard applies to *Giglio*-specific *Brady* claims, a deeply entrenched circuit split has developed among nine federal courts of appeals on

whether *Brecht* applies to *Giglio* claims. And one other court of appeals has addressed but not affirmatively ruled on the issue, recognizing the question has not been resolved by this Court.

I. THE DECISION BELOW DEEPENS A CLEAR CIRCUIT SPLIT

The Second, Third, Fourth, and Ninth Circuits have correctly held that *Brecht*'s harmless-error standard cannot be applied to *Giglio/Napue* claims on habeas review because the presentation of false testimony is "inconsistent with the rudimentary demands of justice." *Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 141 (3d Cir. 2017). *See also Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005); *Drake v. Portuondo*, 553 F. 3d 230 n.6 (2d Cir. 2009); *and Chandler v. Lee*, 89 Fed.Appx. 830 n.4 (4th Cir. 2004).

The First, Eighth, and Eleventh Circuits, however, have held the *Kotteakos* harmless-error standard applies to *Giglio* claims raised in habeas creating an entrenched circuit split. *Gilday v. Callahan*, 59 F.3d 257 (1st Cir. 1995); *U.S. v. Clay*, 720 F.3d 1021 (8th Cir. 2013); and *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088 (11th Cir. 2012). The erroneous reasoning in these cases undermines an accused's right to a fundamentally fair trial and allows the small but not insignificant number of prosecutors who are willing to obtain a conviction by deceit to do so without accountability.

Three courts of appeals have struggled to decide the standard of review applicable to *Giglio/Napue* claims on collateral review. The Sixth Circuit has left open whether *Brecht* applies to cases of grave prosecutorial misconduct, while the Tenth Circuit has held that *Brecht*'s harmless-error standard is the functional equivalent to *Kyles*'s reasonable probability standard. The Fifth Circuit has assumed but not decided a *Brecht* analysis follows when a material *Giglio* violation has been established.

In rejecting Petitioner's appeal, the Court of Appeals for the Eleventh Circuit deepened the already existing split when it held that *Giglio/Napue* claims are subject to *Brecht* harmless error review in collateral matters, relying on its own binding precedent in *Trepal*, 684 F.3d 1088. The holding in this case is in direct conflict with the Third Circuit Court of Appeals' decision in *Haskell.* and resulted in the Eleventh Circuit issuing an erroneous opinion in the present case.

The Second, Third, Fourth and Ninth Circuits

In *Haskell,* a case involving the knowing presentation of false testimony that the prosecutor "returned to and emphasized" in closing argument (as happened in Phillips' case), the Third Circuit carefully analyzed whether a habeas petitioner must demonstrate a reasonable likelihood the false testimony could have affected the judgment of the jury under *Giglio* and *Napue*, or whether he must show "actual prejudice" under *Brecht*. *Haskell*, 866 F.3d at 147. The court reviewed the underpinnings of *Giglio* and *Napue*, and reviewed the holdings of other circuits, in determining that *Brecht* did not apply.

The Third Circuit determined that "*Brecht* relied on three characteristics of habeas proceedings to ground the distinction between harmless error under *Chapman*" and the heightened standard on habeas under *Brecht*. *Id.* at 148. The *Brecht* court first gave weight to the interest in the finality of convictions; second, to the concern that federal intrusion frustrates a State's "good faith attempts to honor constitutional rights," (citing *Engle v. Isaac*, 456 U.S. 107, 128 (1982)); and, third, "liberal allowance of the writ degrades the prominence of the trial itself, and at the same time encourages habeas petitioners to relitigate their claims on collateral review." *Id.* 148 (internal citations omitted).

The Third Circuit recognized that these concerns do not apply to all constitutional errors and "there are a number of exceptions to *Brecht's* actual-prejudice requirement." *Id.*

at 148-49. Relying in part on this Court's footnote in *Brecht*, supra, and this Court's reasoning in *Kyles*, the Third Circuit held that the *Brecht* actual prejudice standard does not apply to claims involving a state's knowing use of perjured testimony. *Id*. at 152.

The court reasoned that in cases involving perjured testimony, *Brecht's* three underlying concerns were not implicated. The Third Circuit noted that the deliberate deception of a court and the presentation of false testimony is "inconsistent with the rudimentary demands of justice." *Id*. (quoting *Mooney*, 294 U.S. at 112). "Thus, it is difficult to see how concerns of finality would trump rudimentary demands of justice and fundamental fairness when those are precisely the values the writ of habeas corpus is intended to protect." *Id*. Second, a State's knowing presentation of perjury is not "a 'good-faith attempt [ ] to honor constitutional rights,' but instead [ ] a bad-faith effort to deprive the defendant of his right to due process and obtain a conviction through deceit." *Id*. (internal citations omitted). "Third, there is little chance that excluding perjured testimony claims from *Brecht* analysis will 'degrade[ ] the prominence of the trial itself[,]' *Brecht*, 507 U.S. at 635, because a defendant petitioner most likely will not know of the prosecution's use of perjured testimony until after the opportunity for direct review has passed. *Id*.

The Second and Fourth Circuits have also concluded that once a *Giglio/Napue* claim meets a traditional materiality standard, no further *Brecht* analysis is warranted. *Drake*, 553 F. 3d at 241 n.6. (habeas relief granted on *Giglio/Napue* claim where no *Brecht* analysis was performed). *See also Shih Wei Su v. Filion*, 335 F.3d 119 (2d Cir. 2003) (same); *and Chandler*, 89 Fed.Appx. at 842 n.4 (same).

The Ninth Circuit has also held that *Brecht* does not apply to *Giglio/Napue* claims. *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005). Given this Court's jurisprudence regarding "the special role played by the American prosecutor in the search for truth in

criminal trials," the Ninth Circuit recognized that *Giglio/Napue* error is a type of constitutional *Brady* error, governed by the *Agurs* materiality standard as set out in *Kyles*. *Id*. (*quoting Strickler v. Greene*, 527 U.S. 263, 281 (1999)). It would follow, then, that "when the Supreme Court has declared a materiality standard, as it has for this type of constitutional error, there is no need to conduct a separate harmless error analysis." *Id*.

a. The First, Eighth and Eleventh Circuit

The First, Eighth and Eleventh Circuits have held that *Brecht* applies to *Giglio/Napue* claims. In *Trepal*, the Eleventh Circuit acknowledged that "a showing of materiality under *Brady*… necessarily establishes actual prejudice under *Brecht*," but reasoned since "*Giglio* error is trial error [and] not a structural defect," *Giglio* error should be held to the *Brecht* standard. *Trepal*, 684 F. 3d at 1112. The panel reasoned that the *Brady* materiality standard is higher than the *Brecht* standard, whereas "the more lenient *Giglio* materiality standard leaves room for the possibility that perjured testimony may be material under *Giglio* but still be harmless under *Brecht*." *Id.* at 1113. The court did not address whether cases involving egregious prosecutorial misconduct may fall under an exception to Brecht.

The First Circuit agreed with the Eleventh Circuit's reasoning, stating, "the Supreme Court's recent decision in *Kyles* makes clear… the approach to harmless error in the *Brady/Giglio* context has evolved as the *Chapman* formulation of 'harmless beyond a reasonable doubt'" has yielded in habeas cases to the softer *Brecht* test of whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Gilday v. Callahan*, 59 F.3d 257, 267 (1st Cir. 1995) (internal citation omitted). The Eighth Circuit has also ruled that *Brecht* applies to *Giglio/Napue* errors. *See U.S. v. Clay*, 720 F.3d 1021, 1026-27 (8th Cir. 2013) (application of *Brecht* analysis on *Giglio/Napue* claim).

b. The Sixth Circuit

The Sixth Circuit has recognized that this Court left open the question of whether *Brecht* analyses applies to egregious prosecutorial misconduct. Although the Sixth Circuit relied on the First Circuit's opinion in *Gilday* in determining that perjured testimony was subject to a *Brecht* analysis, in doing so, it also recognized that this Court in *Brecht* did not seek to foreclose the possibility of granting habeas relief in cases with "deliberate and especially egregious error[s] of the trial type, or [errors that are] combined with a pattern of prosecutorial misconduct." *Rosencrantz v. Lafler*, 568 F.3d 577, 589 (6th Cir. 2009) (quoting *Brecht*, 507 U.S.at 638 n. 9). The court applied the *Brecht* harmless-error standard because it did not view the "case as the unusual, especially egregious instance of prosecutorial misconduct, or one that reveals any pattern of prosecutorial misconduct," as identified by this Court in *Brecht*. *Rosencrantz*, 568 F.3d at 589.

Additionally, the majority opinion in *Rosencrantz* conceded the "dissent [made] a valid point in arguing that a literal reading of *Giglio*'s rule suggests that countenancing false testimony implicates structural concerns," but the majority opinion reserved judgment on the point as this Court has "yet to explicitly hold *Brady/Giglio* errors are structural." *Id*.

c. The Tenth Circuit

The Tenth Circuit also applied *Brecht* to *Giglio/Napue* claims, but only after assuming the *Brecht* harmless-error standard is functionally equivalent to the *Kyles* reasonable probability standard:

> [A]ssuming the Giglio 'reasonable likelihood standard is in fact less demanding than the Kyles 'reasonable probability' standard, a petitioner who succeeds under that standard will still have to meet the harmless error standard of *Brecht v. Abrahamson*, which the Supreme Court has held is met by the *Kyles* test. Thus, for all practical purposes the two standards ultimately meet the same inquiry.

Douglas v. Workman, 560 F.3d 1156, 1173 (10th Cir. 2009) (internal citations omitted)

d. The Fifth Circuit

The Fifth Circuit has recognized the application of *Brecht* to Giglio claims is an open question but has not squarely rule don the issue. *See Barrientes v. Johnson*, 221 F.3d 741, 755-57 (5th Cir. 2000). *But see also Coulson v. Johnson*, 273 F.3d 393 n. 19 (5th Cir. 2001) ("We note that in *Barrientes*, this court did not require that courts in this circuit conduct [a *Brecht* harmless-error standard of] review."); *and Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008) (habeas relief granted on *Giglio/Napue* claim where no *Brecht* analysis was performed).

The circuit split on whether a court may or should apply the *Kotteakos* harmless-error standard to habeas petitioners raising *Giglio* claims in cases involving a pattern of egregious prosecutorial misconduct results in a lack of uniformity in the law nationwide with habeas petitioners' claims being treated differently depending in which jurisdiction their cases lie. This acknowledged and entrenched circuit split warrants this Court's intervention and guidance to the lower federal courts.

II. THE DECISION BELOW WAS WRONGLY DECIDED

The decision below was wrongly decided for three reasons: (1) the court of appeals in applying the *Kotteakos* harmless-error standard in a case involving a pattern of egregious prosecutorial misconduct.(2) But even if the *Kotteakos* standard applies, Phillips met the *Kotteakos* standard because the court of appeals failed to consider how knowledge of the prosecutor's misconduct would have affected the jury; and (3) The court also erred in denying Phillips' claims that the Florida state courts misapplied clearly established federal law in merging the *Giglio* and *Brady* materiality standards and made unreasonable

determinations of fact in light of the state court record.[12] Phillips established he was entitled to relief as AEDPA deference should not have applied. Nonetheless, the Eleventh Circuit ultimately denied Phillips' *Giglio* claim involving the prosecutor's cutting and pasting of the police reports, and the implications of that concealment and resulting perjured testimony, based on *Brecht*. This is the focus of this Petition, although Petitioner does not concede or abandon his argument that he has made a sufficient showing to obtain habeas relief under *Brecht* and § 2254.

In assessing Petitioner's *Giglio* claim, the court of appeals was bound by circuit precedent holding that a habeas petitioner must overcome *Brecht* to obtain relief on a

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[12] This Court has explained this standard as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the case.

(Terry) Williams v. Taylor, 529 U.S. 362, 412-13 (2000). AEDPA "demands that state court decisions be given the benefit of the doubt" and "imposes a highly deferential standard." *Renico v. Lett,* 559 U.S. 776, 783 (2010). A reviewing court must ask whether the state court's application of the relevant constitutional standard was *unreasonable*. "For purposes of §2254(d)(1), an unreasonable application of federal law is different that an incorrect application of federal law." *Harrington v. Richter,* 562 U.S. 86, 101 (2011) (internal quotations and citations omitted). A state court's factual determinations are also entitled to a presumption of correctness. 28 U.S.C. §2254(e)(1). But AEDPA's statutory presumption of correctness applies only to findings of fact made by the state court, not to mixed determinations of law and fact. *Parker v. Head*, 244 F. 3d 831 (11th Cir. 2001). "A determination of 'materiality' for a *Brady* violation is a question of law not entitled to a presumption of correctness." *Guzman v. Sec'y Dept. of Corrections,* 663 F.3d 1336, 1346 (11th Cir. 2011).

Giglio claim. *Rodriguez v. Sec'y, Fla. Dep't of Corr*. 756 F.3d 1277, 1302 (11th Cir. 2014) (App., infra, 42a-43a).

In *Brecht*, this Court held that habeas petitioners seeking collateral relief based on errors of the trial type must satisfy the *Kotteakos* standard, which requires a showing that the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, 328 U.S. at 776. In other words, *Brecht* prevents habeas petitioners from "habeas relief based on trial error unless they can establish that [the error] result[ed] in 'actual prejudice.'" *Brecht*, 507 U.S. at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

Brecht's harmless error standard was motivated by three concerns. First, this Court highlighted the importance of "the State's interest in the finality of convictions that have survived direct review within the state court system." *Id*. at 635. The second reason involves conceptions of "comity and federalism," especially in the context of "'defining and enforcing criminal law.'" *Id*. (quoting *Engle v. Isaac,* 456 U.S. 107, 128 (1982). Finally, this Court recognized that ""liberal allowance of the writ… degrades the prominence of trial itself,' and at the same time encourages habeas petitioners to relitigate their claims for collateral review." *Id*. (internal citations and quotations omitted). "The imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Id*. at 637. Thus, this Court held that the *Kotteakos* standard "is better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases." *Id*. at 638.

This Court's concerns in *Brecht* were not all-encompassing, however. This Court recognized that structural constitutional claims were not subject to harmless error review.

Moreover, this Court also expressly recognized that "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638, n. 9.

A common example of egregious trial error are the kinds of *Brady* errors set forth in *United States v. Agurs*, 427 U.S. 97 (1976). In *Agurs*, this Court delineated three distinct forms of *Brady* violations: (1) the knowing presentation of or failure to correct false testimony; (2) failure to provide requested exculpatory evidence; and (3) failure to volunteer exculpatory evidence never requested. *Id*. at 103-104. This Court held that *Brecht*'s harmless-error standard is not applicable to the second and third kinds of *Brady* errors, as such trial errors carry "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, [which] necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (quoting *Bagley*, 473 U.S. at 682 and *Brecht*, 507 U.S. at 623).

The *Kyles* Court's decision to decline from answering whether or not *Giglio/Napue* errors are subject to *Brecht*'s harmless error standard does not take away from the fact that this Court has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103.

Giglio/Napue error is firmly under the *Brady* error umbrella. This is because any conviction "obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue,* 360 U.S.at 269. False

testimony has the potential to "establish such fundamental unfairness as to justify a collateral attack on a [defendant's] conviction" and is "as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Agurs*, 427 U.S. at 104 n. 7 (quoting *Mooney*, 294 U.S. at 112).

The Eleventh Circuit's precedent applying *Brecht* to *Giglio/Napue* claims wrongly separates *Giglio/Napue* from the *Brady* umbrella based on the fact that *Giglio/Napue* error has a separate standard of review than other forms of *Brady* error.

> But the "distinction between *Brady* materiality and *Napue* materiality seems to reflect a sentiment that the prosecution's knowing use of perjured testimony will be more likely to affect our confidence in the jury's decision, and hence more likely to violate due process, than will a failure to disclose evidence favorable to the defendant. It likely also acknowledges that every *Napue* claim has an implicit accompanying *Brady* claim: Whenever the prosecution knowingly uses false testimony, it has a *Brady* obligation to disclose that witness's perjury to the defense."

Jackson v. Brown, 513 F. 3d 1057, 1076 n.12 (9th Cir. 2008).

Even if *Giglio/Napue* claims are distinguishable from other *Brady* claims, the deliberate deception of a court or a jury by the presentation of testimony known to be false is inconsistent with the rudimentary demands of justice that are a cornerstone of our legal system.

The court of appeals, however, did not engage with these considerations and declined to do so when Petitioner sought rehearing *en banc*. (App. *infra*, 67a- 94a) The court of appeals reasoned that "the State should 'not be put to the arduous task of retrying a defendant based on mere speculation that the defendant was prejudiced by trial error.'" (App. *infra*, 43a) (quoting *Davis v. Ayala*, 576 U.S. 257, 268 (2015)). "Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis*, 576 U.S. at 267-268 (internal citations and quotations omitted). The court of appeals also held

that under circuit precedent, when a habeas court is presented with a "colorable *Giglio* claim," the court could "choose to examine the *Brecht* harmlessness issue first." (App., *infra*, 44a) "'Because [the court of appeals] consider[s] the *Brecht* question in the first instance on federal habeas review, there is no state court *Brecht* actual-prejudice finding to review or to which we should defer.' *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1112 (11th Cir. 2012)." (App., *infra*, 44a)

However, the court of appeals failed to give full weight to the extent of the misconduct in this case, so that it would fall under the *Brecht* exception of a pattern of egregious misconduct that this Court recognized and also rose to the level of substantial and injurious effect. The court of appeals went through the categories of *Giglio* violations present in this case, including the determinations by the State court of promises of leniency and monetary benefits made to the witnesses, Scott's status as an agent for the Miami-Dade police, Farley's lie about the timing of the recording of his interview connected to Waksman's cutting and pasting of the police reports, and other instances. (App., *infra,* p. 45a – 55a) The court then stated that, "[r]ather than address whether this aspect of the Florida Supreme Court's decision is entitled to deference under AEDPA, we conclude that Phillips is not entitled to relief because, under *Brecht*, any error was harmless given the State's other evidence about Phillip's guilt[.]" (App., *infra*, 45a)

This assessment was erroneous because the concerns of comity, federalism, the finality of the trial and the State's good faith attempt to honor constitutional rights was either diminished or not present here. The deliberate deception of a court and the presentation of false testimony is "inconsistent with the rudimentary demands of justice." *Mooney,* 294 U.S. at 112. A State's knowing presentation of perjury does not honor or protect constitutional rights but is instead a "bad-faith effort to deprive the defendant of his right to due process

and obtain a conviction through deceit." *Haskell,* 866 F.3d at 152. (internal citations omitted). Further, the prominence of the trial will not be degraded, and principles of comity and federalism will still be honored as it is the federal court's role to protect a defendant's constitutional rights in a case with an egregious pattern of prosecutorial misconduct as was present here. The court of appeals' assessment was wrongly decided.

III. THE QUESTION PRESENTED IS EXTREMELY IMPORTANT

The question presented is extremely important, not only because this case is an ideal vehicle for this Court to address the lingering issue left open in *Brecht,* but also to address the issue of the appropriate standard of review for habeas petitioners raising claims of prosecutorial misconduct which have undermined the fairness of the underlying trial. This Court has long emphasized "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Allowing a pattern of egregious *Giglio/Napue* errors as seen in the present case to remain uncorrected would be a miscarriage of justice and undermine the truth-seeking function of criminal trials.

An accused's due process rights to a fair trial are constitutionally enshrined in our jurisprudence. *See In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable double of every fact necessary to constitute the crime with which he is charged.") The government's interest in a criminal prosecution then "is not that it shall win a case, but that justice shall be done," *Berger v. United States*, 295 U.S. 78, 88 (1935). Instances of prosecutorial misconduct not only harm the integrity of the courts and the public's trust in the justice system, but prosecutorial misconduct is frequently a factor in cases involving

wrongful conviction.[13] By permitting the decision below to stand, this Court risks affirming that there are few, if any, consequences to prosecutorial misconduct used to unfairly gain an advantage in a criminal trial. Indeed, as noted *supra*, the Miami-Dade State Attorney's office has been found just within the last year to have engaged in the same or similar egregious types of prosecutorial misconduct in at least one other capital case.

Most prosecutors hold themselves to high ethical standards and scrupulously honor a defendant's right to a fair trial. They are to be commended for their service to our system of justice. But in unusual cases such as this case, where there has been a breakdown in standards of conduct, ethical norms and the foundations of a fair trial, this Court must step in to protect the integrity of our system of justice. This is particularly so in a capital case.

Phillips has steadfastly maintained his innocence in this case. And while to be sure the prosecution had evidence suggesting Petitioner had a motive and was a reasonable suspect to investigate, the main evidence pinning Petitioner to the crime was the testimony of the four jailhouse informants, all of whom were tainted by false testimony and the hiding of impeachment evidence that bore directly on their credibility. At least two of them directly admitted that they committed perjury at the direction of the prosecutor and lead detective. Further, defense counsel's efforts were hampered based on the fact that he was relying on police reports that were clandestinely doctored by the prosecuting attorney.

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[13] Prosecutorial misconduct and incentivized testimony are both present in more than 60% of wrongful conviction cases, including 53% (prosecutorial misconduct) and 57% (incentivized testimony) of Florida wrongful conviction cases since 1989. https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Sept. 10, 2024); *see also* Carrie Leonetti, The Innocence Checklist, 58 Am. Crim. L. Rev. 97 (2021) ((known causes of wrongful convictions include prosecutorial misconduct, witness coaching, diminished mental capacity, recantations, police corruption, and snitch testimony).

Brecht's concerns over habeas proceedings rightly rest on concepts of comity and integrity of final trial decisions, but as this Court said in *Brecht* itself, "the writ of habeas corpus has historically been regarded as an extraordinary remedy, *a bulwark against convictions that violate fundamental fairness*." *Brecht*, 507 U.S. at 633 (emphasis added). This is exactly the unusual habeas case deserving the extraordinary remedy of habeas.

Additionally, clarity on the question presented will have immediate and robust practical implications. District courts and courts of appeals decide hundreds of habeas cases each year, many of which raise *Giglio* claims. This Court's clarification of the standard of review on habeas when courts are presented with cases that involve patterns of egregious prosecutorial misconduct would immeasurably assist the lower courts in issuing uniform rulings on similarly situated cases and provide much needed guidance in this complex area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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