CASE NO. 24-5553

IN THE UNITED STATES SUPREME COURT

HARRY FRANKLIN PHILLIPS

Petitioner,

vs.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT CORRECTIONS

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General
Tallahassee, Florida

CARLA SUZANNE BECHARD
Associate Deputy Attorney General
* *Counsel of Record*

LISA-MARIE LERNER
Assistant Attorney General

Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607
Telephone (813) 287-7900
carlasuzanne.bechard@myfloridalegal.com
capapp@myfloridalegal.com

QUESTIONS PRESENTED

(Capital Case)

Whether this Court should deny certiorari when the *Brecht v. Abrahamson*, 507 U.S. 619 (1993) actual prejudice review is the appropriate standard for reviewing collateral habeas claims and when the facts do not support use of an alternate review based on prosecutorial misconduct?

(Restated)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

NOTICE OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

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)
Judgement Entered: August 30, 1985

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

First Post-conviction Proceeding:
Circuit court in and for Miami-Dade County, Florida,
State Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: February 13, 1989

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

Supreme Court of the United States
Phillips v. Florida, 509 U.S. 908 (1993)
Judgement Entered: June 21, 1993

Resentencing Proceeding:
Circuit court in and for Miami-Dade County, Florida
State Florida v. Harry Franklin Phillips, 88-435
Judgement 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)
Judgement Entered: October 5, 1998

Second Post-conviction Proceeding:
Circuit court in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: August 28, 2000

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

Third and Fourth Post-conviction proceedings:
Circuit court in and for Miami-Dade County, Florida
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: October 28, 2004

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

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

Circuit court in and for Miami-Dade County, Florida
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: September 24, 2007
Florida Supreme Court
Phillips v. State, 984 So. 2d 503 (Fla. 2008)
Judgement Entered: March 20, 2008

Florida Supreme Court
Phillips v. State, 998 So. 2d 859 (Fla. 2008)
Judgement Entered: September 23, 2008

Fifth Post-conviction Proceeding:
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: January 27, 2011

Florida Supreme Court
Unpublished Order, Case No. SC11-472
Judgement Entered: April 26, 2011

United States District Court for the Southern District of Florida
Phillips v. Jones, No. 08-23420 (S.D. Fla. Nov. 19, 2015), as corrected.
Judgement Entered: November 19, 2015
United States Court of Appeals for the Eleventh Circuit

Phillips v. Secretary, Florida Department of Corrections, No. 15-15714-P
Stay Entered: March 2, 2016

Sixth Post-conviction Proceeding:
Circuit court in and for Miami-Dade County, Florida
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: April 27, 2017

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

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

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

Florida Supreme Court
Phillips v. State, 299 So. 3d 1013 (Fla. 2020)
Judgement Entered: May 20, 2020

United States District Court for the Southern District of Florida
Phillips v. Jones, No. 08-23420 (November 19, 2015)

United States Court of Appeals for the Eleventh Circuit
Phillips v. Secretary, Florida Department of Corrections, No. 15-15714
(February 9, 2024) (Rehearing and rehearing en banc denied, April 15, 2024)

STATEMENT OF JURISDICTION

Petitioner, Harry Franklin Phillips, is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are at issue. Also at play is 28 U.S.C. § 2254.

FACTS AND PROCEDURAL HISTORY

Phillips was charged with, and convicted of, the first-degree murder of Bjorn Thomas Svenson, a parole supervisor, which occurred on August 31, 1982. The Florida Supreme Court, in the direct appeal, summarized the facts:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An investigation revealed the body of Bjorn Thomas Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounds. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicates that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to stay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of his probation officers, appellant's parole was revoked and he was returned to prison for approximately twenty months.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had testified against appellant. Neither was injured in the incident, for which appellant was subsequently charged.
>
> Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder.

Phillips v. State, 476 So. 2d 194, 195-96 (Fla. 1985). He was sentenced to death, and his conviction and sentence were affirmed by the Florida Supreme Court on August 31, 1985. *Id.* at 194, 195, 197.

In 1987, while under a death warrant, Phillips sought state habeas relief, which was denied. *Phillips v. Dugger*, 515 So. 2d 227 (Fla. 1987). He also sought state post-conviction relief, which included the claims pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The state trial court granted an evidentiary hearing after which it denied relief. William Farley and William Scott, two of the inmates who testified for the State at Phillips's trial, testified at the hearing. Larry Hunter and Malcolm Watson, the other two inmate State witnesses, refused to testify but Phillips submitted affidavits signed by each for the court's consideration. Phillips's mother, Laura Phillips, and sister, Ida Stanley, also testified at the evidentiary hearing. Janice Scott, inmate Scott's ex-wife, testified as well. The two defense trial attorneys, Ron Guralnick and Joe Lang Kershan, testified, as did the trial prosecutor, David Waksman. Finally, two of the investigating detectives on Phillips's murder case, Det. Gregory Smith and Det. Charles Hebding, also testified.

After considering this evidence and applying *Brady* and *Giglio*, the state post-conviction court denied the claims. The court found that Phillips knew Scott was a police informant since Scott admitted such in his pre-trial deposition and found that Scott had not been promised anything by the State. The court found Farley not to be credible and discounted his testimony. The court found Hunter's affidavit recanting his trial testimony was negated by the facts adduced at the original trial and

rejected all claims involving Hunter. Finally, the court found that all promises made to Watson before his trial testimony were disclosed so Phillips failed to show a *Brady* violation. DE 13 App. II Vol. 49 at 8693-96.

Trial and Post-Conviction Testimony

The *Brady* and *Giglio* claims center on the testimony of four inmates who testified against Phillips at his trial. Each testified that Phillips had confessed to killing his parole officer. The four inmates and Detective Smith were all deposed prior to the trial, as was the prosecutor before the evidentiary hearing. DE 13 App. II-Vol. 3 at 519-64, 587-605, Vol. 4 at 692-778.[1] During voir dire, the State informed the jury that the informants had received benefits in exchange for their testimony. *Id.* at 68-69. During opening statement, Petitioner argued that none of the informants were credible because they all had prior convictions and all received benefits for their testimony. *Id.* at 178-80. Each inmate was thoroughly cross-examined and impeached by defense counsel during the trial. During the state post-conviction litigation, the court granted an evidentiary hearing on these claims. In that hearing, two of the inmates testified and recanted their trial testimony. The defense presented affidavits recanting their trial testimony for the other two inmates. Additionally, the prosecutor and the lead detective also testified, denying the inmates' claims that they had been promised rewards in the form of cash or favors for their trial testimony. They also denied the claims that the detective had

[1]The State adopts Petitioner's citation method. Citations to the record reflect the appendix and documents filed in the federal district court.

supplied detailed information about the crime to the inmates which formed the basis of their trial testimony.

William Smith a/k/a William Scott

During the trial, Scott testified that he had known Phillips for years. See DE 13, Vol. 5, Appx. HH at 578. In September 1982, Scott, charged with assault, saw Phillips at the Dade County Jail, where both were incarcerated. Scott asked Phillips why he was there and Phillips told him that "I just downed one of them motherfuckers." *Id.* at 580. Phillips said he was not worried about the murder weapon because he had given it to some woman. *Id.* at 581. Scott stated that no one told him to go into the cell and talk to Phillips about the case and that he decided to call a detective he knew. *Id.* at 582. That detective put him in touch with Detective Smith, who was investigating the homicide in this case. Scott testified that neither the police nor the prosecutor gave him anything for his testimony. When cross-examined, Scott admitted that he had lied on many occasions. *Id.* at 588. Scott also admitted that he had been a federal informant for four years and was paid $1000 a month for this work. *Id.* at 589-90. He further testified that he had a prior conviction for armed robbery, had been placed on probation, had been involved in a shooting while on probation, and had his probation violated by being in possession of a gun. *Id.* at 590-92. Scott also acknowledged that he had received a 40-year sentence for a different offense. *Id.* at 595. Scott maintained that he received no benefit for giving the police information about Phillips, including any monetary stipend paid to government informants. *Id.* at 591. Regarding the dismissal of the assault charges, Scott said that it had been his wife who had gotten the charge

dismissed when she intervened with the victim. *Id.* at 583. After the charge was dropped, Scott was released on his own recognizance. Although a violation of parole was still pending against him at the time, Scott testified that it was "being taken care of." *Id.* at 584.

At the initial post-conviction evidentiary hearing, Scott did not testify because his whereabouts were unknown. However, Scott was later located. The court re-opened the evidentiary hearing and Scott testified that he had been a confidential informant for the Metro-Dade Police Department before 1984. See DE 13, Vol. 59, App 11 at 37. Scott stated that he had been a police informant for either state or federal law enforcement from 1982 to the then-present time. Scott stated he received meals and lodging from a detective during Phillips's case and may have gotten "around fifty dollars" from a detective preceding Phillips's trial. He also received three hundred dollars after he testified at the trial. He had known about the reward money "a couple weeks before trial." *Id.* at 111. Scott also testified that he had taken a polygraph test about the veracity of his testimony at Phillips's trial and that he had passed. *Id.* at 127.

The post-conviction court found the claim that the State withheld information about Scott's status as a police informant refuted by his pretrial deposition in which he said he was a paid confidential informant for the police. DE 13, Vol. 49, App 11. The court also found that there was no evidence showing that Scott received financial support during the trial or that the police were instrumental in having assault charges against Scott dismissed. *Id.*

William Farley

At the time of trial, Farley was in custody and had a presumptive release date of November 9, 1984. Farley testified that neither the prosecution nor the police had anything to do with the Parole Board's decision to release him. See DE 13, Vol. 7, Appx. H14 at 805. Farley met Phillips at the Reviewing Medical Center at Lake Butler. *Id.* at 806. Farley testified that while he was there two detectives from Miami came and asked if he had spoken with Phillips about a murder. When Farley said he had not, he was sent back to his cell where Phillips turned out to be his cellmate. Phillips showed Farley a copy of a newspaper article about a family departing a funeral; certain excerpts from the text were highlighted. Phillips told him that he had murdered the man. *Id.* at 810. Farley clarified that Phillips had actually said he "murdered the cracker." Phillips told Farley that he "laid across the street" and "shot him a whole heap of times." Phillips said he wanted to kill the parole officer because he had "unjustly violated his parole and sent him back to prison." *Id.* at 812. Farley then contacted the authorities and told them he would like to speak to a detective about the murder. Farley then gave a tape-recorded statement to Det. Smith. Farley testified that Det. Smith made no promises that he would do anything for him and that his parole date had been set before he ever spoke to Phillips. Farley testified against Phillips because Phillips seemed like he had no respect for life and because he felt bad for the little boy in the news article. *Id.* at 817.

On cross, Farley stated that he had known Phillips for three days before Phillips confessed to the murder. *Id.* at 818. Farley also testified that he had

previously signed an affidavit before trial, indicating that Phillips had never confessed to him. But he also testified that he was forced to sign the affidavit by a group of other inmates. *Id.* at 829. Although a prosecutor and Det. Smith promised to write letters on his behalf to the Parole Board, Farley stated that ultimately his decision to testify was because "[f]or once in my life I wanted to do something to try to serve society and help humanity." *Id.* at 851.

At the state post-conviction evidentiary hearing, Farley changed his story. Farley testified that when he was in a cell with Phillips at Lake Butler, Phillips "made it explicit at that time that he didn't, you know, he wasn't guilty of the crime that he was accused of committing." DE 13, Vol. 56, Appx. II at 934. Farley did not know why he was placed in a cell with Phillips, but a few days after he was there, Det. Smith came to see him and asked whether Phillips had made any statements to him. *Id.* at 938. During that meeting, Det. Smith told Farley that he "looked like [he] was tired of being incarcerated or whatever." *Id.* at 945. Farley inferred that he could get out of jail if he provided some information about Phillips to the Metro-Dade police. Farley testified that Det. Smith told him that the victim had been shot "numerous times" and that there was a reward. *Id.* at 961. Farley testified that Det. Smith spoke with him for about 15-20 minutes before he recorded the statement. During those minutes, Det. Smith promised to assist Farley in getting out on parole. Farley also alleged that Det. Smith "instructed me specifically to state certain things" on the tape-recorded statement. *Id.* at 971. The prosecution made similar promises to him.

At the evidentiary hearing, Farley read excerpts of two letters that he had written to the prosecution. In both, he expressed concern about the prosecutor's ability to get him out of jail as promised. *Id.* at 998-99. He also said that he received a one hundred seventy-five dollar check after he testified. Farley claimed that he was "promised money before the trial." *Id.* at 1006. After he wrote the first letter, Det. Smith came to visit him in jail. Farley said Det. Smith was upset because Farley had threatened to tell the truth, to say that he had lied at the trial. Farley was then transferred that same day to a harsher section of the jail. *Id.* at 1012. Farley essentially said the detective and the prosecution coached his testimony. The details about the murder that Farley gave during his trial testimony were given him by Det. Smith and the prosecution; Phillips had not told him that information. Farley admitted that he lied about his criminal record at trial when he said he only had one conviction and one parole violation. *Id.* at 1017.

On cross-examination, Farley admitted to having been re-arrested more than once after he was paroled following Phillips's trial. When arrested, Farley would call the State Attorney's Office to ask Mr. Waksman to speak to the prosecutor on his new cases to see if anything could be done regarding the pending charges. Farley denied that his impending life sentence was the motivating factor for him now changing his story since being known as a snitch in state prison was dangerous. *Id.* at 1028-37. The post-conviction court found Farley's "testimony to be totally incredulous and unbelievable and therefore reject[ed] the same." DE 13, Vol. 49, Appx. II.

Larry Hunter

At trial, Hunter testified that he was in the Dade County Jail in 1983, where he met Phillips in the law library. See DE 13, Vol. 13, Appx. HH at 648. Hunter stated that Phillips approached him about crafting an alibi for the murder of Svenson. During that conversation, Phillips told him that "he had come up from the east end of the parole building, from behind a clinic with some bushes, and he see (sic) one car in the back parking lot, and that he killed a man by the entrance of the gate to the parking lot, left the same way, and went home." *Id.* at 650. Hunter went back to his cell and told his cellmate what had happened. His cellmate called Det. Smith, who came to the jail to meet with Hunter. Hunter testified that he gave the detective four alibi letters Phillips had written. Later, Phillips approached Hunter and told him to sign an affidavit which said that Hunter knew nothing about the case. Hunter testified that he felt threatened by Phillips to sign the document. As a result, the prosecution had him transferred from the jail.

The only promise the police or the prosecution made to Hunter was that they would inform the judge on his case that he had been a witness for the State at the Phillips trial. *Id.* at 653. Hunter explained on cross-examination that he did not think the State's assistance would be helpful to him in his case because he did not need any help with his pending charges since he was innocent. An additional benefit Hunter got was that Det. Smith would let him smoke his cigarettes.

Hunter refused to testify at the evidentiary hearing in 1988, asserting his Fifth Amendment right against self-incrimination. DE 13, Vol 57, Appx. II at 1056. The post-conviction court admitted his 1997 affidavit into evidence. DE 13, Vol. 4,

Appx. II at 652-56. In the affidavit, Hunter swore that Phillips "never made a confession to me. He never spoke about the murder. The only knowledge that I have about the events I testified to was provided to me by Det. Smith and Mr. Waksman." *Id.* at 652. Hunter also swore that Det. Smith was the one who gave him all the information he had about the details of the murder. He also stated that Mr. Waksman told him to testify that the State had made him no deal although, in truth, the State promised to give him probation instead of the potential life sentence he was facing. Hunter also averred that Det. Smith gave him two hundred dollars after trial. The post-conviction court found Hunter's affidavit "totally at odds with the facts." DE 13, Vol. 49, Appx. II.

Malcolm Watson

At trial, Watson testified that he had owned a dry-cleaning store prior to his incarceration. Watson related that, in 1980, Phillips came into his store, asked for $50.00, and wanted Watson to hold a gun as collateral. DE 13, Vol. 13, Appx. HH at 688. Watson also testified that Phillips stated that he was going to "get even" with a parole officer. *Id.* at 690. Watson saw Phillips again in 1982, this time at the Dade County Jail. At that time, Phillips admitted to killing his parole officer and said, "But they got to prove it." *Id.* at 692. Watson overheard Phillips talking in the law library about firing a shot at his parole officer's house. Watson testified that the police did not instruct him to go into Phillips's cell to speak with him; rather Phillips "volunteered the information." *Id.* at 694. Watson concluded by explaining that Phillips said there were no eyewitnesses and that he threw away the gun used in the murder. Watson did initiate contact with the police, but not for any rewards.

He stated that since he had already pled guilty and had been sentenced, he could get no benefit from the police. He testified that he came forward because his brother was "an officer, too" who was shot and was paralyzed from the waist down. Watson was moved from one area in the Dade County Jail to another for his safety. Again for his safety, Watson told other inmates that he knew nothing about Phillips's case. He testified that he only said that because he was afraid for his own safety once the other inmates learned that he was a witness for the state. *Id.* at 698.

Initially, Watson testified that he had never been on probation or parole. DE 13, Vol. 6, Appx. HH 6 at 692. However, on cross-examination he acknowledged that he had previously been convicted of three or four felonies. *Id.* at 703. He admitted that he was serving a sentence at the time. *Id.* Watson testified that he did request that a detective administer a polygraph test in relation to his underlying criminal case. If he passed, the detective would "speak up" for him since he was going to be a witness for the State. However, Watson insisted that the police would have administered a polygraph to him regardless because they believed in his innocence. On re-direct, Watson testified that Det. Smith once bought him dinner. *Id.* at 713.

Watson did not testify at the evidentiary hearing.[2] The post-conviction court found that "[a]fter Phillips' trial, Watson passed a polygraph and in accordance with the agreement his conviction was reduced to simple robbery." DE l 3, Vol. 49, Appx. II. That court denied the *Brady* claim as to Watson because it found that the State

[2] Watson's affidavit recanted his trial testimony, saying Phillips had never confessed.

disclosed to Phillips during pretrial proceedings the existence of an agreement between the State and Watson. *Id.*

Detective Charles Hebding

Det. Charles Hebding testified that he interviewed Farley with Det. Smith. Neither officer asked Farley to speak to Petitioner. DE 13 App. HH-Vol. 6 at 768-69. Instead, he directly told Farley not to initiate any conversation with Phillips. *Id.* at 769. Det. Hebding stated that no promises were made to Farley during the interview he attended. *Id.* at 773. Instead, Farley was told that he would not get a benefit for cooperating. *Id.* at 773.

Detective Gregory Smith

At the evidentiary hearing in 1988, the State called Det. Smith who was the lead investigator on the Svenson murder case. DE 13, Vol. 75, Appx. II at 1257. During the course of his investigation, Det. Smith came into contact with all of the informants who testified against Phillips. He first met Farley at the correctional facility at Lake Butler. Det. Smith testified that he had nothing to do with Farley and Phillips being cellmates, nor did he suggest to Farley to elicit information from Phillips. However, Det. Smith did ask Farley to listen and, if Phillips made any incriminating statements, to contact him. *Id.* at 1258. Det. Smith denied ever advising Farley that he could be released from prison if he testified against Phillips. Det. Smith never mentioned reward money, nor did he have anything to do with Farley being transferred to another correctional facility. After Farley was transferred to Poe Correctional Facility, Det. Smith went to see him again and recorded Farley's oral statement. Det. Smith did not provide Farley with any

information concerning the murder. The only promise that Det. Smith made to Farley was that he would inform his attorney about his cooperation and tell the court if necessary. *Id.* at 1268. Det. Smith did know about the reward money before trial but that he did not tell Farley about it until afterward. On cross-examination, Det. Smith stated that Farley was mistaken when he testified at trial that the two men did not have a conversation prior to the tape recorder being turned on at the jail. Det. Smith could not recall if he asked Mr. Waksman to correct that mistaken testimony during the trial.

Det. Smith first met Hunter at the Dade County Jail after Waksman notified him that Hunter had some information about the Svenson murder. *Id.* at 1271. Det. Smith did not have Hunter solicit information from Phillips, did not offer him any money as a reward for his testimony, and only promised to notify his attorney as to his cooperation and to testify before the judge if necessary. *Id.* at 1273.

As for Scott, Det. Smith testified that he advised Scott's parole officers that Scott was providing helpful information on a murder and the authorities would like him to continue to do so. *Id.* at 1291. Det. Smith had given Scott twenty dollars and asked him to go over to Phillips's family home to find out where the murder weapon was. Det. Smith acknowledged that, at that time, Scott was acting as an agent of the Metro-Dade Police Department. *Id.* at 1295. Although this was in conflict with Scott's testimony at trial, Det. Smith stated that it may have been that Scott has a different definition of "agent" than he did. Det. Smith testified that he did not coach or give information about the crime to any of the witnesses, nor did he inform them about the reward money before they testified.

Assistant State Attorney David Waksman

David Waksman, the prosecutor at Phillips's trial, testified at the 1988 evidentiary hearing. Mr. Waksman, along with Det. Smith, met with all the inmate informants for the Phillips's trial. Regarding Watson, Waksman testified that the State entered into a joint stipulation with Watson's counsel to have his conviction for robbery with a firearm vacated and a judgement for simple robbery entered by the court. The stipulation also requested the court vacate the life sentence it had imposed and, instead, impose a suspended sentence of 15 years imprisonment, with Watson placed on probation for five years. DE 13, Vol. 57, Appx. II at 1082. The prosecution entered into this stipulation despite its prior determination that Watson was "without question a career criminal" and "his case should not be pled to anything less than 25 years in state prison." *Id.* at 1083.

As to Scott, Mr. Waksman testified that Scott's capacity as an informant for the Metro-Dade Police Department was that Scott "knew Det. Hough over the years and periodically when he heard something - and Hough was assigned to homicide for many years - he would call Det. Hough and give him information." *Id.* at 1100. As to Farley, Mr. Waksman wrote a letter to the Florida Parole Commission in which he and Det. Smith recommended Farley for "early parole." *Id.* at 1130. As to Hunter, Mr. Waksman testified that he felt obligated to tell the judge handling Hunter's case at the time of sentencing that he rendered assistance in a major case for the State. *Id.* at 1131. This was the only promise made to Hunter before he testified at Phillips's trial. Ultimately, Hunter's case was continued until after he

testified at Phillips's trial and then he entered into a plea agreement which allowed him to be released from jail after Phillips's trial.

Mr. Waksman conceded that more was done for the informants than had been initially promised but he explained that this was because "some of them had been beaten up in the county jail awaiting trial" or had spent months in "safety cells" for their own protection. *Id.* at 1158. Nonetheless, to the extent Mr. Waksman did more than he had originally promised, it was done without the knowledge of the informants. While Mr. Waksman became aware, towards the end of the trial, of some reward money from the Police Benevolent Association, he never told that to any of the witnesses until the case was over. Mr. Waksman denied that he told Farley before trial that the State had a witness who saw Svenson carrying something because the State did not have any such witness. Mr. Waksman also directly disputed that he had told Hunter that (1) there was going to be a reward, (2) the date of the murder, or (3) that he would get probation on Hunter's pending criminal case. Mr. Waksman said that his only promise to Hunter was that he would speak to the judge who would be accepting Hunter's guilty plea and advise him of Hunter's cooperation. After Farley had been released, he contacted Mr. Waksman additional times requesting further "help" from him in regards to subsequent arrests. When Mr. Waksman seemed less likely to assist, Farley threatened to "sabotage that Phillips case" by telling the papers that he lied at trial. *Id.* at 1207. Likewise, Hunter also contacted Mr. Waksman when he violated his probation and he was sent back to prison. When Mr. Waksman was unable to provide him with the resolution he sought, Hunter sent a letter to State Attorney

Janet Reno saying that Mr. Waksman was going back on his promise. *Id.* at 1208-09.

Mr. Waksman admitted to employing a routine practice of cutting and pasting police reports where he would get a copy of the entire police report and determine what was discoverable and what was not. Mr. Waksman would then cut out what was, in his opinion, not discoverable, scotch-tape the documents together, and copy the document again so that defense counsel was unaware that any information had been redacted and would believe he was receiving a full copy of the documents without alterations. Mr. Waksman employed this practice rather than use a marker or white-out to remove or redact the undiscoverable material from a document.

For example, Mr. Waksman redacted the portion of Det. Smith's report pertaining to a telephone message from Hunter on May 17, 1983, which indicated that Hunter had contacted Mr. Waksman directly and offered that "he had information regarding the murder of the parole officer and Harry Phillips." *Id.* at 1094. Consequently, defense counsel was unaware that Hunter had contacted the State Attorney's Office to "offer" information regarding Phillips. Mr. Waksman explained his practice by saying that the rules "tell me what I am supposed to disclose. I disclose what I think I have to, and I do not disclose the balance." *Id.* at 1176. He testified that he did not advise any of the informants about the reward money and expressly disavowed the allegations that he encouraged or coached the witnesses to give false testimony.

Post-Conviction Order Denying Relief

In denying relief, the post-conviction court found the testimony of both Det. Smith and Mr. Waksman credible. The post-conviction court noted that "[b]oth the prosecutor and Det. Smith, at the hearing, denied these allegations." DE 13, Vol. 49, Appx. II. Thereafter, the court did not credit the informants' testimony as supporting any *Brady* violations and found that Phillips failed to substantiate his claims. *Id.* The post-conviction court did not address the alteration of documents, nor did it analyze Phillips's *Giglio* allegations.

Florida Supreme Court Opinion Affirming Denial of Relief

On appeal, the Florida Supreme Court affirmed the denial of relief regarding the conviction. *Phillips v. State*, 608 So. 2d 778, 779-82 (Fla. 1992). As to the *Brady* claims, the court found that the post-conviction court's credibility findings were supported by competent, substantial evidence and, on that basis, rejected the *Brady* claims. Unlike the lower court, the Florida Supreme Court directly addressed the *Giglio* claims, citing the case and its standards. The court denied the claim as to Scott because it found his testimony about being an agent for the police ambiguous which did not constitute false testimony.

The court found the remainder of the *Giglio* claims failed since the information was either known by the defense or the false testimony in no way could have affected the jury's judgement. *Id.* at 780-81. However, it found that counsel had been ineffective in investigating and presenting mitigation and granted a new penalty phase trial. *Id.* at 782-83.

In 1994, Phillips was resentenced to death. *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997). On September 25, 1997, the Florida Supreme Court affirmed that sentence. *Id.* at 1320, 1323. Phillips sought certiorari review of that decision, which was denied on October 5, 1998. *Phillips v. Florida*, 525 U.S. 880 (1998).

Successive Post-Conviction Proceedings

Beginning on September 13, 1999, Phillips sought post-conviction relief regarding his second sentence. *Phillips v. State*, 894 So. 2d 28, 33 (Fla. 2004). On October 14, 2004, the Florida Supreme Court affirmed the denial of post-conviction relief and denied state habeas relief. *Id.* at 28, 34.[3]

Federal District Court Proceedings

On December 10, 2008, Phillips filed a petition for writ of habeas corpus in the Southern District of Florida, in which he raised 13 claims. On September 15, 2015, the district court entered its order denying the petition. (Doc 25). Regarding Claim V, on October 28, 2015, Phillips filed a motion to alter or amend the order denying his petition. (Doc 26). On November 20, 2015, the district court denied the motion to alter or amend. (Doc 28). It admitted that it had made a transcription error regarding the experts' names but found that the error did not affect the denial of relief. (Doc 28). It did issue a corrected order denying the petition, correcting the error regarding the experts' names. (Doc 29).

---

[3] Phillips filed multiple motions for post-conviction relief, eventually raising an intellectual disability claim, on which the trial court held an evidentiary hearing after the Florida Supreme Court relinquished jurisdiction. The court found that Phillips had failed to prove intellectual disability in part because his evidence was not credible. The Florida Supreme Court affirmed. *Phillips v. State*, 984 So. 2d 503,

On December 12, 2015, Phillips moved the district court for a COA on all of the claims he had raised in his petition. (Doc 31). On January 26, 2016, the district court entered its order granting COA on the *Brady* and *Giglio* claims.

On February 10, 2016, Phillips filed a motion to expand the COA application with the district court. (Doc 35). Later, on February 22, 2016, he filed in the Eleventh Circuit a motion to stay pending the resolution of his state court claims pursuant to *Hurst v. Florida*; the court granted the motion on March 2, 2016.[4] (Doc 35).

Eleventh Circuit Court of Appeals

On June 15, 2021, Phillips moved the Eleventh Circuit to relinquish jurisdiction to the district court in order for him to move to amend his federal habeas petition.[5] The court granted that motion as well as the July 1, 2021, motion

---

509-13 (Fla. 2008). Petitioner later renewed that claim which was also denied and affirmed. *Phillips v. State*, 299 So. 3d 1013, 1017-24 (Fla. 2020).

[4] Phillips also filed on July 1, 2021, the motion to reopen or amend his federal habeas petition. The district court denied that motion on January 27, 2022, because it was an unauthorized successive habeas petition and because such an amendment would be futile since it would not provide a basis for relief since the controlling Circuit had found that *Hall* is not retroactive. *Kilgore v. Secretary, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314-15 (11th Cir. 2015). (Doc 56 at15). Further, the district court noted that the Florida Supreme Court's decision would still stand under *Hall* because it found that Phillips's low IQ scores were the result of malingering. (Doc 56 at 16). Finally, that court denied relief under Federal Rule of Civil Procedure 60(b) as well. (Doc 56 at 16-17). The district court also denied a COA on the same day. (Doc 57).

Phillips then filed on February 23, 2022, a motion to alter or amend the judgement pursuant to Fed. R. Civ. Pr. 59(e). (Doc 58). On April 11, 2022, the district court denied the rehearing. (Doc 61).

[5] Later, on February 22, 2016, he filed in the Eleventh Circuit a motion to stay pending the resolution of his state court claims pursuant to *Hurst v. Florida*; the court granted the motion on March 2, 2016. (Doc 35).

to remand to the district court for an indicative ruling, or in the alternative, to relinquish jurisdiction. Following his unsuccessful remand to the district court, Petitioner filed his initial brief in the Eleventh Circuit Court of Appeals. Following briefing, supplemental briefing and oral argument, the Eleventh Circuit issued an opinion affirming the denial of habeas relief for the *Brady* and *Giglio* issues on February 9, 2024. In that opinion, the Eleventh Circuit credited much of the state courts factual and credibility findings before embarking on a harmless error review under *Brecht*. Aside from the post-trial witness recantations - generally found not credible by the state courts - the Eleventh Circuit noted the State's evidence was strong. The Eleventh Circuit held:

> Here, the State's case included particularly robust evidence of motive (Svenson's role in sending Phillips back to prison and threatening to send him back to prison again) as well as evidence that Phillips had possessed a firearm, similar to the one used to shoot into Nanette's home and to murder Svenson, around the time of the murder; had shot into Nanette's home; and provided a false alibi. And at Phillips's trial, there was no evidence of other viable suspects. Given the totality of the evidence introduced at Phillips's trial, we simply cannot say that the alleged errors had a substantial and injurious effect or influence on the jury's guilty verdict.

Phillips v. Sec'y, Florida Dep't of Corr., No. 15-15714, 2024 WL 512442, at *21 (11th Cir. Feb. 9, 2024)

REASONS FOR DENYING THE WRIT

THE APPLICATION OF HARMLESSNESS UNDER BRECHT TO *BRADY* AND *GIGLIO* CLAIMS RAISES NO SUBTANTIAL, UNSETTLED CONSITUTIONAL QUESTION IN THIS CASE AND THE OUTCOME OF THE FACT INTENSIVE REVIEW OF THE CLAIMS RAISED ON REVIEW FROM THE ELEVENTH CIRCUIT COURT OF APPEALS IS NOT FAIRLY DEBATABLE. (Restated)

Petitioner seeks this Court's review of the Eleventh Circuit Court of Appeals' decision using the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), to deny his *Giglio* claims. The Eleventh Circuit and the majority of the Circuit Courts apply the *Brecht* review standard to *Giglio* claims, although a few merely rely on the materiality requirement inherent in the *Giglio* analysis. There is no basis for granting certiorari review of this case since Petitioner's claims fail under either standard of review. Phillips has not established that any egregious trial error or pattern of prosecutorial misconduct occurred to warrant either using a standard different than *Brecht's* or granting of the habeas petition. Certiorari must be denied.

Certiorari review is not a matter of right, but of judicial discretion. It is granted only for compelling reasons. Federal habeas relief may not be granted unless this Court finds that the Florida Supreme Court's assessment of the *Giglio* or *Brady* claims are contrary to or an unreasonable application of this Court's precedent. *Williams v. Taylor*, 529 U.S. 362 (2000). AEDPA, "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 131 S. Ct. 1305, 1307 (2011) (per curiam). Phillips has not demonstrated that the Florida

Supreme Court's merits determination based on credibility and factual findings supported by the record requires review by this Court. While "[r]easonable minds reviewing the record might disagree about the [witness]'s credibility, on habeas review that does not suffice to supersede the trial court's credibility determination." *See Rice v. Collins*, 546 U.S. 333, 341-42 (2006)). Under the doubly deferential ADEPA standard for both defense counsel's performance and the state court's rejection of the *Giglio* and *Brady* claims, certiorari should be denied.

"A state court's determination that the claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86 (2011) (internal quotation marks omitted). If there is any basis for any reasonable jurist to agree with the state court, habeas relief must be denied. "In order to be granted relief, the inmate must show that the state court's merits ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement. *Id.* The presumption of correctness applies to both implicit and explicit factual findings. *See Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). That Phillips did not overcome the presumption of correctness by clear and convincing evidence is not debatable. This Court has stated that it is particularly inappropriate for a reviewing court to overturn a factual finding that already had been reviewed twice even in a direct review context. *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Here, Phillips cannot show that the state court's opinion on the *Brady* and *Giglio* claims, which rested on factual and credibility determinations supported by the record, decided an important question of federal

law in a manner that conflicts with a decision of this Court. *See* Supreme Court Rule 10.

Moreover, to satisfy 28 U.S.C. §2254(d)(2), a petitioner must show that a state court factual finding is unreasonable in light of the record to qualify for relief. To show a state court finding is unreasonable, it does not suffice to show that reasonable minds would differ from the state court on the issue of fact. *Wood v. Allen*, 558 U.S. 290, 301 (2010). Further, a federal court may not hold a state court factual finding unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Id.* Also, determination of whether the rejection of Phillip's *Brady* and *Giglio* claims is dependent wholly on the facts of the case and of significance to no one other than the parties to this litigation. What Petitioner is seeking in this Court is not review of an important or unsettled question of law, but a review of adverse factual and credibility findings in the hope of obtaining a different outcome. Certiorari should be denied.

Federal Courts' Review Under *Brecht v. Abrahamson*.

While there is a conflict among some federal courts of appeal on whether *Brecht* harmlessness review on Gigli/Brady claims, that conflict is not a material question presented by this case. Petitioner's claims fail under either theory and it is apparent the Eleventh Circuit found it easier to dispose of these claims under *Brecht*. Notably, the Eleventh Circuit Court of Appeals did not state its opinion would be different under the *Giglio* or *Brady* materiality standard. *Phillips v. Sec'y, Florida Dep't of Corr.*, No. 15-15714, 2024 WL 512442, at *19 (11th Cir. Feb. 9, 2024)(" Phillips also claimed that the State violated *Giglio* in other ways. But we

need not decide whether it was unreasonable for the Florida Supreme Court to reject the remainder of his Giglio claim because any error was harmless under *Brecht*.").

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), this Court set forth the standard for relief where, on habeas review, error is determined to exist. This test is "less onerous" then the harmless beyond a reasonable doubt standard enunciated in *Chapman v. California*, 386 U.S. 18 (1967). "The test is whether the error had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637.

While three of the Circuits use the less demanding materiality standard articulated in *Giglio* for claims involving perjury, the remaining circuits largely apply the *Brecht* standard for those types of claims. The Eleventh Circuit uses the *Brecht* standard when reviewing and analyzing *Giglio* claims. *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1302 (11th Cir. 2014); *see Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1355-56 (11th Cir. 2011) (finding a *Giglio* violation but denying habeas relief because the petitioner failed to demonstrate the error had a "substantial and injurious effect on the outcome of his trial"). In order to get *Giglio* relief in a federal habeas petition, a petitioner must specifically demonstrate ***both*** that (1) the Florida Supreme Court's decision was contrary to, or an unreasonable application of *Giglio*, or was based on an unreasonable determination of the facts,

and (2) that the *Giglio* error was not harmless under *Brecht*. *Rodriguez*, 756 F.3d at 1303-04.

The First Circuit noted that the *Giglio* materiality standard for perjured testimony would most often find constitutional error. The court, however, then went on to apply "the *Brecht* harmless error inquiry into whether the perjured testimony in fact had a substantial and injurious effect or influence on the jury's verdict." *Gilday v. Callahan*, 59 F.3d 257, 268 (1st Cir. 1995). The court also noted that *Brecht* does not apply to *Brady* claims because the *Brady* analysis already requires that the non-disclosure of evidence have "an impact on the jury verdict sufficiently substantial to satisfy the *Brecht* harmless error test." *Id.*

The Sixth Circuit agreed, pointing to the differing materiality tests/standards between *Brady* and *Giglio* claims and that this Court has not held that claims involving perjured testimony constitute structural rather than trial error. *Rosencrantz v. Lafler*, 568 F.3d 577, 589-90 (6th Cir. 2009) (Recognizing that most constitutional errors can be harmless and following the First Circuit's analysis of the difference in the materiality standards of *Brady* and *Giglio* claims). The Eighth Circuit followed suit. *United States v. Clay*, 720 F.3d 1021, 1026 (8th Cir. 2013) (applying *Brecht* because "the materiality standard for false testimony is lower, more favorable to the defendant, and hostile to the prosecution as compared to the standard for a general *Brady* withholding violation" and such error is trial error rather than structural. (internal quotation marks and citation omitted)).

The Fifth Circuit has assumed, but not firmly held, that the *Brecht* substantial and injurious error standard applies to the review of *Giglio* claims in

habeas petitions.

> After considering the interests of finality and state sovereignty supporting the Supreme Court's decision in *Brecht, see* 507 U.S. at 635–37, 113 S.Ct. 1710, and weighing those interests against the Court's recognition 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," *id.* at 638 n. 9, 113 S.Ct. 1710, we assume, without deciding, that it is appropriate to conduct a *Brecht* harmless-error analysis in such a circumstance. *See Gilday v. Callahan,* 59 F.3d 257, 268 (1st Cir.1995) (applying *Brecht* harmless error to a claim of knowing use of perjured testimony).

Barrientes v. Johnson, 221 F.3d 741, 756–57 (5th Cir. 2000). *See also Coulson v. Johnson*, 273 F.3d 393 (5th Cir. 2001) (holding that *Giglio* error would not require reversal because the false evidence did not meet the *Brecht* standard of having a substantial and injurious effect or influence in determining the jury's verdict); *Tassin v. Cain,* 517 F.3d 770 (5th Cir. 2008) (using the *Brady* materiality standard to review false testimony *Giglio* claim). Similarly, the Tenth Circuit also recognized that *Brecht* applies to *Giglio/Brady* claims.

> The Supreme Court previously articulated a separate materiality standard applicable to *Giglio* violations in *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), where it 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." As we subsequently noted, however, assuming 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,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), which the Supreme Court has held is met by the *Kyles* test. *See Kyles,* 514 U.S. at 435–36, 115 S.Ct. 1555. Thus for all practical purposes the two standards ultimately mandate the same inquiry. *Mitchell v. Gibson,* 262 F.3d 1036, 1062 n. 13 (10th Cir.2001).

Douglas v. Workman, 560 F.3d 1156, 1173 fn 12 (10th Cir. 2009).

The Fourth Circuit has not addressed the application of *Brecht* to *Giglio* false testimony claims. In *Chandler v. Lee,* 89 Fed.Appx. 830 (4th Cir. 2004), the court determined that no false testimony was presented in the trial court, obviating the need for an analysis of any error's impact on the trial, but noting that other Circuits use the *Brecht* harmless error standard.

The Ninth, Second, and Third Circuits have held that the *Brecht* standard does not apply to false testimony *Giglio* claims because the materiality and harmless error standards merge and because a conviction obtained through "perjured testimony is fundamentally unfair." *Haskell v. Superintendent Greene SCI,* 866 F.3d 139, 150-51 (3d Cir. 2017). *See also Hayes v. Brown,* 399 F.3d 972 (9th Cir. 2005); *Drake v. Portuondo,* 553 F.3d 230 (2d Cir. 2009). Those courts view the use of perjured testimony as akin to structural error, something this Court has never held.

The majority of the Circuits apply the *Brecht* harmless error standard in reviewing *Giglio* claims. Since habeas is collateral review, *Brecht* should apply to all claims raised. At any rate, any conflict among the lower courts does not warrant review at this time, as further percolation would give the lower courts an opportunity to carefully assess the varying arguments that have been advanced for whether or not to apply the actual prejudice standard to these types of claims. *See, e.g., California v. Carney*, 471 U.S. 386, 400 n.11 (1985) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule.").

As noted in *Brecht,* once a conviction is secured and the sentence becomes final, States have "a strong interest in preserving the integrity of the judgment." *Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394, 403 (2001). Consistent with that state interest, this Court has recognized that "the principle of finality . . . is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309 (plurality op.). "Without finality," this Court has explained, "the criminal law is deprived of much of its deterrent effect." *Id.*

The Claims Fail Under Both Standards Of Review.

Contrary to his assertion, Phillips did not establish that he was entitled to relief because he failed to present clear and convincing evidence to refute the state court factual findings or to overcome the presumption of correctness AEDPA mandates for those findings on the *Brady* and *Giglio* claims. The record below, as reviewed by the district court and the Eleventh Circuit, firmly supported those findings as well as the denial of relief. Furthermore, no egregious pattern of prosecutorial misconduct was established by that record, even given the prosecutor's ill-advised redacting of police reports. Phillips asserts that the Florida Supreme Court used the incorrect materiality standard for the *Giglio* analysis, despite the court accurately quoting the standard, which the Eleventh Circuit found. Given the record as well as the rest of the evidence of his guilt established at the trial, Phillips's claims fail under either the *Brecht* or *Giglio* standards. The Eleventh Circuit's analysis was correct and Phillips was not entitled to relief on these claims. There is no reason to grant certiorari.

At the heart of his argument Phillips argues that the State provided the witnesses with undisclosed benefits and did nothing to correct any of their inaccurate testimony or perjury, in violation of both *Brady* and *Giglio*. Further, Phillips argues that the prosecutor's alteration of a detective's report before giving it to defense counsel so that counsel could not tell something had been removed created a pattern of egregious prosecutorial misconduct. Phillips also asserts that the State concealed the prior crimes and mental health histories of the informants.

The *Brady* and *Giglio* Standards.

To establish a *Brady* violation, Phillips must show that:

> (1) the government possessed favorable evidence to the defendant; (2) the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different.

United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002); *see also United States v. Stein*, 846 F.3d 1135, 1146 (11th Cir. 2017). It is the defendant's burden to show a *Brady* violation exists. *United States v. Esquenazi*, 752 F.3d 912, 933 (11th Cir. 2014). "Evidence is favorable to the accused for *Brady* purposes if it is either exculpatory or impeaching." *Stein*, 846 F.3d at 1146 (internal quotations and citations omitted). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish prejudice." *United States v. Brester*, 786 F.3d 1335, 1339 (11th Cir. 2015) (internal quotation marks omitted).

The State does not need to provide a defendant with information he either already has or, with any reasonable diligence, he can obtain himself. *United States v. Valera*, 845 F.2d 923, 928 (11th Cir. 1988); *Stein*, 846 F.3d at 1146. For a federal habeas court to grant relief, a petitioner must show that the state high court's adjudication was contrary to or an unreasonable application of *Brady* or was based on an unreasonable determination of the facts, 28 U.S.C. § 2254(d). *Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1302–04 (11th Cir. 2014).

In *Giglio v. United States*, this Court held that when the prosecution solicits or fails to correct known false evidence, due process requires a new trial where "the false testimony could in any reasonable likelihood have affected the judgment of the jury." 405 U.S. at 154, 92 S. Ct. at 766 (ellipsis omitted). *Giglio* error is a type of *Brady* error which exists when the undisclosed evidence shows that the State's case contained false testimony and, further, that the State either knew, or should have known, about the perjury. *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107-08 (11th Cir. 2012).

The *Giglio* materiality standard is "different and more defense-friendly" than the *Brady* materiality standard. *United States v. Alzate*, 47 F.3d 1103, 1109-10 (11th Cir. 1995). The evidence is material under *Brady* if there is a reasonable probability that if the State had disclosed it to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375 (1985). Evidence is material under *Giglio* when "there is any reasonable likelihood that the false testimony could have affected the jury's

judgment. ... The *Brady* materiality standard 'is substantially more difficult for a defendant to meet than the 'could have affected' standard' under *Giglio*." *Trepal*, 684 F.3d at 1108 (citations omitted).

There is no *Giglio* violation if the defense was aware of the evidence, unless the State capitalized on it. *Stein*, 846 F.3d at 1147-48. "The could have standard requires a new trial unless the prosecution persuades the court that the false testimony was harmless beyond a reasonable doubt." *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011) (citations omitted). A court must consider the materiality of the evidence withheld "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555, 1567 (1995); *Rodriguez*, 756 F.3d 1303-04.

The specific instances of alleged *Giglio* error were: Scott's statement at trial that he was not a police agent; Farley's misstatement at trial about when the police started recording his interview; the inmates' lies about their criminal histories; and Hunter's inaccurate testimony about who contacted the police about his overhearing Phillips's confession. (The related *Brady* claims were Scott's meeting with Petitioner's family and the state not seeking and turning over Hunter's mental health history.) Phillips's assertion that the prosecutor and lead detective supplied the incriminating information to the inmate witnesses is belied by the record. As noted earlier, the trial court held an evidentiary hearing and found the informants were not credible and the prosecutor and detective were credible. The Florida Supreme Court's analysis and application of *Giglio* was reasonable and not contrary to this Court's precedent. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000).

The Florida Supreme Court correctly identified *Giglio* as providing the standard for adjudicating claims concerning the alleged knowing presentation of false testimony and accurately enunciated that standard. *Phillips*, 608 So. 2d at 781. As *Giglio* stated, courts do not "automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." *Giglio*, 405 U.S. at 154, 92 S. Ct. at 766 (citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177 (1959) (quotation mark omitted). The Florida Supreme Court identified the first three instances listed above as alleged *Giglio* errors but did not address Hunter's false testimony. It specifically found, as did the post-conviction court, that the defense knew about Scott being a paid informant and that a portion of the Farley interview preceded the recorded statement. *Id.* Under *Giglio*, a defendant has to show that false testimony was presented to a jury and that it could have affected the jury's verdict. *Giglio*, 405 U.S. at 150. However, there is no *Giglio* violation if the defense was aware of the evidence and could have addressed any discrepancies during the testimony. *Stein*, 846 F.3d at 1147-48.

The state court's rejection of the claim concerning Farley's statement that his entire conversation with Det. Smith was taped was reasonable. The court rejected it because the misstatement was not material and Phillips was aware that Farley's comment was contradicted by Det. Smith's pre-trial deposition. Rejecting a *Giglio* claim because a defendant was aware a statement was subject to impeachment is in accordance with Eleventh Circuit precedent. *Stephens v. Hall*, 407 F.3d 1195, 1206 (11th Cir. 2005); *Routly v. Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994). The same

is true of rejecting a *Giglio* claim because it was not material. *Ventura v. Attorney General*, 419 F.3d 1269 (11th Cir. 2005); *United States v. Antone*, 603 F.2d 566, 571 (5th Cir. 1979). The facts of this case support the state court's analysis and denial of relief.

The record supports these findings. During his deposition, Det. Smith repeatedly differentiated between interviewing the witnesses and taking formal statements from them. DE 13 App. II-Vol. 3 at 519-64, App. II-Vol. 4 at 692-778. In fact, the detective even mentioned the interview he had conducted with Farley before the tape began on the taped statement. *Id.* at 568. As such, the record fully supports that Petitioner was aware that Det. Smith and Farley had spoken before the tape began.

The record also supports the finding that the misstatement was immaterial. Farley was extensively impeached about his motivation for testifying, being a convicted felon, and recanting his testimony pretrial. While Phillips insists that showing that the entire conversation was not taped would have shown that Det. Smith coached Farley, the record supports the rejection of this assertion. Det. Smith denied providing information to Farley. DE 13 App. II-Vol. 58 at 9988, 9989-90. Det. Smith described speaking to Farley before taking a formal statement from him in a manner that showed that this was standard procedure. *Id.* at 9988-89. The only evidence of coaching came from Farley's own unbelievable testimony in post-conviction. The record supports the post-conviction's court finding that Farley was not credible. As such, the record supports both the finding that Phillips was aware

of the misstatement and the misstatement was merely cumulative impeachment. Thus, there was nothing unreasonable about the rejection of this claim.

The state courts found that Farley's testimony and Hunter's affidavit were not credible. *Phillips*, 608 So. 2d at 780-81; App. II-Vol. 49 at 8695. In addition to the testimony of Mr. Waksman and Det. Smith refuting Farley's testimony and Hunter's affidavit, the record provides additional bases to support this finding. Hunter refused to testify at the evidentiary hearing. DE 13 App. II-Vol. 57 at 9780-85, App. II-Vol. 58 at 9969, 9971. Both the prosecutor and the attorney appointed to represent Hunter in connection with the hearing indicated that Hunter had informed them that the affidavit was false and coerced. DE 13 App. II-Vol. 58 at 9969-71, 9942-43. This evidence fully supports the state courts' finding that Farley's testimony and Hunter's affidavit were not credible.

In order to overcome such a factual finding, a petitioner must show by clear and convincing evidence that the finding was incorrect or unreasonable in light of the record. *Gilliam v. Sec'y for the Dept. of Corrections*, 480 F.3d 1027, 1032 (11th Cir. 2007). Phillips failed to present any such evidence. Instead, his claims rest on unsubstantiated allegations which are contrary to the findings based on the evidence that was before the state court and reviewed by the federal courts. Claims without evidence do not carry a habeas petition's burden regarding the factual findings. *Jennings v. McDonough*, 490 F.3d 1230, 1240 (11th Cir. 2007).

The Florida Supreme Court's finding that false testimony by Farley and Watson regarding their criminal histories was not material was also reasonable. The Court stated that the misstatements were immaterial because it was

cumulative to the impeachment of these witnesses. *Phillips III*, 608 So. 2d at 781. Rejecting a *Giglio* claim because the misstatement was cumulative to other impeachment is in accordance with this Circuit's precedent. *Ventura v. Attorney General*, 419 F.3d 1269 (11th Cir. 2005); *United States v. Antone*, 603 F.2d 566, 571 (5th Cir. 1979). As such, there was nothing unreasonable about the Florida Supreme Court relying on the cumulative nature of the evidence in rejecting this claim.

To the extent that Phillips is attempting to claim that the impeachment was not cumulative, he is entitled to no relief. The record fully supports the finding that the impeachment was cumulative. Farley and Watson both admitted to being convicted felons. DE 13 App. HH-Vol. 7 at 819-20, App. HH-Vol. 6 at 703. Farley admitted that he was hoping to be released from prison early. DE 13 App. HH-Vol. 7 at 817-18, 824-28. Farley was impeached with the fact that he had recanted his trial testimony prior to trial. *Id.* at 828-38, 985, App. HH-Vol. 8 at 999. Similarly, Watson admitted that he had been promised to be given a polygraph examination concerning whether he was truly armed during his own crime and to have the result of this test provided to the judge in this case. DE 13 App. HH-Vol. 6 at 705-12. Watson was also impeached with the fact that he had denied even knowing Petitioner pretrial. DE 13 App. HH-Vol. 6 at 701-02, 705, App. HH-Vol. 1328 at 1032. Further, an inmate claimed that Watson had been given benefits for testifying against Petitioner. DE 13 App. HH-Vol. 8 at 1024-25. Thus, the record fully supports that the misstatements by Farley and Watson were cumulative to the impeachment of these witnesses. The state court's holding was reasonable.

Further, there was no *Giglio* violation about the two inmates' criminal history because their criminal history was known by the defense at the time of trial and counsel was able to impeach them with their additional crimes. Mr. Guralnick, trial defense counsel, testified that he had conducted his own investigation of the witnesses and was either provided with the informant's criminal history reports or would have learned of their criminal histories through other sources. DE 13 App. II-Vol. 53 at 9255, 9267. In his pre-trial deposition, Det. Smith testified about: Hunter's pending charges and prior convictions; Farley's prior convictions, number or nature of which was unknown; Scott's prior convictions; and Watson's current prison term and prior convictions. DE 13, App. II-Vol. 4 at 707-09, 722, 727-28, 735. Given the state of the record, including the impeachment on cross-examination detailed earlier, there was nothing unreasonable about the state courts' rejection of this claim. *Williams*, 529 U.S. at 411.

The final instance of alleged *Giglio* error involved a redacted police report where the prosecution did not inform the defense that Hunter himself initiated contact with the authorities in order to give evidence against Phillips. At trial, Hunter testified that his cellmate, not himself, contacted the authorities about Phillips's statements. As the district court noted, there is no dispute that the prosecution purposefully removed the information. While before the court, the Florida Supreme Court did not address this one instance, rather it denied the *Giglio* claims as a whole. However, AEDPA deference still applies. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of

any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 131 S.Ct. 770, 784-85 (2011) (citation omitted). *Harrington* applies to state court summary denials with no discussion but also to state court decisions where the court discusses only part of the claim in denying the whole claim. *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013); 28 U.S.C. § 2254(d).

As the Eleventh Circuit found, there was substantial evidence of Phillips's guilt apart from the inmates' testimonies. The State presented multiple non-inmate witnesses, all of whom testified that Phillips had serious problems with Svenson prior to the murder. Svenson had previously sent Phillips back to state prison on a parole violation, and subsequently had instructed Phillips on multiple occasions to stay away from parole officer Brochin, warning that his parole would once again be violated. Further, the State presented testimony that Phillips had inquired as to how to remove gun powder residue and that he had admitted to firing a gun, in violation of his parole. The defense, and the jury, knew that Scott was an informant, and the defense knew that Farley's interview was longer than just the taped portion. The only information not provided concerned how Hunter contacted the prosecution. Given the record of the entire trial, Phillips failed to show that one piece of information actually prejudiced him. Given all of the evidence, there was no reasonable likelihood that the missing information would have affected the verdict. Habeas relief was properly denied. Certiorari should be denied.

Phillips essentially argues that the prosecution should have turned everything over to the defense. The record shows that while the prosecution may

not have turned over everything written in individual police reports, it did turn over complete information on promises made to the witnesses and any exculpatory/impeaching information it and the police had regarding these witnesses' histories. This Court opined:

> As Justice Blackmun emphasized in the portion of his opinion written for the Court, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. 473 U.S., at 675, 105 S. Ct., at 3380 and n. 7. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.

Kyles v. Whitley, 514 U.S. 419, 436–37, 115 S. Ct. 1555, 1567 (1995). The Florida courts' factual findings were reasonable and its application of *Giglio* and *Brady* to the facts of this case was reasonable and not in contravention of this Court's precedent. Phillips has not carried his AEDPA burden, much less his *Brecht* burden.

Again, the state court found that Petitioner's *Brady/Giglio* claims failed because the inmate recantations were not credible, the state prosecutor and detective were credible, and the relevant incorrect testimony was immaterial which could not have affected the verdict. This case is not an appropriate vehicle for certiorari since the outcome would not change since Petitioner is not entitled to relief. Certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
ASHLEY MOODY
Attorney General

CARLA SUZANNE BECHARD
Associate Deputy Attorney General
* *Counsel of Record*

/s/Lisa-Marie Lerner
LISA-MARIE LERNER
Assistant Attorney General

Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607
Telephone: (813) 287-7900
carlasuzanne.bechard@myfloridalegal.com
capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT