DOCKET NO. 24-5553

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent's response confirms that the courts of appeals are split on the question presented and that this case is an ideal vehicle for resolving it.

ARGUMENT

I. The Circuit Split is Longstanding, Significant and has Percolated

Respondent concedes (at 23) that "there is a conflict among some federal courts of appeal" on whether *Brecht*'s[1] harmlessness review applies to

[1] *Brecht v. Abrahamson*, 507 U.S. 619 (1993)

Giglio[2]/*Napue*[3] claims, but argues (at 27) that "further percolation" on this issue 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." Respondent's argument is incorrect, as percolation has been met not merely by sheer number of circuits, but also by the extent of analysis conducted by the lower circuits.

As of the filing of this reply, ten circuits have grappled with the issue at hand.[4] Both Respondent and Petitioner agree that six out of the ten circuits have definitively ruled on the direct issue. Of these circuits, the First, Eighth, and Eleventh Circuits have held that *Brecht*'s harmlessness review applies to *Giglio/Napue* claims. Respondent also concedes that the Second, Third, and Ninth Circuits have held that *Brecht*'s harmlessness review does not apply to *Giglio/Napue* claims involving prosecutorial misconduct. There is a deep and entrenched split on the application of *Brecht* to *Giglio/Napue* claims.

Additionally, Respondent alleges that the Sixth Circuit has definitively held that *Brecht* applies to *Giglio/Napue* claims, but as previously stated by Petitioner, the Sixth Circuit has recognized that this Court has left open the question of whether *Brecht* analysis applies to cases with "deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial

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[2] *Giglio v. United States*, 405 U.S. 150 (1972).
[3] *Napue v. Illinois*, 360 U.S. 264 (1959).
[4] The Seventh and D.C. Circuits have yet to issue a ruling. It should be noted the D.C. Circuit does not hear issues related to state court habeas petitions.

misconduct." *Rosencrantz v. Lafler*, 568 F.3d 577, 589 (6th Cir. 2009) (quoting *Brecht*, 507 U.S. at 638 n. 9).

The Fourth, Fifth, and Tenth Circuits have considered *Brecht's* applicability to *Giglio/Napue* claims without deciding the issue, to mixed results. The Fourth Circuit has yet to issue a ruling, while the Fifth and Tenth Circuits have confused the appropriate standard. This confusion of the issue only further highlights the necessity of this Court's guidance.

Additionally, *Brecht v. Abrahamson*[5] was first decided in 1993. The lower courts have been interpreting this Court's rulings for more than thirty years. The breadth and depth of legal analysis pertaining to this ruling is widespread and most evident in *Haskell v. Superintendent Greene SCI*, 866 F.3d 139 (3d Cir. 2017), where the Third Circuit carefully analyzed the different holdings of the First, Sixth, Eighth, Ninth, and Eleventh Circuits prior to reaching its ultimate holding. *Haskell* at 150. *Haskell* demonstrates not only the depth of the circuit split, but also the extent of percolation on this issue by the lower courts.

Percolation, as defined by Respondent's brief, has been appropriately satisfied in this case.

II. This Case Remains an Ideal Vehicle for Addressing the Question Presented

Respondent argues that this case is poorly suited for addressing the question presented because Petitioner's claims fail under both standards of review. Respondent's argument is unpersuasive.

[5] *Brecht v. Abrahamson*, 507 U.S. 619 (1993)

Respondent first alleges that Petitioner failed to present clear and convincing evidence to refute the state court's factual findings. Petitioner stands on the facts as presented in his original petition to the Court, but would like to further address Respondent's assertion that no egregious pattern of prosecutorial misconduct exists in the instant case. The Eleventh Circuit clearly and firmly held that the lead prosecutor's actions in this case were "dishonest and unethical," and in his concurrence, Judge Wilson made a finding 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." However, the Eleventh Circuit, hamstrung by precedent, determined that under *Brecht*, such egregious *Giglio* error was harmless.

Respondent also argues that Petitioner has failed to overcome the presumption of correctness AEDPA mandates. Under AEDPA, habeas corpus relief can only be granted if the state court's adjudication "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 "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." 28 U.S.C. § 2254(d)(1)-(2). As argued below by Petitioner, the State post-conviction circuit court assessed Petitioner's claim as *Brady*[6] violation, omitting any *Giglio* analysis in its denial. The Florida Supreme Court then affirmed the lower circuit court's holding based on

[6] *Brady v. Maryland*, 373 U.S. 83 (1963)

its own precedent of *Routly v. State*, 590 So. 2d 397, 400 (Fla. 1991). *Phillips v. State*, 608 So. 2d 778, 780-81 (Fla. 1992). The Florida Supreme Court would later acknowledge that its ruling in *Routly* was *incorrect* due to having obfuscated the different materiality prongs of *Giglio* and *Brady*. *Guzman v. State*, 868 So. 2d 498, 505-06 (Fla. 2003). To further reiterate, the Florida Supreme Court's ruling in Petitioner's original post-collateral appeal was based on its own precedent that was later overturned. Petitioner's claims were denied, in part, on a mistaken interpretation of federal law and the appropriate legal standard.

Further, a state court decision is "contrary to" this Court's precedent if it "arrives at a conclusion opposite to that reached by this Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an] [opposite] result." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). As previously mentioned, this Court has left open the issue of whether egregious prosecutorial misconduct warrants the granting of habeas relief under *Brecht*. *Brecht*, 507 U.S. at 638 n. 9. Although *Giglio/Napue* errors have yet to be considered structural errors, "deliberate and especially egregious error of the trial type, or [a case] that is combined with a pattern of prosecutorial misconduct," may so undermine the confidence of the criminal justice system as to implicate structural errors. *Id.* Petitioner's case presents an excellent vehicle for this Court to address the question left open in *Brecht* more than thirty years ago.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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