

No. _____

In the Supreme Court of the United States

ROBERT RODRIGUEZ,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Third
District Court of Appeal of Florida

PETITION FOR A WRIT OF CERTIORARI

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APRIL 27, 2018

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QUESTION PRESENTED

Petitioner Robert Rodriguez was accused of sexual battery of a child under the age of twelve for allegedly sodomizing his girlfriend's son. At trial, the prosecution elicited testimony from its child sex abuse expert that the boy could not have made up a story involving this specific set of allegations. And in closing argument, the prosecutor assured the jury that the child's testimony was credible because eight-year-old children lack the life experience necessary to fabricate an accusation of sodomy. But both the prosecutor and the state's child sex abuse expert were aware that *this* child had previously been sodomized by another family member in a different case. Thus, unlike the typical young child, the alleged victim here actually did possess the knowledge necessary to fabricate an accusation of sodomy. Petitioner was convicted and sentenced to life imprisonment. The question presented is:

Whether Petitioner's conviction contravenes this Court's rulings in *Giglio* and *Napue*, which held that due process is violated where a prosecutor knowingly presents false testimony to the jury or permits it to go uncorrected.

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Petitioner Robert Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the Third District Court of Appeal of Florida.

OPINIONS BELOW

The opinion of the Third District Court of Appeal of Florida (Pet. App. 1a-4a) is reported at 230 So. 3d 1249 of the Southern Reporter. In an unpublished order (Pet. App. 5a), the Florida Supreme Court declined to exercise its discretionary jurisdiction to review Petitioner's appeal.

JURISDICTION

The judgment of the Third District Court of Appeal of Florida was entered on October 25, 2017. A timely notice invoking the discretionary jurisdiction of the Florida Supreme Court was filed on October 30, 2017, and the Florida Supreme Court denied review on January 29, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: “No person shall be * * * deprived of life, liberty, or property, without due process of law.” The Fourteenth Amendment likewise states, in pertinent part, “nor shall any State deprive any person of life, liberty, or property, without due process of law.”

INTRODUCTION

Petitioner Robert Rodriguez was convicted in Florida of—and is currently serving a life sentence for—sexual battery of a child under the age of twelve based on testimony and prosecutorial argument that any reasonable observer would conclude was knowingly false. With full knowledge that the child victim had previously been sodomized by a family member, the prosecutor assured the jury during closing argument that “what does an eight year old know of anal sodomy[?]” and “No eight year old know[s], * * * it[] doesn’t exist unless it happened.” Elsewhere the prosecutor argued to the jury, “What kid is going to come up with the concept of being anally raped, who is only eight years old * * * [?]”

Those claims were based in part on false testimony from the State’s child sex abuse expert, left uncorrected by the prosecutor, that the child’s allegations were credible because “it’s not like a boy can make up a story like that.” Like the prosecutor, the State’s expert was familiar with the facts of the prior instance of sexual abuse because he had personally examined the child in the wake of that incident. Despite the obvious falsity of the State’s claims—and the prosecutor’s personal knowledge of their falsity—the trial court overruled Petitioner’s objections to the closing argument comments and refused to grant a mistrial.

The jury therefore went to deliberate based on the false assumption that the child victim lacked the sexual experience necessary to fabricate a story involving anal sodomy. It may well have concluded, as the prosecutor herself urged, that an eight-year-old child lacks the basic knowledge required to invent an accusation of anal sodomy—and thus that *this* child must have been telling the truth about the abuse. That is a gross violation of this Court’s decisions in *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), which unequivocally forbid prosecutors from knowingly misleading jurors. As this Court has long held, “[s]uch a contrivance by a state to procure the conviction and imprisonment of a defendant is [] inconsistent with the rudimentary demands of justice.” *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

On direct appeal to the Florida Third District Court of Appeal, the state appellate court rejected Petitioner’s *Giglio* claim without so much as discussing the facts of the case or reciting this Court’s clear holdings. It instead noted only that Petitioner had raised an issue involving an “*alleged* misrepresentation” by the prosecutor. Because the district court declined to discuss the facts of the case—and due to state-law limitations on the discretionary jurisdiction of the Florida Supreme Court—the district court’s decision was insulated against review by the state high court. In sum, Petitioner is currently serving a life sentence, obtained through prosecutorial misconduct, without any meaningful review of the pertinent legal issues in his case.

For the reasons that follow, this Court should grant certiorari and ultimately reverse Petitioner's conviction. Alternatively, the Court may wish to summarily reverse the ruling of the Third District Court of Appeal and remand to that court with instructions to properly consider *Giglio* and *Napue*. This would not be the first time in recent memory the Court has summarily reversed based on a prosecutor's open disregard for constitutional and ethical norms. *See, e.g., Wearry v. Cain*, 136 S.Ct. 1002 (2016) (per curiam).

STATEMENT

A. Nature of the Criminal Charges

Petitioner Robert Rodriguez was prosecuted by the State of Florida for multiple acts arising after Petitioner allegedly anally sodomized A., an eight-year-old boy. A.'s history of abuse and neglect has been well documented. Three years earlier, at the age of five, A. was sexually assaulted by his step-grandfather, Fermin Nunez, who was accused of touching A.'s penis and performing digital-anal penetration and oral sex on A. *See Nunez v. State*, 109 So. 3d 890, 891, 892 n.2 (Fla. Dist. Ct. App. 2013). A.'s mother, Maria Cea Perez, is a crystal meth user and convicted felon who kept their apartment in such a state of filth that A. had to sleep on the couch since the bed was covered in dog feces. Trial Tr. 7, 566-67, 569-70. At the time of the events giving rise to this appeal, Perez had not sent eight-year-old A. to school for more than a month. *Id.* at 460, 590. A. instead spent his days at a nearby park where men from the neighborhood would hang out. *Id.* at 457, 573.

Petitioner was Maria Perez's boyfriend and was living with her, A., and A.'s adult sister in April 2013, several years after A. had been sexually abused by Nunez. *Id.* at 275, 458. Perez and Petitioner's relationship was a volatile one. *Id.* at 500-01, 578-79. Their arguments sometimes got so heated that Petitioner would leave and be gone for a day or two, and Petitioner himself admitted that they would occasionally hit each other; that they took drugs; and that Perez would sometimes "fake a fight" and call the police to have him arrested. *Id.* at 501, 579.

In early April, Perez discovered large red marks on the skin above A.'s buttocks. *Id.* at 221, 473, 497. A. initially said that he had gotten the injuries from being dragged by older boys on the artificial turf in the park. *Id.* at 370, 469, 572. But upon persistent questioning by Perez, A. changed his story and said that the marks were burns from the night before when Petitioner awoke A. in the dead of night, took him to the bathroom, and burned him with a hot lightbulb. *Id.* at 466-69, 362. A. also told Perez that Petitioner had put his "pee pee" against A.'s "butthole." *Id.* at 373, 469. Rather than call the police, Perez summoned a large group of men from the park to attack Petitioner. *Id.* at 286-90, 475, 576. Police came to Petitioner's aid and found him sheltering from the men in a nearby convenience store. *Id.* at 306.

The State charged Petitioner with three counts stemming from the incident: (1) kidnapping a child under the age of 13; (2) aggravated child abuse; and (3) sexual battery on a victim under the age of 12.

By the time of trial, Perez—who had an open arrest warrant for a probation violation—had absconded. *Id.* at 7. The State's evidence instead included the

testimony of law enforcement personnel who had spoken to A. after his conversation with his mother, the Child Protection Team workers who examined the child, and Dr. Walter Lambert, the State's child sexual abuse expert. Most significantly, the case hinged on the trial testimony of A. himself. The jury found Petitioner guilty of all counts, *id.* at 776-77; R. 110-12, and he was sentenced to life imprisonment for counts 1 and 3, consecutive to thirty years for count 2. R. 122-24, 278.

B. Evidence at Trial

1. A. testified at Petitioner's trial. He was eight at the time of the allegations and was living with Perez, his sister Stephanie, and Petitioner. Trial Tr. 458. Because his mother "never took" him to school, *id.* at 460, A. would go to the park near their apartment "a lot." *Id.* at 457. According to his trial testimony, A. had been burned and sodomized by Petitioner late one night in April 2013. *Id.* at 461, 465-66, 469. The next day, Perez brought A. toilet paper in the bathroom and saw the injuries on his buttocks. *Id.* at 473, 497. Asked by Perez how he received the injuries, A. said it was from "kids [] dragging me in the grass in the playground." *Id.* at 469. As explained by A. at trial, he made this story up because Petitioner was within earshot and he was afraid. *Id.* at 469, 473-74.

Police and fire rescue dispatched to the scene observed what appeared to be burn marks on A.'s buttocks, *id.* at 221, 327, and when asked about the injuries, A. told them what Petitioner had done the previous night. *Id.* at 219, 221, 327. Though A. also told the authorities his initial explanation that he was dragged on artificial

turf, no one investigated that possibility or asked with whom A. had been roughhousing in the park. *Id.* at 498-99.

At trial in 2015, A. had difficulty recalling the events that occurred two and a half years earlier. In response to one line of questions, he responded “I don’t remember, it was a long time ago.” *Id.* at 605. Defense counsel asked: “If you don’t remember that, what are you basing your answers, you know, when you are answering the prosecutor’s questions, what are you basing that on, where are you getting the answers from?” *Id.* at 605-06. A. replied that his testimony was based on his memory of contemporaneous statements he had given to the authorities in 2013, and that he only recalled “a bit” of the actual incident. *Id.* at 606.

A. said that Petitioner had never previously done anything like this to him. *Id.* at 377, 506. He had also told one of the State’s investigators, Mercy Restani, that no one had ever “put their pee pee in [his] butt hole” before. *Id.* at 375.

2. Central to the State’s case was the testimony of Dr. Walter Lambert, a pediatrician and associate professor of clinical pediatrics at the University of Miami. *Id.* at 514. At the time of trial he had been licensed to practice medicine for thirty years and was acting as the interim statewide medical director for the Child Protection Team, an organization that investigates claims of child sexual abuse on behalf of law enforcement and the State Attorney’s Office. *Id.* at 514-15, 230-32. Dr. Lambert told the jury that he conducts trainings in both the United States and abroad on detecting child abuse, and has examined child victims on many occasions. *Id.* at 516. He did not interview A. directly but supervised the Child Protection Team

nurse practitioner who conducted a physical examination of the boy. *Id.* at 518, 230, 235-37.

The prosecutor asked Dr. Lambert to provide the jury his opinion as to the cause of A.'s injuries. With respect to possible injuries to A.'s anus, Dr. Lambert agreed that there were "no documented tears to the anal sphincter" but explained that this did not foreclose the possibility of sexual abuse because the anus is capable of healing quickly. *Id.* at 525-26. Discussing what he described as "sort of a bruise" on A.'s anal cavity, *id.* at 526, Lambert opined that the injury was "consistent with" a penis being pressed up against the anus. *Id.* at 527-28. Turning to the possible burn marks on A.'s buttocks, Dr. Lambert said that "they certainly look like a thermal type of injury" and that the injuries were "consistent with" having been burned by a lighter. *Id.* at 520-21. But they were equally consistent with "road rash" caused by artificial turf, *id.* at 536, a possibility Lambert dismissed solely because he had not been told anything about A. being dragged in the park. *Id.* at 521.

On cross-examination, Dr. Lambert admitted that his analysis of the physical evidence was "completely reliant on history"—meaning the version of events A. had told the doctor—and contended that it was standard practice in medicine to base a diagnosis on a patient's recital of the facts. *Id.* at 533 ("that's the way we practice medicine"). Elsewhere the doctor testified that although the physical evidence was inconclusive, the lack of inconsistency between A.'s allegations and the physical evidence was "why we made the diagnosis of physical abuse." *Id.* at 542. In other

words, Dr. Lambert concluded that A. had been sexually abused because he believed A.'s story and the story was not directly contradicted by the evidence.

Apart from this implicit bolstering of the child's testimony, Dr. Lambert offered his explicit opinion that A.'s version of events was truthful because "the mechanism[s] are so specific, right, that it's not like a boy can make up a story like that." *Id.* at 543.¹ The prosecution punctuated that testimony by resting its case immediately after. *Id.*

3. Although law enforcement and Child Protection Team workers took DNA swabs of A.'s anus and various items retrieved from the apartment, *id.* at 247-48, 414, there was no forensic evidence tying Petitioner to A.'s injuries. His DNA was found neither on the child nor on the lightbulbs and a light fixture police recovered from the apartment, which the State argued were the source of the burn. *Id.* at 409-10, 418, 670.

4. Petitioner took the stand at trial and unequivocally denied abusing A. *Id.* at 561-62. He acknowledged A.'s miserable living conditions, including a lack of electricity in the apartment (save for a few appliances that he powered with siphoned electricity from the apartment plaza) and the fact that Maria Perez had not taken A. to school in a month. *Id.* at 569-70, 590. He also admitted that his relationship with Perez was sometimes violent and that they had used crystal meth on the night of the alleged crimes. *Id.* at 565-68, 578-79, 587.

¹ This testimony went without objection.

Petitioner testified that he only learned of A.'s injuries when Perez brought the boy out of the bathroom and asked Petitioner to look at them. *Id.* at 571. A. explained to Petitioner and Perez that he got the injuries when his friends dragged him on artificial turf in the park. *Id.* at 572. Perez did not believe A.'s account, however, and continually insisted that he tell her the truth. *Id.* at 572-73 (“[S]he started badgering him, and saying that’s not how it happen. He was going, yes, I swear that’s how it happen. She kept telling him no, that’s not how it happen, and he kept swearing that’s how it happened.”). Perez then asked Petitioner to get Stephanie from the park, and he left Perez alone with A. *Id.* at 573. No witness overheard what Perez said to A. during that time. Because Perez did not appear at trial, the jury never learned whether she had suggestively questioned A. in a manner that might have influenced his ultimate allegations. Nearly an hour later Petitioner was attacked by the group of men Perez recruited from the park. *Id.* at 574-78.

C. The Prosecutor’s Closing Argument

Seizing on Dr. Lambert’s claim that a boy A.’s age could not have invented specific details involving this type of sexual abuse, the prosecutor asserted in closing argument that A.’s testimony was truthful because “what does an eight year old know of anal sodomy[?]” Trial Tr. 677. “No eight year old know[s],” she reckoned, “it[] doesn’t exist unless it happened.” *Ibid.* In other words, the prosecutor believed A. could not have fabricated the events because he lacked the life experience necessary to invent a story involving sodomy. Defense counsel objected and moved for a mistrial, arguing that the prosecutor was impermissibly vouching for the victim by

misrepresenting A.'s sexual history to the jury. *Id.* at 677-78. Counsel pointed out that the prosecutor knew A. had endured a "prior incident where he was anally sodomized" by another man and that a pretrial motion had been filed to preclude any discussion of that prior incident. *Ibid.*

The facts of that incident are a matter of public record and are laid out in the Florida district court's 2013 opinion in *Nunez v. State*, 109 So. 3d 890 (Fla. Dist. Ct. App. 2013). There, A.'s step-grandfather Fermin Nunez had been convicted of sexual battery after A. alleged that Nunez touched A.'s penis, put his fingers in A.'s anus, and performed oral sex on A. *See id.* at 891, 892 n.2.

The prosecutor—who had referenced the *Nunez* prosecution in a pretrial motion in limine, R. 72, and knew that Dr. Lambert himself had examined A. after that crime, Trial Tr. 529²—contended she was merely commenting on A.'s interview with investigator Mercy Restani in which A. said no one had ever "put their *pee pee* in [his] butt hole" before. *Id.* at 678 (emphasis added); *see id.* at 375. She claimed not to have insinuated that A. had "never been sexually abused," prompting defense counsel's rebuttal that "[t]hat's what she said to the jury." *Id.* at 678. The court denied the request for a mistrial. *Ibid.*

Resuming her argument, the prosecutor doubled down on the lack-of-sexual-knowledge claim, telling the jury: "So, by v[i]rtue of the fact that a kid is able to articulate this kind of offense tells you it's got to be something to it." *Id.* at 679. She reiterated that claim one last time in rebuttal argument just before the jury began

² The prosecutor also knew that Mercy Restani had previous contact with A. stemming from the Nunez incident. Trial Tr. 393.

deliberations, saying: “What kid is going to come up with the concept of being anally raped, who is only eight years old by another grown man’s penis, no, it’s not going to happen.” *Id.* at 748. The court overruled defense counsel’s objection. *Ibid.*

The jury ultimately convicted Petitioner of all three counts as charged, and the trial court sentenced him to two counts of life imprisonment and one count of thirty years’ imprisonment.

D. State Appellate Proceedings

1. On direct appeal to the Florida Third District Court of Appeal, Petitioner asked the state intermediary appellate court to reverse his convictions because the prosecutor had presented knowingly false testimony and argument to the jury. Invoking this Court’s decision in *Giglio v. United States*, 405 U.S. 150 (1972), Petitioner contended that the prosecutor violated the Due Process Clause by presenting Dr. Lambert’s testimony that a child in A.’s position could not have fabricated the events because eight-year-old children lack the necessary sexual experience or knowledge to invent a tale of sodomy. Initial Br., *Rodriguez v. State*, No. 3D16-215, at 20-24 (Fla. Dist. Ct. App. Nov. 3, 2016). As Petitioner pointed out, both the prosecutor and Dr. Lambert had actual knowledge that Lambert himself had examined the child three years earlier when the allegations of sodomy arose against Fermin Nunez. Both Dr. Lambert and the State therefore knew that the implication Lambert offered the jury—that A. had no life experience with sodomy—was false. Petitioner further contended that the prosecutor committed prosecutorial misconduct

by expounding on Dr. Lambert's claim during closing argument. *Id.* at 18-20 (citing state and federal cases applying *Giglio*).

Along with those arguments, Petitioner raised several state-law claims for a new trial (the denial of due process funds for Petitioner to undergo a polygraph, for example) as well as for remand for the ministerial act of entering a written finding that Petitioner had been orally deemed competent to proceed to trial.

In a cursory opinion, the Florida district court affirmed. Pet. App. 1a-4a. It declined to provide any written reasons for its rejection of the *Giglio* or prosecutorial misconduct claims; indeed, the court did not even discuss the facts of Dr. Lambert's and the prosecutor's false statements, writing only that Petitioner had raised an issue concerning "an *alleged* misrepresentation by the prosecutor regarding prior sexual abuse suffered by the child victim" and that "[a]fter a thorough review of the record in the case and, in particular, upon application of the appropriate standards of review to each of the issues raised by Rodriguez, we reject Rodriguez's first five issues on appeal." Pet. App. 2a-3a (emphasis added). In a footnote, the district court observed that one or more of Petitioner's claims had not been raised before the trial court and therefore were unpreserved. *Id.* at 3a n.2.

Though it affirmed the convictions and sentences, the district court remanded the case to the trial court for the limited purpose of entering a written order finding Petitioner competent to proceed to trial. *Id.* at 3a.

2. Petitioner then filed a petition for discretionary review in the Florida Supreme Court. That court is one of limited jurisdiction: it may review direct appeals

only where, on the four corners of the district court’s opinion, it appears that an enumerated basis for jurisdiction is present. *See infra* at 23-24. Because the Florida Supreme Court may predicate the exercise of its jurisdiction solely on facts explicitly discussed in a district court opinion, litigants are precluded from arguing any grounds for jurisdiction not present on the face of a district court opinion.³

Constrained to refer only to the facts expressly mentioned in the district court’s decision, Petitioner asked the Florida Supreme Court to accept review because the district court’s decision conflicted with decisions of the Florida Supreme Court and other district courts on a matter of state evidentiary law.

The Florida Supreme Court declined to accept review of Petitioner’s case on January 29, 2018. Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari to Correct a Gross Violation of Due Process

A. *Giglio* and *Napue* prohibit prosecutors from knowingly presenting false testimony or from knowingly misleading jurors

This Court has long recognized that “a conviction obtained through use of false evidence, known to be such by representatives of the State,” is antithetical to due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see also Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (holding that government’s knowing use of “a contrivance to procure the conviction and imprisonment of a defendant” violates due process). This

³ When the Florida Supreme Court concludes that it possesses jurisdiction to review an appeal and exercises its discretion to do so, it may consider any and all claims of error fairly presented by the record, even those not explicitly discussed in a district court’s opinion. Thus, had the court opted to review Petitioner’s appeal, Petitioner could have raised the *Giglio* violation on plenary review.

principle imposes a duty on the government both to refrain from “soliciting false evidence” and to correct it “when it appears.” *Napue*, 360 U.S. at 269. The Court reiterated that fundamental precept in *Giglio v. United States*, writing that “the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” 405 U.S. 150, 153 (1972) (quoting *Mooney*, 294 U.S. at 112).

Applying those rules, this Court has consistently reversed criminal convictions obtained through the use of false testimony or statements. In *Napue*, for example, the state’s star witness testified that he had not received promises from the prosecutor in exchange for favorable testimony and admitted only that the “public defender”—not the prosecution—had promised to “do what he could” for the witness. 360 U.S. at 265. It was later discovered that the prosecutor had promised the witness that if he testified against the defendant, the prosecutor would recommend a reduction of a sentence the witness was currently serving. *Id.* at 266. The prosecutor had failed to correct the witness’s false testimony at trial.

This Court began its analysis of those facts by observing that the prosecution violates due process either when it intentionally elicits false testimony or “allows it to go uncorrected when it appears.” *Id.* at 269. “The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness.” *Ibid.* The Court ultimately reversed. “Had the jury been apprised of the true facts,” it reasoned,

“it might well have concluded that Hamer had fabricated testimony in order to curry favor of the very representative of the State who was prosecuting the case in which Hamer was testifying * * *.” *Id.* at 270.

And this Court has not limited that rule to the presentation of false testimony or evidence; it has also concluded that its precedents prohibit the presentation of knowingly false *argument* to the jury. *See Miller v. Pate*, 386 U.S. 1 (1967). The prosecutor in *Miller* told the jury in closing argument that an article of clothing introduced into evidence was stained with blood when in fact the prosecutor knew the stains were red paint. *Id.* at 4-6. In reversing the judgment of the court of appeals, this Court condemned the prosecutor’s “consistent and repeated misrepresentation,” *id.* at 6, and has since reiterated that knowing factual misstatements by a prosecutor “may profoundly impress a jury and may have a significant impact on the jury’s deliberations.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 646 (1974); *see also Sawyer v. Smith*, 497 U.S. 227, 235 (1990) (“We stated in *Donnelly* that improper remarks by a prosecutor could at some point ‘so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.’”).

Thus, as properly understood by the circuit courts, *Giglio* and *Napue* apply not merely where the government allows false testimony to go uncorrected, but also where the prosecutor herself made “explicit factual representations” or “implicit factual representations to the jury,” knowing that those representations were false. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995); *see also Davis v. Zant*,

36 F.3d 1538, 1548 (11th Cir. 1994) (“Little time and no discussion is necessary to conclude that it is improper for a prosecutor to use misstatements and falsehoods.”).

These bedrock principles are enshrined both in the Constitution and in the ethical rules governing the behavior of prosecutors. According to the American Bar Association, “[t]he prosecutor may argue all reasonable inferences from the evidence in the record, *unless the prosecutor knows an inference to be false.*” ABA Standards for Criminal Justice, Prosecution Function § 3-6.8(a) (4th ed.) (emphasis added); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The state’s] interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done.”). The reason for that rule is obvious: “the average jury” expects that prosecutors have a “duty to refrain from improper methods calculated to produce a wrongful conviction” and expect that this duty “will be faithfully observed.” *See Berger*, 295 U.S. at 88. Jurors are therefore likely to place considerable confidence in a prosecutor’s factual representations in closing argument.

B. The prosecutor knew this child had previously been sodomized yet presented testimony and argument vouching for the child’s credibility on the theory that no young child knows about sodomy

1. Petitioner’s prosecutor obtained his conviction by repeatedly violating this Court’s prohibitions in *Giglio* and *Napue*. To begin with, the prosecutor was aware of the facts of the prior case in which A. was sodomized. First, the prosecutor’s pretrial motion in limine cited the Fermin Nunez prosecution by case number and warned that any mention of that case by the defense would open the door to the State bringing up its facts. R72. The prosecutor elsewhere spoke knowledgeably about the

Nunez case, pointing out that Dr. Lambert had performed the examination of A. in the wake of Fermin Nunez's conduct. Trial Tr. 529. And the facts of that earlier case were public record: the Florida district court's published opinion reversing and remanding for a new trial in *Nunez* laid out the facts of the sexual abuse in detail, noting that Nunez had digital-anally sodomized A. and performed other sexual acts on him. *See Nunez v. State*, 109 So. 3d 890, 891, 892 n.2 (Fla. Dist. Ct. App. 2013). As a result of those acts, Nunez was charged and convicted of sexual battery on a child under the age of 12, the very same charge at issue here.

That the prosecutor knew A. had previously been sodomized is confirmed by the prosecutor's defense of her conduct at a sidebar during closing argument. Rather than dispute that A. had experienced sodomy, in response to Petitioner's objection that the prosecutor's closing argument impermissibly bolstered A.'s testimony by misleading the jury, the prosecutor attempted to justify her conduct by contending that the prior incident had involved *digital*-anal penetration, rather than the penile-anal penetration at issue here. In the prosecutor's mind, it was permissible to tell the jury that A. had never been sodomized—even though he had been—because it was true that A. had never been sodomized by a *penis*. Of course, the prosecutor had not confined herself to arguing that A. had never been sodomized by a *penis*; she instead broadly asserted in front of the jury that A. had never been sodomized *at all* and would have no notion of such conduct.

2. Indeed, ignoring her knowledge that A. had been sodomized and forced to perform sexual acts involving a penis—and thus that A. had enough familiarity with

the concept of sodomy to potentially fabricate the claims against Petitioner—the prosecutor presented both false testimony and false argument to the jury. The first such offense was the testimony of the State’s medical expert, Dr. Walter Lambert, who told the jury that “it’s not like a boy can make up a story like that.” Trial Tr. 543. Like the prosecutor, Dr. Lambert knew that A. had previously been sexually abused, since he was the doctor who examined A. during the investigation into Fermin Nunez. *Id.* at 529.

The prosecutor then amplified Dr. Lambert’s expert testimony in her closing argument, exhorting jurors to reject the defense’s theory that the abuse had never occurred by assuring them, on three separate occasions, that no eight-year-old could manufacture a tale involving sodomy:

- “How else do we know, well, what does an eight year old know of sodomy. No eight year old know[s], it doesn’t exist unless it happened.” Trial Tr. 677.
- “So, just by v[i]rtue of the fact that a kid is able to articulate this kind of offense tells you it’s got to be something to it.” *Id.* at 679.
- “What kid is going to come up with the concept of being anally raped, who is only eight years old by another grown man’s penis, no, it’s not going to happen.” *Id.* at 748.

Those statements were demonstrably false, both explicitly and in their implications. They were explicitly false because, as A.’s own personal history showed, *some* young children have had actual life experiences with anal sodomy. But more

importantly, they were false in their implication. Any reasonable jury would have inferred from the comments that *this* child had never been the victim of sodomy. After all, the prosecutor's argument would have no logical force if A. himself had previously been sodomized: were that the case, A. would have possessed the necessary life experience from which to fabricate the current allegations. Thus, from the mere fact that the prosecutor was permitted by the trial judge to advance her argument, jurors would have assumed that A. had not been previously sodomized. That implication was false.

C. The false statements irreparably tainted this trial

“[A] conviction obtained by the knowing use of false testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict.” *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985) (internal citation omitted). This standard “is equivalent to the *Chapman* harmless-error standard,” which requires the government “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Ibid.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The prosecutor's repeated misstatements and failure to correct Dr. Lambert's false testimony were prejudicial because they bolstered A.'s credibility in a case where the child's credibility was paramount. *See Napue*, 360 U.S. at 269 (reversing conviction where false evidence went “to the credibility of the witness”). In some child sex abuse cases, a prosecutor may permissibly make the commonsense argument that the child could not have fabricated the allegations because “most young children lack

the experience required to manufacture detailed and explicit descriptions of sexual abuse.” John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 117 (1989). “When a child describes an event which a similarly situated child could not reasonably be expected to fabricate,” experts say, “the statement gains in reliability.” *Ibid.* But that does not hold true where “the child has either experienced such acts or been exposed to them,” *ibid.*—precisely the situation here.

Because of the prosecutor’s conduct, the jury went to deliberate with a badly skewed view of the facts. And while Petitioner’s trial counsel was aware that the State’s claims were false, there was nothing the defense could do to meaningfully cure the error. First, the most explicit of the factual misrepresentations came during the prosecutor’s closing argument, at a time which the defense would be unable to present rebuttal testimony. Second, pursuant to a pretrial motion in limine, the parties had agreed not to discuss the facts of the Fermin Nunez prosecution, since informing jurors that A. had previously been sexually abused would inflame the passions of the jury.⁴ The State’s misrepresentations were therefore especially pernicious: they forced Petitioner to choose between the lesser of two evils, either live with the lie the prosecutor told the jury or seek to correct it in a manner that itself prejudiced Petitioner. Without the trial judge’s assistance, either in sustaining the objection or granting a mistrial, the trial would be tainted one way or the other.

⁴ It is unclear from the record whether the trial court ordered the parties not to discuss the facts of the Nunez case. It appears that the motion in limine seeking to preclude evidence of the Nunez conduct was designed to avoid tainting the jury under Florida’s version of rule 403. See R. 72, Trial Tr. 677-78.

As discussed above, a prosecutor has no excuse for knowingly misleading jurors. Such falsehoods, when deemed “material” by an appellate court, require a new trial. The crucial factual dispute at Petitioner’s trial was whether A. had accurately reported the manner in which he sustained his injuries. The child’s credibility was paramount. Yet, because Maria Perez had not testified, the jury had no way of telling whether Perez had suggestively questioned A. in a way that shaped his later claims of abuse.

It is well known that children are far more vulnerable to suggestive questioning than adults, and that interviewers may unwittingly implant in the mind of a child a false version of events. *See, e.g.*, Trial Tr. 346; R. 213 (testimony regarding risks of suggestive questioning). For example, in its guidance issued to child forensic interviewers, the United States Department of Justice warns that suggestive or leading questions can “significantly affect the integrity and fact-finding function of the interview” and should be avoided. “Child Forensic Interviewing: Best Practices,” U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, 7 (Sept. 2015), *available at* <https://www.ojjdp.gov/pubs/248749.pdf>. In other words, a questioner’s “preconceived ideas” may “bias the information gathered” absent precautions. *Id.* at 6. Perez, of course, was not a trained childcare professional and, given her own life experiences dealing with A.’s prior abuse, might have accidentally induced a false allegation from the child.

But this jury, believing A. to be incapable of manufacturing an accusation of sodomy in response to potentially coercive questioning, would have dismissed that

possibility. So it was unlikely to credit any defensive theory stemming from Perez's aggressive questioning of A. that had occurred in or out of Petitioner's presence. *See id.* at 420, 469, 572-73.

Moreover, Petitioner took the stand and denied the allegations at trial. *Id.* at 561-62. With no eyewitness besides the eight-year-old victim himself, the trustworthiness of A.'s statements was the key factual determination for the jury.

II. The State Appellate Court Paid No Heed to This Court's Precedents. And Due to State-Law Limitations on the Florida Supreme Court's Jurisdiction, the Appellate Court's Ruling Was Effectively Unreviewable

Florida state courts have demonstrated themselves either unwilling or unable to police the prosecutorial misconduct that occurred here. Despite the obvious falsity of the State's arguments to the jury and their clear potential for prejudicing the verdict, the trial judge overruled Petitioner's objections in closing argument and denied the motion for mistrial. On appeal, the Florida district court devoted just one line of its opinion to addressing the *Giglio* issue. It did not even acknowledge the falsity of the testimony or prosecutorial arguments, writing simply that Petitioner had raised a claim of an "*alleged* misrepresentation." Pet. App. 2a (emphasis added).

Because the district court declined to address the facts or circumstances of the *Giglio* violation, the Florida Supreme Court was powerless to review the case itself. In Florida, the district courts of appeal are designed to function as courts of last resort, and in most instances are "final and absolute." *Ansin v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958). As a result, the state constitution grants the Florida Supreme Court only limited jurisdiction to hear specifically enumerated classes of cases. For

instance, it may exercise discretionary jurisdiction to hear an appeal where the district court opinion interpreted a constitutional provision; conflicts with another district court on the same question of law; or affects a class of constitutional officers. *See* Art. V, § 3(b), Fla. Const. The court has strictly construed its own jurisdiction by insisting that it may exercise jurisdiction only where the asserted jurisdictional ground appears within the “four corners” of the district court opinion. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986); *see also Wells v. State*, 132 So. 3d 1110, 1111 (Fla. 2014) (“As in all petitions seeking this Court’s discretionary jurisdiction pursuant to article V, section 3(b)(3), we are confined to consider only those facts contained within the four corners of the district court’s majority opinion.”). It therefore will not review district court decisions where the facts of the case are not discussed in depth.

Given those limitations, Petitioner could seek Florida Supreme Court review only by asserting jurisdiction arising from a separate state-law evidentiary claim totally unrelated to the *Giglio* violation. But because the district court had included very few facts in its opinion regarding even *that* evidentiary claim, the Florida Supreme Court unsurprisingly denied Petitioner’s request to accept review. That signaled the end of the line for Petitioner’s direct appeal in the state courts.⁵

⁵ Should this Court decline to grant certiorari, Petitioner may eventually raise his claims in federal district court under 28 U.S.C. § 2254. On review of any adverse federal district court ruling, the Eleventh Circuit and this Court may be constrained by the “highly deferential” standard of review established by the Antiterrorism and Effective Death Penalty Act of 1996. *Harrington v. Richter*, 562 U.S. 86, 105 (2011); *see* 28 U.S.C. § 2254(d) (limiting grant of habeas relief to state prisoners to cases where the state court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or was “based on an unreasonable determination of the facts”).

In short, the two Florida tribunals empowered to rectify the prosecutor’s false statements simply declined to do so, while the Florida Supreme Court lacked the authority to correct the matter itself. Given the Florida courts’ refusal to acknowledge the serious nature of the constitutional violation here, or even to cite this Court’s precedents, this Court should grant certiorari and ultimately reverse Petitioner’s conviction for sexual battery on a child under the age of twelve.⁶ *See Napue*, 360 U.S. at 271 (discussing the “duty of this Court,” stemming from its “solemn responsibility for maintaining the Constitution inviolate,” to perform its “own independent examination of the record when federal constitutional deprivations are alleged”).

Alternatively, in light of the “obvious” nature of the Florida district court’s failure to apply this Court’s precedents, *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006), the Court may wish to consider summary reversal. As this Court recently wrote in the context of a defendant’s successful claim under *Brady v. Maryland*, 373 U.S. 83 (1963), the Court “has not shied away from” summarily reversing state court decisions that “egregiously misapplied settled law.” *Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016) (per curiam). That should be particularly true where a state court does not even attempt to justify its rejection of a federal constitutional claim, and affirms in such a way that renders its decision unreviewable by the state supreme court. The first of those concerns animated this Court’s decision in *Youngblood v. West Virginia*, where it summarily reversed and remanded because the state supreme court had

⁶ Because the kidnapping and aggravated child abuse convictions likewise turned on the child’s credibility, which hinged on the misrepresentations, those convictions must also fall.

affirmed a defendant's lengthy prison sentences "without examining the specific constitutional claims associated with the alleged suppression of favorable evidence." 547 U.S. 867, 869 (2006) (per curiam). Further review of Petitioner's life sentences is no less warranted.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari and reverse his convictions. Alternatively, this Court may wish to summarily reverse the decision of the Florida district court and remand with instructions to apply *Giglio* and *Napue*.

Respectfully submitted,

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APRIL 27, 2018