No. _____

IN THE

Supreme Court of the United States

MARK ALLEN GERALDS,

Petitioner,

v.

RICKY D. DIXON, Secretary,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the materiality inquiry for *Brady* and the prejudice analysis for *Strickland* require a cumulative analysis in determining whether confidence is undermined in the outcome of a trial?

2. Whether a *Giglio* violation is limited to claims based only on perjured testimony?

3. Whether testimony that either misleads the jury or gives it a false impression can constitute a *Giglio* violation?

LIST OF RELATED PROCEEDINGS

Direct Appeal

Geralds v. State, 601 So. 2d 1157 (Fla. 1992)
Supreme Court of Florida, SC60-75938
April 30, 1992; Remanded for resentencing

Direct Appeal (resentencing)

Geralds v. State, 674 So. 2d 96 (Fla. 1996)
Supreme Court of Florida, SC60-81738
February 22, 1996, Affirmed

State Collateral Proceedings

Geralds v. State, 111 So. 3d 778 (Fla. 2010)
(Initial Postconviction Motion)
Supreme Court of Florida, SC06-761
September 16, 2010, Affirmed

Geralds v. State, 237 So. 3d 923 (Fla. 2018)
(Successive Postconviction pursuant to *Hurst v. Florida*)
Supreme Court of Florida, SC17-1765
February 28, 2018, Affirmed

Federal Habeas Review

Geralds v. Inch, 2019 U.S. Dist. LEXIS 80164, (N.D. Fla., May 13, 2019)
United States District Court for the Northern District of Florida
No. 5:13-cv-00167-MW-EMT
May 13, 2019, Petition denied

Geralds v. Attorney General, 855 F. App'x 576 (11th Cir. 2021)
United States Court of Appeals for the Eleventh Circuit
19-13562
May 12, 2021, Affirmed

Certiorari Review

Geralds v. Florida, 519 U.S. 891 (1996)
Supreme Court of the United States, No. 96-5309
October 7, 1996, c*ert denied*

Geralds v. Florida, 139 S. Ct. 324 (2018)
Supreme Court of the United States, No. 18-5376
October 9, 2018, *cert denied*

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DECISIONS BELOW

The Eleventh Circuit's decision appears as *Geralds v. Attorney General,* 855 F. App'x 576 (11th Cir. 2021), and is Attachment A. The Eleventh Circuit's order denying panel and en banc rehearing is Attachment B. The district court's order denying relief is Attachment C. The Florida Supreme Court's opinions affirming the denial of postconviction relief, direct appeal I, and direct appeal II are Attachments D, E, and F.

JURISDICTION

On May 12, 2021, the Court of Appeals for the Eleventh Circuit entered its judgment affirming the district court's denial of habeas relief. On September 15, 2021, rehearing was denied. This Court granted Petitioner an extension of time to file a petition for a writ of certiorari until January 13, 2022. *See* Sup. Ct. R. 30. This petition is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

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

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

STATEMENT OF THE CASE[1]

I. Procedural history

On March 15, 1989, Mark Allen Geralds was indicted for the first-degree murder of Tressa Pettibone, armed robbery, and grand theft (R. 2232). On February 7, 1990, the jury found Geralds guilty as charged, and he was sentenced to death (R. 2187). On direct appeal, the Florida Supreme Court affirmed the convictions but vacated the death sentence and remanded for a new sentencing proceeding due to the prosecutor's improper references to Geralds' prior non-violent convictions. *Geralds v. State*, 601 So. 2d 1157 (Fla. 1992).

At the conclusion of the resentencing proceeding, the jury unanimously recommended the death penalty (R2. 858). On April 13, 1993, the trial court followed the jury's recommendation and sentenced Geralds to death (R2. 366-76). On direct appeal, the Florida Supreme Court affirmed. *Geralds v. State*, 674 So. 2d 96 (Fla. 1996). Certiorari was denied on October 7, 1996. *Geralds v. Florida*, 519 U.S. 891 (1996).

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[1] Citations in this petition are as follows: References to the record on direct appeal are designated as "R. __." References to the record on direct appeal following resentencing are designated as "R2. __." References to the record on appeal from the denial of postconviction relief are designated as "PC-R. __." References to exhibits entered at the postconviction evidentiary hearing are designated as "Ex. __." All other references are self-explanatory or otherwise explained.

On September 22, 1997, Geralds filed a postconviction motion in the state circuit court, which was later amended in January 2001 (PC-R. 993-1203). Subsequent to an evidentiary hearing, the trial court denied relief on January 18, 2006 (PC-R. 1737-54). Geralds' motion for rehearing was also denied (PC-R. 1809).

Geralds appealed to the Florida Supreme Court, which affirmed the denial of relief on September 16, 2010. *Geralds v. State*, 111 So. 3d 778 (Fla. 2010). Geralds filed a motion for rehearing, which was denied in light of a revised opinion on February 2, 2012. Geralds' motion for rehearing of the revised opinion was denied on April 8, 2013. Mandate issued on April 24, 2013.

On April 29, 2013, Geralds filed a federal habeas petition in the Northern District of Florida. *Geralds v. Inch*, N.D. Fla. No. 5:13-cv-167, ECF No. 1. On May 13, 2019, the district court issued an order denying Geralds' petition. *Id.*, ECF No. 39. After a COA was ultimately granted as to several issues, and subsequent to briefing and oral argument, the Eleventh Circuit issued an opinion on May 12, 2021, affirming the denial of Geralds' federal habeas petition. *Geralds v. Attorney General,* 855 F. App'x 576 (11th Cir. 2021). Geralds filed a petition for en banc and panel rehearing, which was denied on September 15, 2021.

On November 15, 2021, this Court granted Geralds a thirty-day extension of time to file the instant petition for a writ of certiorari.

II. Facts relevant to the questions presented

A. The trial

A week before the crimes, the victim, Tressa Pettibone, and her children ran into Geralds at the mall (R. 1466, 1479).[2] The victim spoke to Geralds and told him that her husband was out of town (R. 1480). Geralds spoke to the victim's son, Bart, in the arcade (R. 1468). According to Bart, Geralds asked him questions about when his father planned to return and what time Bart went to school (R. 1469).

The morning of the crimes, February 1, 1989, the victim drove her daughter, Blythe, to school just after 7:00 a.m. (R. 1489). Bart left for school at approximately 8:00 a.m. (R. 1471). The victim's friend, Kelly Stracener, spoke to the victim at approximately 9:00 a.m., for about ten minutes (R. 1417). Stracener attempted to call the victim's home at 10:30 a.m., but there was no answer (R. 1417). Stracener drove to the victim's home and arrived shortly before 11:00 a.m. (R. 1417). The victim's car was not in the driveway (R. 1417). A few minutes later, Stracener came upon the victim's car parked at the elementary school (R. 1419).

Later that day, Stracener received a phone call from Blythe, who explained that her mother had not picked her up from school (R. 1420). Stracener picked up Blythe (R. 1422). When Stracener and Blythe arrived at the Pettibone home, Bart appeared at the door crying (R. 1424). Stracener entered the house and found the victim on the kitchen floor surrounded by a great deal of blood (R. 1426).

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[2] Geralds was a carpenter who had worked on the remodeling of the Pettibone residence about a year before the homicide (R. 1524-25).

It was not long before crime scene personnel from the Florida Department of Law Enforcement (FDLE) arrived to photograph and collect evidence. Much blood was spattered throughout the kitchen, though pictures and furniture were out of place in the hallway and dining room (R. 1543-46). FDLE Analyst Jan Johnson testified that the blood spatter indicated there was a struggle between the victim and her assailant (R. 1636). Johnson testified as to her opinion that a struggle began in the kitchen, near a desk, and continued to the point where the victim was kneeling on the floor somewhere between the dining room and kitchen, until finally the victim was laying on the kitchen floor (R. 1642). The victim's body was dragged across the floor (R. 1640). A bloody knife was found in the kitchen sink – it belonged to the Pettibones (R. 1546). A path of bloody footprints was detected through the house (R. 1562). FDLE Analyst Laura Rousseau testified that the shoe tracks appeared to be consistent with only "one shoe tread design" (R. 1619).

The autopsy revealed ten areas of blunt trauma to the victim's body, and three stab wounds to the neck (R. 1836). The cause of death was determined to be exsanguination (R. 1836).

As to Geralds' whereabouts on the day of the crime, the prosecution presented evidence that he went by his grandfather's house at approximately 11:30 a.m. and told his grandfather he had been working on a boat (R. 1673). Geralds had racing or driving gloves – where the backs and fingers were not covered (R. 1675). Geralds took a bath at his grandfather's house and left about an hour later (R. 1675).

Vicky Ward recalled that sometime at the end of January or early February, Geralds visited her at work and gave her red sunglasses (R. 1685). Geralds was replacing a pair of bluish Bucci sunglasses that Ward had borrowed from him, but since she preferred red, he exchanged them for her (R. 1686).

According to Billy Danford, who owned a pawn shop, Geralds pawned a 24-inch herringbone necklace on February 1, 1989, at 2:00 p.m. for $30.00 (R. 1753, 1758). Danford testified that Geralds asked him whether the chain was real (R. 1757).

In the days following the crime, the victim's family attempted to identify items missing from the house (R. 1492-93). A pair of red Bucci sunglasses and a herringbone necklace were identified as the victim's (R. 1432-33, 1495-96, 1515). Blythe testified that she was "positive" that the sunglasses introduced into evidence belonged to her mother (R. 1515), and that the herringbone necklace introduced was "identical" to the one her mother wore (R. 1495). Kevin Pettibone, the victim's husband, also identified the necklace (R. 1525).

On March 1, 1989, Geralds was arrested. Geralds consented to the search of his motel room and automobile. During the search of his motel room, the police retrieved a pair of Nike sneakers (R. 1711). Analyst Rousseau testified that she conducted a presumptive test for blood on Geralds' shoes and a small area on his left shoe tested positive (R. 1721). Also, FDLE Analyst Kenneth Hoag testified that he compared some of the shoe impressions from the crime scene to Geralds' shoes and those shoes "could have made the tracks" at the scene (R. 1728). However, Analyst

Hoag found no "individual characteristics within the patterns" at the crime scene (R. 1728).

During the search of Geralds' automobile, the police retrieved plastic ties. Clifford Hutchinson testified that the ties found in Geralds' automobile and one tie found at the scene were Thomas Industries ties (R. 1701-02).[3]

Later that day, after obtaining a pawn receipt from Geralds' wallet, a herringbone chain was retrieved from a pawn shop (R. 1745). There appeared to be blood on the necklace (R. 1750). FDLE Analyst Shirley Ziegler testified that the substance on the chain was blood and it was consistent with the victim's blood type and 5 enzymes (R. 1784).

B. The resentencing

In the prosecution's case-in-chief, many of the same witnesses were called who had testified at the original trial. The prosecution also presented the testimony of Investigator Bob Jimmerson, who testified on behalf of several other witnesses including Analyst Rousseau, Clifford Hutchinson, Douglas Freeman, and Vicky Ward. Jimmerson told the jury that his testimony was based on previous testimony, reports, and what he had been told.

Jimmerson unequivocally testified that the ties used to bind the victim's hands and the ties found in Geralds' automobile were Thomas Industry ties and that only 30,000-40,000 of those ties were produced a year (R2. 380, 403-04); the shoe treads from Geralds' Nike shoes were the "particular tracks" he saw in the Pettibone home

[3] Hutchinson was the project manager for Thomas Industries.

(R2. 402); Geralds' grandfather saw him wearing gloves when he arrived at his home on February 1, 1989 (R2. 409); Geralds was not working on a fiberglass boat on February 1, 1989 (R2. 409); Geralds had taken a pair of red Bucci sunglasses to Vicky Ward on February 1, 1989 (R2. 410); and presumptive testing on Geralds' Nike shoes indicated blood on the left shoe (R2. 413-14). Jimmerson was also questioned about William Pelton, another suspect, and he told the jury he had confirmed Pelton's alibi for February 1, 1989 (R2. 421, 443).

In addition to other mitigation witnesses, Geralds himself testified at the resentencing. Geralds told the jury that his ex-wife and daughter were threatened by Pelton (R2. 710). Specifically, Pelton told his ex-wife that "if Mark says anything to the police . . . something is going to happen to you and Jordan" (R2. 710). According to Geralds, another individual, Archie McGowan, delivered a similar message to Geralds' ex-wife (R2. 711). Finally, Geralds denied killing the victim (R2. 717).

Trial counsel also presented the testimony of Pelton and McGowan. Pelton had known Geralds for several years, but he denied having anything to do with the crime (R2. 656). Pelton also denied threatening Geralds' family (R2. 643). Likewise, McGowan denied having made threats to Geralds' ex-wife (R2. 667).

C. The postconviction proceedings

During Geralds' postconviction evidentiary hearing, exculpatory evidence was presented which the jury did not hear either as a result of the State's failure to disclose or the ineffective assistance of trial counsel.[4]

[4] Geralds' trial counsel, Robert Adams, was deceased by the time of the hearing.

The jury did not hear that the description by the victim's family of the jewelry that was missing following the crime did not include a herringbone necklace similar to the one obtained from Billy Danford at the pawn shop (*see* Def. Ex. 1).[5] Also, the Bucci sunglasses that were obtained from Vicky Ward were not included on the list of missing items (*Id.*). After Geralds was arrested on March 1, 1989, and a pair of sunglasses were recovered from Ward, law enforcement "updated" the list of missing items to include a pair of red Bucci sunglasses (*Id.*).[6]

Further, in regard to the herringbone necklace, the jury did not hear of an interview that the police had with Tony Swoboda, a jeweler, which occurred on January 26, 1990, three days before Geralds' trial commenced. According to notes from the interview, Swoboda confirmed to law enforcement that he had previously sold Geralds a herringbone necklace "under the table" (Def. Ex. 7).[7] Swoboda testified at the evidentiary hearing that he knew Geralds and that he had fixed a couple of pieces of jewelry for him over the years and sold him a gold herringbone necklace (PC-R. 2546). Swoboda sold Geralds the chain several months before the crimes at issue (PC-R. 2547).

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[5] Blythe Pettibone testified in her deposition that law enforcement wanted her to travel to the pawn shop with them because they had recovered the herringbone necklace that the family had identified as missing (*See* Def. Ex. 3). However, the herringbone necklace that was recovered did not match the description of the missing herringbone necklace.

[6] The herringbone necklace that was obtained later that day was still not identified as being missing (*Id.*).

[7] The trial prosecutors conceded that Geralds' purchase of a chain "under the table" could explain why he would ask Danford if the chain was real when it was pawned (PC-R. 2245, 2347).

Additionally, unbeknownst to the jury was the fact that a handwritten note by Investigator Jimmerson indicated that he recovered a pawn ticket from Geralds on March 7, 1989, six days after the herringbone necklace was recovered from the pawn shop (Def. Ex. 11). The note contradicts the evidence that Jimmerson obtained the pawn ticket on March 1, 1989, which led the police to the pawn shop where the victim's family identified the necklace (*see* R. 1747). Further, Geralds maintained that he did not have a pawn ticket or a wallet in his possession when he was arrested on March 1, 1989 (R. 728). And, the records obtained from the jail do not reflect that Geralds even had a wallet when he was arrested (Def. Ex. 46).

The jury did not hear that, according to notes from witness interviews, no one could provide an alibi for William Pelton on the day of the crimes (*see* Def. Ex. 13).[8] Based on the notes, David Meadows testified at the evidentiary hearing. Meadows was Pelton's supervisor at the time of the crimes (PC-R. 2325). Meadows stated that his employees' time records were not always accurate, but "would [note] the hours they were credited with working that day but any time during the course of those hours, depending on who that person was and what their needs might have been, they could come and go from the club." (PC-R. 2328). As to Pelton, Meadows recalled that he had freedom to "come and go" (PC-R. 2328). Meadows also confirmed that while renovating Club La Vela, plastic ties were used to bind cables (PC-R. 2330).

[8] This information was contrary to Investigator Jimmerson's testimony and report (*see* R2. 422).

Also not heard by the jury was critical information contained in handwritten notes and reports by State agents (PC-R. 2292, 2303, 2305; *see* Def. Exs. 23, 28, 31, 32, 34). Some of the notes indicate that a bloody handkerchief was found at the crime scene (PC-R. 2292). Serological analysis determined that the blood on the handkerchief was ABO type "O", which was neither the victim's blood type nor Geralds' (PC-R. 2293; *see* Def. Ex. 28). A suspect in the case, Kenneth Dewey Mayo, who was a former employee of the Pettibone Construction Company and a relative of the victim's step-mother-in-law, was blood type "O" (Def. Exs. 20, 44).[9]

The jury did not hear that Analyst Ziegler's report contained information concerning the serological testing that was conducted on Geralds' Nike sneakers. Analyst Ziegler stated that no human blood "could be demonstrated" (Def. Ex. 20). And notes and a report, from Analyst Larry Smith concerning the hair analysis, evidences that hair found in the victim's left hand, and on her body, did not match Geralds (*see* Def. Ex. 34, 36). As to other evidence obtained from the crime scene, the jury did not see a photograph that appeared to show a different tread pattern at the crime scene than the tread pattern of Geralds' sneakers (PC-R. 2492; *see* Def. Ex. 25).

Additionally, a few days before Geralds' trial began, trial counsel deposed Billy Danford, the owner of the pawn shop. During Danford's deposition, he denied having a criminal record (*see* Def. Ex. 9). However, not heard by the jury was the fact that Danford had been cited shortly before Geralds' trial for failing to properly document

[9] Mayo was seen with scratches on his face shortly after the crime occurred (Def. Ex. 44).

transactions in his shop (*see* Def. Ex. 8). Danford's charges were resolved after he provided statements implicating Geralds but before Geralds' trial (*Id.*).[10]

The jury did not hear that several prints, which did not match Geralds, the victim, or her family, were located near the victim's body and on and around her jewelry box (Def. Exs. 26, 27, 31). Likewise, four prints were obtained from the victim's stolen automobile that were not matched to Geralds, the victim, or her family (*Id.*).

Additionally, the jury did not hear that the tie straps used to bind the victim's hands were readily available in the construction community (Def. Exs. 12, 15, 42); and, because Geralds was an electrician, it was not unusual for him to possess tie straps (Def. Ex. 15).

At the postconviction evidentiary hearing, Geralds also presented witness testimony in support of his claims regarding trial counsel's failure to challenge and/or investigate the crime scene evidence. Stuart James, an expert in crime scene reconstruction, bloodstain pattern analysis, and examination of physical evidence, testified. One area of inquiry concerned the value of presumptive blood testing (PC-R. 2487). According to James, any testimony that a presumptive test demonstrating a positive result meant that blood was present, is false (PC-R. 2488). James also testified that presumptive testing is routinely inadmissible in court proceedings

[10] Prosecutor Grammar acknowledged that had defense counsel known of the criminal charges and the favorable resolution of those charges for Danford, he could have attacked Danford's credibility and argued that Danford had testified against Geralds in order to curry favor with the prosecution (PC-R. 2253).

unless a confirmatory test has been performed to verify the results (PC-R. 2491). Trial counsel did not challenge the testimony about presumptive testing at Geralds' trial.

James was also asked to compare Defense Exhibit 25, which was admitted during the evidentiary hearing, with State Exhibits J-48, J-49, and J-50, which were introduced during Geralds' trial. All of the photos illustrate bloody shoe print impressions from the crime scene (PC-R. 2491-92). James testified that the shoe print illustrated in Defense Exhibit 25 appeared to be a different design than the shoe print seen in the photos introduced at Geralds' trial (PC-R. 2492).

James further testified that the fingerprints and palm prints found near the body were scientifically relevant to the prosecution (PC-R. 2495). Similarly, the fact that the victim had hair in her hands that did not match Geralds was a significant finding due to the condition of the victim and the crime scene (PC-R. 2496).

As an experienced criminalist, James believed that while it was clear that the perpetrator(s) had blood on his shoes, the quantity of blood at the crime scene increased the possibility that the perpetrator would have had blood on his clothing (PC-R. 2494). Yet trial counsel failed to present evidence showing that Geralds did not have blood on his clothes or appear to have been in a struggle when he was seen on the day of the crimes.

Indeed, Sheila Freeman, Geralds' aunt, testified at the evidentiary hearing that she was present at her father's house on the morning of February 1, 1989 (PC-R. 2223). Freeman observed Geralds and did not notice any blood or anything indicating that he had been in a struggle (PC-R. 2223-24). Trial counsel never

interviewed Freeman, but on the first day of Geralds' trial, he told her he may ask her to testify, so he sent her home (PC-R. 2224). Trial counsel never called her (PC-R. 2224).

III. The Courts' Rulings

A. Cumulative review

Geralds asserted during his postconviction proceedings that the State failed to disclose reports as well as handwritten notes of FDLE agents. The Florida Supreme Court in its opinion disagreed, finding that Geralds failed to establish that the evidence was either not disclosed or not available to him. *Geralds v. State*, 111 So. 3d 778, 787-91 (Fla. 2010). The Florida Supreme Court also stated as to several items that Geralds failed to demonstrate either that the information was suppressed by the State or that the information was material. *Geralds*, 111 So. 3d at 791.

In its order denying Geralds' federal habeas petition, the district court found that the Florida Supreme Court's determination was supported by competent, substantial evidence in the record, and that Geralds failed to rebut this finding by clear and convincing evidence. *Geralds v. Inch*, N.D. Fla. No. 5:13-cv-167, ECF No. 39 at 28, 50. Regarding *Brady*'s materiality prong, the district court found that "[w]hile some of the evidence may cast doubt as to Geralds' guilt, most of this evidence does not contradict the strong circumstantial evidence of guilt in this case." *Id.*, ECF No. 39 at 51. According to the district court, "Given the deference owed to the state court's finding that the evidence against Geralds supports the verdict of guilt, Geralds cannot prevail on this claim." *Id.*

Geralds argued before the Eleventh Circuit that as to *Brady*'s[11] materiality analysis, the district court seemingly relied on the Florida Supreme Court's determination on direct appeal that "[a]fter a thorough review of the record, we are satisfied that the evidence in this case was sufficient to sustain the jury verdict." *Geralds v. State*, 601 So. 2d 1157, 1159 (Fla. 1992). However, as Geralds' argued, such a determination was entitled to no deference, as it was made without consideration to the undisclosed evidence presented by Geralds at the postconviction evidentiary hearing. Geralds further asserted that the district court, like the state court, failed to conduct a proper materiality review of his *Brady* and *Strickland*[12] issues, arguing that cumulative review was required.

The Eleventh Circuit in its opinion stated that "[t]o the extent that the district court relied on the state court's determination as to the sufficiency of the evidence from *Geralds I*, we agree with *Geralds* that *Brady*'s materiality prong requires analyzing the undisclosed evidence, rather than just the evidence presented at trial." *Geralds v. Attorney General,* 855 F. App'x 576, 587, n.10 (11th Cir. 2021). The Eleventh Circuit, however, disagreed with Geralds' contention that the prejudice from the *Brady* and *Strickland* claims should have been analyzed collectively. *Id.* at 588, n.11. The Eleventh Circuit stated that Geralds provided no Supreme Court precedent in support of this proposition; and therefore, under AEDPA, the rule was not clearly established and the state court's decision was not contrary to law. *Id.*

[11] *Brady v. Maryland*, 373 U.S. 83 (1963).
[12] *Strickland v. Washington*, 466 U.S. 668 (1984).

B. Inaccurate or misleading testimony

Geralds also raised the issue that at his resentencing, the State employed deliberate deception in making its case against him. For instance, Geralds asserted that the State violated *Giglio*[13] by permitting Investigator Jimmerson to testify falsely that alternative suspect William Pelton's alibi had been confirmed when police investigation showed Pelton's whereabouts that day were unaccounted for, and by misleading the jury into believing there was blood on Geralds' sneaker based on a presumptive field test when later testing resulted in a negative finding for blood.

In denying Geralds' claim, the Florida Supreme Court and the federal district court each relied on the fact that Geralds had not proven that Jimmerson's testimony was categorically false. The district court in its order cited to the postconviction court's determination that Jimmerson's testimony was "not so inaccurate and untrue to constitute a *Giglio* violation." *Geralds v. Inch*, N.D. Fla. No. 5:13-cv-167, ECF No. 39 at 56, quoting order denying motion for postconviction relief.

Geralds argued before the Eleventh Circuit that the district court's and the Florida Supreme Court's analyses were based on the notion that only clearly false evidence or testimony can constitute a *Giglio* violation; and therefore, lesser degrees of mistruths or even misleading statements do not necessarily constitute improper conduct. Geralds contended that clearly established federal law held otherwise, citing to *United States v. Bagley*, 473 U.S. 667 (1985), and *Alcorta v. Texas,* 355 U.S. 28 (1957).

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[13] *Giglio v. United States*, 405 U.S. 150 (1972).

The Eleventh Circuit in its opinion disagreed with Geralds' argument, stating that "[t]o the extent Geralds argues that *Bagley* and *Alcorta* held that misleading but literally correct material testimony necessarily violates *Giglio*, we disagree." *Geralds*, 855 F. App'x at 589. The court attempted to distinguish *Alcorta,* and it found that the favorable language in *Bagley* cited by Geralds was part of the plurality, not the majority, opinion. *Id.* Thus, the Eleventh Circuit held that the Florida Supreme Court's decision was not contrary to Supreme Court precedent on a pure question of law. *Id.* at 590.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve the issue of whether the Eleventh Circuit's analyses of Geralds' claims are in direct conflict with the precedent of this Court.

A. Cumulative review

This Court should grant certiorari to clarify, contrary to the Eleventh Circuit's determination, that *Brady* materiality and *Strickland* prejudice claims require a cumulative analysis.

It is "clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973) (combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial.")). It is not necessary for each error considered individually to amount to a due process violation. A defendant's due

process rights are violated where the errors "rendered the criminal defense far less persuasive, and thereby had a substantial and injurious effect or influence on the jury's verdict." *Parle*, 505 F.3d at 928 (internal citations and quotations omitted) (citing *Chambers*, 410 U.S. at 294; *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Where multiple errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process," habeas relief is warranted. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See also Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) (The court analyzed guilt phase errors cumulatively, stating, "We recognize that errors that individually do not warrant habeas relief may do so when combined."); *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000) ("Trial errors which in isolation are harmless might, when aggregated, alter the course of a trial so as to violate a petitioner's right to due process of law."); *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003) (noting the Tenth Circuit's practice of aggregating all errors in cumulative analysis).

In *Strickland*, this Court acknowledged that a "Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." 466 U.S. at 696. When assessing a *Strickland* claim, a court must determine whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. *Strickland* set forth a two-prong test that requires a showing of both deficient performance and prejudice. *Id.* "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695.

In *Bagley*, this Court defined *Brady* materiality in terms of *Strickland* prejudice. *United States v. Bagley*, 473 U.S. 667 (1985). This Court noted that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Bagley*, 473 U.S. at 715, n.12 (internal quotations omitted); *see also United States v. Agurs*, 427 U.S. 97, 104 (1976). The *Bagley* Court held:

> the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed 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.

473 U.S. at 682.

This Court identified a correlation between the rules governing the conduct of the prosecution and defense counsel when it adopted a *Brady* materiality standard equivalent to *Strickland's* prejudice standard. It recognized that a *Brady* violation in and of itself could render trial counsel unable to adequately prepare and present a case. Thus, trial counsel's performance is fundamental to a *Brady* materiality review.

In discussing *Brady's* materiality analysis, this Court in *Kyles* explained that "suppressed evidence [must be] considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). The "net effect of the evidence withheld by the State [ ] [must] raise[ ] a reasonable probability that its disclosure would have produced a different result. . .." *Id.* at 421-22. A "reasonable probability" of a different result exists when the government's evidentiary suppressions, viewed cumulatively,

undermine confidence in the guilty verdict. *Id.* at 436-37; *see also Banks v. Dretke*, 540 U.S. 668, 698-99 (2004) (holding evidence is "material" under *Brady* where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different); *Ruiz v. United States*, 339 F.3d 39, 43 (1st Cir. 2003) ("*Brady* claims are subject to the same prejudice requirement as ineffective-assistance claims"); *Marshall v. Hendricks*, 307 F.3d 36, 85 n.37 (3d Cir. 2002) ("[T]he *Strickland* prejudice standard is the same as the *Brady* materiality standard").

Given this Court's history in combining the effect of individual errors in considering due process violations, the identical standards of *Brady* and *Strickland*, the cumulative review requirements of both, and the often-intertwined nature of the two claims, it is clear that the materiality inquiry for *Brady* claims and the prejudice analysis for *Strickland* claims must necessarily be combined. In Geralds' case, significant exculpatory evidence was not heard by the jury. This included blood, hair, finger and palm prints, and a shoeprint at the crime scene which did not match Geralds nor the victim. Whether due to the State's failure to disclose or trial counsel's failure to present, prejudice ensued, as the exculpatory evidence "put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Contrary to the Eleventh Circuit's determination, to conduct a piecemeal analysis of the two deficiencies would run contrary to the clearly established mandates of both *Brady* and *Strickland.*

B. Inaccurate or misleading testimony

This Court should also grant certiorari to clarify, contrary to the determination

of the Eleventh Circuit as well as several other circuit courts, that inaccurate or misleading testimony can constitute a *Giglio* violation.

In *Alcorta v. Texas,* 355 U.S. 28, 31 (1957), this Court found a due process violation, stating that the witness' "testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship."[14] Numerous courts have subsequently reiterated that misleading testimony can in and of itself violate *Giglio*. In *United States v. Harris*, 498 F.2d 1164, 1169 (3d Cir. 1974), for instance, the court made clear that *Giglio* violations were not limited to instances of perjury: "Regardless of the lack of intent to lie on the part of the witness, *Giglio* and *Napue*[15] require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading." *See also United States v. Bynum*, 567 F.2d 1167, 1169 (1st Cir. 1978) ("In such circumstances, [the co-conspirator's] answers would have the effect of misleading [the jury] into believing that the government had provided no promise to induce [him] to testify."); *Boone v. Paderick*, 541 F.2d 447, 450 (4th Cir. 1976) ("Whether *Giglio* applies depends upon whether the jury may have been falsely led to believe that [the witness] was motivated solely by conscience and altruism and that there was no deal when in truth he responded to [law enforcement's] promises."); *United States v. Barham,* 595 F.2d 231, 240, 241, 243 & n.17 (5th Cir. 1979) (finding due process violation where witness' testimony, while perhaps "truthful in a narrow,

[14] This Court relied on the general principles set forth in *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Pyle v. Kansas*, 317 U.S. 213 (1942). *Alcorta*, 355 U.S. at 31.
[15] *Napue v. Illinois*, 360 U.S. 264 (1959).

literal sense" and not "false or deceitful," was "misleading," "not completely candid," and created a "false impression."); *United States v. Ramirez,* 608 F.2d 1261, 1266 n.9 (9th Cir. 1979) (prosecutor has duty to apprise court where witness gives "misleading testimony" regarding government promises).

In post-AEDPA cases, various courts have continued to find that misleading testimony amounts to a *Giglio* violation. *See e.g., Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) ("[T]estimony was probably true but surely misleading … the jury was left with 'the mistaken impression that [the witness] had no cooperation agreement with the State . . .."'); *Tassin v. Cain*, 482 F. Supp. 2d 764, 775 (E.D. La. 2007), aff'd, 517 F.3d 770 (5th Cir. 2008) ("The State court, using a standard contrary to that established by the Supreme Court in *Giglio* and *Napue*, made a limited inquiry as to whether [the witness] received a firm promise, the existence of which was directly denied in questioning. The proper inquiry was whether Petitioner's conviction was obtained through material misleading evidence known to be misleading by representatives of the State.");[16] *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967) ("Evidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true.").

[16] In affirming the district court's order, the Fifth Circuit stated, "The State not only failed to correct [the witness's] misleading testimony with respect to that deal but capitalized on that testimony, arguing to the jury that [she] had no reason to lie. This is a Fourteenth Amendment violation under the clear precedent of *Giglio*, *Napue*, and *Brady*, as the district court held." *Tassin v. Cain*, 517 F.3d 770, 781 (5th Cir. 2008) (fn omitted).

However, other courts, similar to the Eleventh Circuit, have seemingly taken the more restrictive view that to establish a *Giglio* violation, a defendant must prove that the State knowingly used testimony that rises to the level of perjury. *See, e.g., Abdus-Samad v. Bell*, 420 F.3d 614, 625-26 (6th Cir. 2005) ("To prevail on a false-testimony claim, [the defendant] must show (1) that the prosecution presented false testimony (2) that the prosecution knew was false, and (3) that was material. The statement must be 'indisputably false' rather than 'merely misleading.'"); *United States v. Payne,* 102 F.3d 289, 292 (7th Cir. 1996) (perjury is "the willful assertion under oath of a false, material fact"); *United States v. Albanese,* 195 F.3d 389, 393 (8th Cir. 1999) (finding the witness had not "committed perjury" because he "would lack the requisite *mens rea* for perjury"); *United States v. Wolny,* 133 F.3d 758, 762 (10th Cir. 1998) (defendant must show testimony was false).

This Court's precedent dictates a less narrow approach. The crux of the constitutional inquiry is not the culpability of the witness; rather, it is the misconduct of the state actor in allowing the false testimony to pervert the "truth-seeking function of the trial process." *Agurs,* 427 U.S. at 104. From that standpoint, it makes little difference whether Investigator Jimmerson intentionally lied or whether he "testified accurately to his observations." *Geralds*, 855 Fed. App'x at 590. The result is the same. It permits the State to secure criminal convictions and death sentences though use of testimony that, even though calculated to mislead, was not literally false. *See Bronston v. U.S.,* 409 U.S. 352, 359-61 (1973). As a result, the type of

injustice that so concerned this Court in *Alcorta, Napue,* and *Giglio,* would go largely uncorrected if the Eleventh Circuit's analysis was proper.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit Court of Appeals in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to William David Chappell, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, FL 32399, Assistant Attorney General, Office of the Attorney General, PL-01, the Capitol, Tallahassee, FL 32399-1050, on this 12th day of January, 2022.

/s/ Linda McDermott

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