

CASE NO. 21-6909

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**

RESPONDENT'S BRIEF IN OPPOSITION

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Capital Case

QUESTIONS PRESENTED

1. Whether a state court is required to consider prejudice under Strickland v. Washington, 466 U.S. 668 (1984), as a necessary part of its materiality assessment under Brady v. Maryland, 373 U.S. 83 (1963), even where no Strickland prejudice has been found.

2. Whether a Giglio v. United States, 405 U.S. 150 (1972), violation can occur as a result of defense counsel's strategic decision not to call certain witnesses.

One afternoon in early 1989, eight-year-old Bart came home from school to find his mother Tressa bound, gagged, and lying in a pool of blood. The medical examiner said she died shortly after 9:30 that morning. Around two o'clock that same afternoon, Mark Gerald's pawned a blood-stained triple herringbone gold necklace identified as missing from Tressa's jewelry box. Blood analysis of the stain matched it to the victim. That same afternoon Gerald's gave Vicky Ward a pair of red Bucci sunglasses missing from Tressa's bedroom. Zip ties identical to those used to bind Tressa's hands were found in the trunk of Gerald's car and bloody footprints found throughout the house were consistent with shoes recovered from Gerald's motel room. Luminol and phenolphthalein tests indicated the presence of blood on one of the shoes.

Gerald's challenges the Eleventh Circuit Court's refusal to consider an alleged procedural error committed by the state in resolving his postconviction Brady

claims. Despite the absence of clearly established federal law requiring it, he seeks review of the court's failure to incorporate prejudice from various Strickland claims in the process of also assessing materiality under Brady, while ignoring the fact that Florida found no Strickland prejudice in the first place. He also seeks to persuade this Court to grant review by recasting trial counsel's strategic decision not to call certain witnesses as sinister and deliberate efforts by the prosecution to mislead the jury in violation of Giglio. In any event, as all of his claims are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), no relief is warranted because the state court applied the correct law in an objectively reasonable manner. Accordingly, Gerald's claims raise the aforementioned questions.

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The unpublished opinion of the Eleventh Circuit Court of Appeals' decision is cited as Geralds v. Att'y Gen., Fla., 855 Fed. Appx. 576 (11th Cir. 2021).

JURISDICTION

The Eleventh Circuit Court of Appeals affirmed the district court's denial of habeas relief. The instant petition was timely filed with this Court on January 12, 2022. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1254(1). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Petitioner Geraldts was found guilty by a Florida jury of first-degree murder and sentenced to death. He seeks review of the Eleventh Circuit Court's opinion affirming the denial of habeas corpus relief in a case governed by the strict limitations of the AEDPA. The lower court denied relief because it found the Florida Supreme Court's factual determinations reasonable, entitled to deference, and lacking any federal constitutional error.

Brady Claims

The Florida Supreme Court affirmed the trial court's resolution of Geraldts' claim that reports and other documents were allegedly suppressed by the State in violation of Brady. Florida's high court found that the documents in question were provided or available to the defense; to the extent that anything was suppressed, Geraldts failed to establish materiality. Regarding Geraldts' Strickland claims, the Florida Supreme Court found neither deficiency in counsel's performance nor prejudice. Geraldts v. State, 111 So. 3d 778 (Fla. 2010).

On federal habeas review, Petitioner asserted that Florida's analysis was flawed because the court failed to incorporate prejudice from Strickland claims as part of the requisite cumulative analysis under Brady. In its unpublished opinion, the Eleventh Circuit accepted as reasonable the Florida Supreme Court's conclusion that none of the evidence in question was suppressed; with regard to materiality, the court agreed that cumulative analysis is proper in a Brady claim, but found no clearly established federal law requiring simultaneous assessment of Strickland

prejudice. Even if there were such a requirement, the Eleventh Circuit noted, Florida's high court found no prejudice arising out of Petitioner's Strickland claims; the analytical outcome would therefore be the same. Geralds v. Att'y Gen., Fla., 855 Fed. Appx. 576, 588 n.11 (11th Cir. 2021) (per curiam) (Rosenbaum, Newsom, Brasher, J.J.).

Giglio Claims

Petitioner's argument before the Florida Supreme Court was two-fold: Gerald's challenged first the testimonial validity of an early suspect's alibi (William Pelton), then the allegedly false testimony regarding the presence of blood on a shoe recovered from Gerald's motel room; both claims were rejected. On federal habeas review, the Eleventh Circuit denied relief on AEDPA grounds, as the Florida Supreme Court's decision did not conflict with clearly established federal law, was not contrary to any Supreme Court decision on materially indistinguishable facts, nor was the court's application of law to the facts objectively unreasonable. Geralds v. Att'y Gen., Fla., 855 Fed. Appx. at 589-590.

Regarding William Pelton's alibi, Investigator Jimerson told the jury that Pelton's employer confirmed that Pelton was at work the day of the victim's murder. Postconviction counsel located a witness, Greg Toriac, who stated that Pelton was permitted to leave the job site on work-related errands, but ultimately never advanced any evidence that Pelton in fact left work on the day in question. Gerald's nevertheless asserted in the Florida Supreme Court that Giglio was violated

because the State presented Jimerson's unqualified testimony confirming Pelton's alibi. The Eleventh Circuit held that testimony on this point did not violate Giglio because Toriac's statement did not directly conflict with Jimerson's testimony, Geralds v. Att'y Gen., Fla., 855 Fed. Appx. at 591; Florida's high court concluded that trial counsel was plainly aware of Toriac but made a strategic decision not to call him. Geralds v. State, 111 So. 3d at 791. Giglio was intended to address unfair and misleading practices that violate due process, not Monday morning quarterback challenges to defense counsel's strategy.

Second, regarding blood found on the shoe recovered from Gerald's motel room, investigator Jimerson testified that he observed Agent Rousseau achieve positive results using two different presumptive blood tests. However, later testing by state lab analyst Zeigler found no blood. While Zeigler did testify as to other matters in Gerald's trial, the outcome of blood testing was omitted and neither the State nor Gerald chose to present it to the jury. Florida's high court rejected Gerald's assertion that Zeigler's test results rendered Jimerson's testimony false, because Jimerson's statement to the jury reported what he personally observed, whereas Zeigler's testimony related to a different test conducted outside of Jimerson's presence. On habeas review, the Eleventh Circuit agreed that no Giglio violation occurred on these facts. Clearly, after the State elected not to present Zeigler's testimony, defense counsel could have called her as a defense witness; Zeigler's report documenting her findings was disclosed prior to trial. Noting that

the rule announced in both Brady and Giglio is not intended to supplant the adversarial process but to ensure that a miscarriage of justice does not occur, the Eleventh Circuit concluded that the Florida Supreme Court “reasonably balanced this principle with the requirements of due process.” Geralds v. Att’y Gen., Fla., 855 Fed. Appx. at 590.

Geralds now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE GERALDS HAS NOT ESTABLISHED CONFLICT AMONG STATE HIGH COURTS, FEDERAL DISTRICT COURTS, OR PRESENTED AN UNSETTLED QUESTION OF FEDERAL LAW.

Geralds advances two claims. First, he contends that the Eleventh Circuit improperly refused to combine prejudice from his Brady¹ and Strickland² claims as part of a necessary cumulative analysis. Second, he contends that a violation of Giglio³ occurs where the defense, as a matter of strategy, chooses to omit evidence that arguably contradicts some aspect of the State's case. Review should be denied.

This Court reserves its certiorari jurisdiction primarily to resolve conflicts among the United States courts of appeals and state courts "concerning the meaning of provisions of federal law." Braxton v. United States, 500 U.S. 344, 347 (1991). Gerald's argument is of extremely limited scope, does not identify any significant federal or state court conflict,⁴ and instead amounts to nothing more than a meritless disagreement regarding the Eleventh Circuit's application of this Court's precedent. See Braxton; see also Supreme Court Rule 10. None of Rule 10's

¹ Brady v. Maryland, 373 U.S. 83 (1963).

² Strickland v. Washington, 466 U.S. 668 (1984).

³ Giglio v. United States, 405 U.S. 150 (1972).

⁴ The claimed conflict is between the lower court's analysis and Cargle v. Mullin, 317 F.3d 1196 (10th Cir. 2003). The State's position is that Cargle is an outlier; no other federal court follows Cargle, nor has this Court ever adopted the rule announced in Cargle that prejudice under both Brady and Strickland is analyzed cumulatively. And, as argued *infra*, Gerald's argument is specious because none of the lower courts has found Strickland prejudice.

considerations apply to the claims advanced by Gerald's; accordingly, his request for certiorari should be denied.

A. Cumulative Review

Petitioner's initial claim is related to his assertion that the prosecution violated Brady by withholding allegedly material information along with an assortment of handwritten notes made by various state officers.⁵ He contends that the Eleventh Circuit, in assessing materiality, was also required to consider prejudice suffered as a consequence of Strickland error. The Eleventh Circuit declined, holding that AEDPA precludes adopting the type of analysis advocated by Gerald's in the absence of any decisional law from this Court mandating it. The fact that the proposed collective analysis was used by the Tenth Circuit in Cargle v. Mullin, 317 F.3d 1196 (10th Cir. 2003), the lower court concluded, does not meet Gerald's burden under AEDPA of showing that the state court unreasonably

⁵ According to the Florida Supreme Court's opinion, these included 1) A list of items missing from the victim's house that allegedly established that the gold necklace recovered from the pawn shop was not the victim's; 2) Florida Department of Law Enforcement lab analyst Zeigler's report finding no blood on Gerald's shoe; 3) An image of a shoe print found in the victim's house that did not match Gerald's; 4) A note from Investigator Jimerson establishing that Gerald's bought a similar gold necklace from a jeweler some time before the victim's murder; 5) Information of criminal charges against pawn broker Danford that could have been used as impeachment; 6) A statement by co-worker Greg Toriac that William Pelton left the job site on occasion thus calling into question Investigator Jimerson's testimony that he confirmed Pelton's alibi; and 7) An assortment of other documents relating to when Jimerson obtained a pawn ticket from Gerald's property, notes documenting the location of various unidentified fingerprints found in the victim's home and car, notes regarding hair analysis and, finally, notes made by Jimerson regarding his interview with the victim's husband. Gerald's v. State, 111 So. 3d at 787-791.

ignored clearly established federal law. Geralds v. Att’y Gen., Fla., 855 Fed. Appx. at 588 n.11.

Geralds cites a number of federal court decisions as supporting his argument regarding Brady and Strickland prejudice — these include Parle v. Runnels, 505 F.3d 922 (9th Cir. 2007), Donnelly v. DeChristoforo, 416 U.S. 637 (1974), Albrecht v. Horn, 485 F.3d 103 (3d Cir. 2007), and Alvarez v. Boyd, 225 F.3d 820 (7th Cir. 2000). While these cases generally address the concept that the combined effect of a series of trial errors may violate due process, none speak directly to the question posed here and advocated by Geralds — that prejudice under Brady must be considered cumulatively with Strickland error. As argued herein, given the absence of Strickland prejudice, Geralds’ claim in this regard is moot.

Even if this Court were to consider addressing the merits of Petitioner’s argument, this case is a poor vehicle for resolving the alleged conflict, not only because the Eleventh Circuit found that none of the evidence about which Geralds complains was suppressed, but also because the Florida Supreme Court found no violation of Strickland, and certainly no prejudice. Geralds deliberately paints a dark picture of missed opportunities and squandered points in the hope of enticing this Court to grant certiorari, while failing to establish why the Florida Supreme Court’s determination — that trial counsel’s representation was more than effective with no prejudice of any kind to Geralds — is unreasonable. These findings are entitled to deference under AEDPA, as it is Geralds’ burden to show clear and

convincing evidence that the state court's factual findings were objectively unreasonable. Schriro v. Landrigan, 550 U.S. 465 (2007); Miller-El v. Cockrell, 537 U.S. 322 (2003). Should this Court grant certiorari, it would find itself resolving what is in effect a non-issue, whether Strickland prejudice should be incorporated in a Brady materiality assessment where there has never been any finding of prejudice in the first place. Review of this one-of-a-kind issue should be denied.

B. Inaccurate or Misleading Testimony

Petitioner's second ground is equally uncert-worthy. The two adversaries below, State and defense counsel, were clearly focused on strategic decision-making. On the State side, the prosecution made careful decisions regarding which witnesses and evidence to present, and Gerald's counsel was cagey in manipulating the State's evidence to his advantage, particularly where he observed the State's deliberate decision not to introduce evidence favorable to the defense. A significant aspect of the defense strategy, the Eleventh Circuit recognized, was the need to preserve what is known as the "sandwich," the opportunity to make both first and last closing arguments to the jury before they go to deliberate. Florida law in effect at the time of Gerald's trial gave the defense the sandwich only if it presented no defense case beyond the defendant's own testimony. Both parties knew the strength of this particular tool, and it is apparent that while the State did what it could to push Gerald into forgoing the sandwich, defense counsel pushed back just as vigorously through adept cross-examination and effective closing argument.

Examples of how each party employed their strengths follow.

The State's case against Gerald's was strong but circumstantial; no witness placed Gerald's near the crime scene at the time of Tressa's murder. But Tressa's children described an unexpected meeting with Gerald's at the local mall a few days before their mother's murder;⁶ Gerald's learned from the unwitting family that Tressa's husband was out of town for a few days on a job, and what time the children left for school. The morning she was killed, Tressa spoke by telephone to her husband and a friend; the last call ended shortly before 9:30. Around 10:30, a neighbor heard Tressa's car start up and drive away but did not notice who was driving. The State reasoned therefore that Tressa was killed during that one hour window.

Some four hours later, Gerald's pawned a blood-stained gold necklace. The blood matched Tressa and the family recognized the necklace as hers. Focused now on Gerald's, law enforcement searched his motel and presumptive testing indicated the presence of blood on one of his shoes. Questioning of those close to Gerald's revealed another piece of important evidence — the same day he pawned Tressa's necklace, Gerald's gave an expensive pair of Bucci sunglasses to a friend; Tressa's family recognized the sunglasses as hers, as well. The defense would be challenged to persuade the jury that this combination of events amounted to no more than innocent coincidence.

⁶ Gerald's had worked for a company hired to remodel Tressa's house the previous year.

At trial, the State presented Investigator Jimerson, who explained how the investigation proceeded to the point where a search of Gerald's motel was authorized. Jimerson watched another investigator conduct two different presumptive tests on a shoe found in Gerald's motel — both tests, Jimerson said, indicated the presence of blood. The defense countered by eliciting testimony on cross that any kind, even fish blood, would produce the same results. The State presented Florida Department of Law Enforcement laboratory technician Zeigler to testify about evidence found in the house, but asked her nothing about the blood test she performed on Gerald's shoe, tests that failed to confirm the earlier presumptives — indeed, her tests found no blood at all. Defense cross-examination seeking to explore what other testing Zeigler did was blocked by the State's objection that the query was outside the scope of direct.

Counsel, faced with the choice of calling Zeigler or keeping the sandwich, chose the latter. Then, in closing, he effectively chastised the State for failing to confirm whether the presumptive tests in fact found human blood, and failing to conduct while actively blocking defense requests for DNA testing. State investigators found that Tressa had broken a fingernail during the struggle. Cross-examination of the pawn broker, who saw Gerald just hours after Tressa's murder, revealed no visible injuries of any sort that might explain the broken fingernail — no scratches to his face, no injuries to his hands. Defense counsel took the small victories wherever they could be found.

Investigator Jimerson testified regarding other suspects that for various reasons had been rejected as viable. One of these was William Pelton. Jimerson testified that he had confirmed Pelton's alibi — he was clocked in at work when Tressa was killed. Defense counsel at this point knew he could impeach Jimerson with testimony from Greg Toriac, who worked with Pelton and knew how he left work "a lot," covering his absences with, for example, a receipt showing a purchase at Radio Shack.⁷ Again, when faced with presenting an affirmative defense case or keeping the sandwich, counsel chose the latter. Toriac's testimony impeached, but fell far short of proving that Pelton was away from work at a time when it would help the defense.

In short, Petitioner seeks certiorari by disingenuously casting reasonable strategic decisions by the well-prepared and experienced parties as devious manipulation by the State at the expense of the innocent and unprepared Gerald. Nothing could be further from the truth, as the lower courts all found. No court familiar with the facts of this case has found any violation of Giglio here. To the contrary, where the State omitted evidence not favorable to its case, the defense, knowing the State's strategy as well as the substance of the omitted evidence, countered with its own strategic ploy. Gerald's plan, the Eleventh Circuit noted,

⁷ Defense counsel passed away before the postconviction hearing and was unavailable to testify, and the Eleventh Circuit accepted the State's argument that counsel made a deliberate choice not to present evidence in order to avoid losing the sandwich. Gerald v. Att'y Gen., Fla., 855 Fed. Appx. at 594. The Florida Supreme Court noted that although he did not testify, Toriac was listed as a defense witness and Jimerson's notes relating to Toriac were disclosed before trial. Gerald v. State, 111 So. 3d at 791.

was to characterize the State's investigation as being inept and incomplete, and this was accomplished through clever cross-examination while at the same time seeking to retain that important, final closing argument to the jury. If Gerald's did not prevail, it was not because the State unfairly deceived him through suppression of evidence or use of false testimony.

Gerald's claim that United States v. Bagley, 473 U.S. 667 (1985), and Alcorta v. Texas, 355 U.S. 28 (1957), mandate relief lacks force because both cases are readily distinguishable on the facts. In Bagley, the prosecution deliberately suppressed material evidence; here, defense counsel knew the available evidence but made a deliberate choice about it. The same analysis applies to Alcorta — the prosecution apparently cooperated with a witness to prevent material evidence from being disclosed to the defense. Here, evidence that a different test showed no blood on Gerald's shoe may have been material to the defense, but there is no due process violation where that information was known yet deliberately omitted by counsel. Similarly, counsel's choice not to call Greg Toriac is not the mechanism that drives a Giglio violation; due process is not violated by a decision made by the defense not to present evidence, even if hindsight reveals that choice not to be particularly fruitful.

There is no merit to Petitioner's assertion that the State violated Giglio. Moreover, this would not be the proper vehicle to address this type of claim. Rather than addressing prosecutorial impropriety involving deliberate falsehoods, this

Court would find itself wading through a morass of legal strategizing — typical and proper where tough opposing attorneys use their experience and skill in a best effort to outfox the other, but clearly not the type of case requiring this Court's attention. This Court should deny the writ.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court
DENY the petition for writ of certiorari.

Respectfully submitted,

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