

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*

REPLY BRIEF IN SUPPORT OF CERTIORARI

THIS IS A CAPITAL CASE

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REPLY BRIEF IN SUPPORT OF CERTIORARI

I. Respondent's brief in opposition fails to demonstrate that certiorari is unwarranted in the case at hand.

Respondent argues that the decisions below were correct and that should this Court grant certiorari, it “would find itself resolving what is in effect a non-issue” and that this case is “clearly not the type of case requiring this Court’s attention.” *See* BIO at 9, 14. The Respondent is mistaken in its position. Petitioner’s trial suffered constitutional failures and he now sits on death row. This Court has the authority to grant certiorari and it should.

A. Cumulative review

Respondent argues that a grant of certiorari in the instant case would yield this Court “resolving what is in effect a non-issue” because “there has never been any finding of prejudice” under *Strickland*.¹ *See* BIO at 9. Respondent further argues that “AEDPA precludes adopting” Petitioner’s argument that *Brady*² materiality and *Strickland* prejudice claims require cumulative analysis due to the “absence of any decisional law from this Court mandating it.” BIO at 7.

First, Respondent’s understanding of the issue raised by Petitioner is flawed. Petitioner does not argue a finding of *Strickland* error as a prerequisite to a cumulative review of *Brady* materiality and *Strickland* prejudice claims. Rather, Petitioner argues that because this Court has identified a correlation between the rules governing the conduct of the prosecution and defense counsel when it adopted

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

² *Brady v. Maryland*, 373 U.S. 83 (1963).

a *Brady* materiality standard equivalent to *Strickland*'s prejudice standard, an adequate *Brady* materiality inquiry concerns not only what evidence the jury heard, but also how trial counsel's preparation and presentation would have been altered had the *Brady* evidence not been suppressed by the State. *See Strickland*, 466 U.S. at 695 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."); *see also Bagley*, 473 U.S. at 715, n.12 (internal quotations omitted) ("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."); *see also United States v. Agurs*, 427 U.S. 97, 104 (1976). A lack of a finding below of *Strickland* error is not a bar to Petitioner's argument that a proper *Brady* analysis include a cumulative review of his *Brady* materiality and *Strickland* prejudice claims. 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.

Second, contrary to Respondent's position and the court below, 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, 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.")). As such, errors that individually may not warrant relief, when an aggregate review of all errors alleged under *Strickland* prejudice and *Brady*

materiality is undertaken, relief may be warranted. *See Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (A “reasonable probability” of a different result exists when the government’s evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict.); *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); *see also 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. A piecemeal review of *Brady* materiality claims and *Strickland* prejudice claims fails to provide the due process guaranteed by this Court’s long-standing precedent. The Respondent’s reliance on a lack of a finding of *Strickland* error below is misplaced. As is its position

that there is a lack of “decisional law from this Court mandating” a cumulative review. *See* BIO at 7. Certiorari is warranted to correct the decision below.

B. Inaccurate or misleading testimony: A prosecutor who creates a false impression in the minds of jurors violates *Giglio*.

Respondent invites this Court to avoid the merits of Petitioner’s second and third questions presented by misleadingly reframing the question to ask whether trial counsel’s *alleged* strategy not to present witness testimony violates *Giglio*.³ The questions presented by Petitioner are whether a *Giglio* violation occurs where the State secures a death sentence based upon testimony that creates a false impression in the minds of the jurors even though the testimony does not rise to the level of perjury?

Respondent asserts that Petitioner’s questions are “uncert-worthy” because the “two adversaries below [] were clearly focused on strategic decision-making” regarding which witnesses and evidence to present. *See* BIO at 9. That Petitioner’s trial strategy was to “retain [the] important, final [sandwich] closing argument to the jury” at the guilt phase. *Id.* at 13. The Respondent goes on for several pages outlining what it perceives to be “[e]xamples of how each party employed their [strategic] strengths” at trial. *Id.* at 10. What the Respondent fails to do, however, is address the questions presented.

Petitioner argued that the State violated *Giglio* by permitting State witness, Investigator Jimmerson to testify falsely at the resentencing that alternative suspect William Pelton’s alibi had been confirmed when police investigation showed Pelton’s

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

whereabouts that day were unaccounted for, and by misleading the jury into believing there was blood on Petitioner's sneaker based upon a presumptive field test when later testing resulted in a negative finding for blood. The record makes clear that trial counsel's strategy at the resentencing was to establish mitigation by reducing Petitioner's culpability in the crime—to convince the jury that Petitioner was not present at the crime scene and that alternative suspect Pelton was the perpetrator of the crime. Jimmerson's testimony misled the jury on critical issues concerning mitigation and culpability.

Respondent seemingly fails to comprehend the crux of a *Giglio* inquiry. The conduct to be scrutinized is that of the State. Not the alleged strategy of trial counsel. A defendant's due process rights are violated where the State fails to correct testimony it knows to be inaccurate or misleading creating a false impression in the minds of jurors. Long-standing precedent of this Court establishes that the State, as the beneficiary of the inaccurate and misleading testimony, has a burden to correct such testimony:

As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, '(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' *Id.*, at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'

Giglio, 405 U.S. at 153. Respondent fails to address the numerous cases Petitioner cites supporting his position that inaccurate and misleading testimony can constitute

a *Giglio* violation. *See* Petition for A Writ of Certiorari at 21-22. Nor does Respondent address the cases Petitioner cites that have seemingly taken a more restrictive view that in order to establish a *Giglio* violation, a defendant must prove that the State knowingly used testimony that rises to the level of perjury. *See* Petition for A Writ of Certiorari at 23. Respondent does, however, make a moderate attempt to distinguish *Bagley*⁴ and *Alcorta*⁵. *See* BIO at 13. Respondent argues that *Bagley* is distinguishable because there, the State deliberately suppressed material evidence. *Id.* The Respondent also argues that *Alcorta* is distinguishable under a similar analysis—the State conspired to prevent disclosure of material evidence. *Id.* However, such attempts are less than convincing given that the distinguishment fails to address Petitioner’s argument that inaccurate and misleading testimony can constitute a *Giglio* violation.

Respondent also fails to comprehend the basis of Petitioner’s *Giglio* claim—prosecutorial misconduct at the penalty phase resentencing. Respondent seeks to improperly relieve the State of its constitutional duties to correct misleading testimony by relying on irrelevant allegations of trial counsel’s strategy to preserve the sandwich closing argument. Respondent seems to take the position that because a criminal defendant may counter the State’s deception by presenting its own defense witnesses, the State is relieved of its duty to not mislead the jury. *See* BIO at 9, 11-13. That because when “faced with the choice of calling [guilt phase witnesses] or

⁴ *United States v. Bagley*, 473 U.S. 667 (1985).

⁵ *Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

keeping the sandwich, [trial counsel] chose the latter.” *Id.* at 11. Such a position is indefensible. But more importantly, here, such a position is irrelevant. Petitioner’s *Giglio* claim rests upon the misleading testimony of Jimmerson elicited by the State at the penalty phase resentencing. Petitioner does not allege a *Giglio* violation occurred during the guilt phase portion of the trial. Thus, argument relating to an alleged trial strategy to preserve opening and closing arguments at the guilt phase is irrelevant to this Court’s consideration of Petitioner’s second and third questions presented.

Respondent attempts to lead this Court astray from the actual questions presented by reframing the issue to focus on trial counsel’s actions. *See* BIO at 6 (“[Petitioner] contends that a violation of *Giglio* occurs where the defense, as a matter of strategy, chooses to omit evidence that arguably contradicts some aspect of the State’s case.”); *Id.* at 12 (“[W]hen faced with presenting an affirmative defense case or keeping the sandwich [guilt phase closing argument], counsel chose the latter.”). The questions presented to this Court for consideration are whether a *Giglio* violation occurs where the State secures a death sentence based upon testimony that creates a false impression in the minds of the jurors even though the testimony does not rise to the level of perjury? Nowhere in its brief does the Respondent adequately address the questions presented. This Court should grant certiorari to clarify that inaccurate or misleading testimony can constitute a *Giglio* violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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 4th day of March 2022.

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