No.

In the Supreme Court of the United States

GARY RICHARD WHITTON, PETITIONER,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Petitioner established below, and the Eleventh Circuit agreed, that petitioner's capital murder trial was tainted by a *Giglio* violation. Ordinarily, a petitioner who makes such an extraordinary showing of prosecutorial misconduct would be entitled to habeas relief under 28 U.S.C. § 2254.

But the Eleventh Circuit deemed the violation immaterial. The Eleventh Circuit held that the Florida Supreme Court reasonably concluded that, even without the *Giglio*-tainted testimony, the evidence against petitioner was "overwhelming." The Eleventh Circuit reached that determination almost entirely on the basis of evidence that Florida developed a decade *after* petitioner's trial and that flatly contradicted unrebutted evidence presented by the defense at the actual trial.

The decision below opens a direct circuit split with the Second, Sixth, and Tenth Circuits, *United States v. Jean-Baptiste*, 166 F.3d 102 (2d Cir. 1999); *Apanovitch v. Bobby*, 648 F.3d 434 (6th Cir. 2011); *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013), and the North Carolina Supreme Court, *State v. Best*, 376 N.C. 340, 852 S.E.2d 191 (2020), on a question of exceptional importance. It is also in deep tension with this Court's recent decision in *Glossip v. Oklahoma*, 604 U.S. 226 (2025).

The questions presented are:

1. Whether in determining whether a constitutional error had a prejudicial effect on the outcome of a trial a court must consider only that evidence that was presented to the jury at the trial.

2. Whether the prejudice from the *Giglio* violation in this case met the standards for relief under *Giglio* and *Brecht*.

RELATED PROCEEDINGS

Circuit Court of Walton County, Florida:

State of Florida v. Gary Richard Whitton, No. 90-0429-CF (Fla. Cir. Ct. Sept. 10, 1992) (judgment of conviction)

State of Florida v. Gary Richard Whitton, No. 90-0429-CF (Fla. Cir. Ct. June 2, 2011) (denial of initial postconviction relief)

State of Florida v. Gary Richard Whitton, No. 90-0429-CF (Fla. Cir. Ct. May 5, 2017) (denial of successive postconviction relief)

Florida Supreme Court:

Gary Richard Whitton v. State of Florida, 649 So. 2d 861 (Fla. 1994) (denial of direct appeal)

Gary Richard Whitton v. State of Florida, 161 So. 3d 314 (Fla. 2014) (denial of initial postconviction and state habeas)

Gary Richard Whitton v. State of Florida, 238 So. 3d 724 (2018) (denial of successive state postconviction)

United States District Court for the Northern District of Florida:

Gary Richard Whitton v. Secretary, Florida Department of Corrections, No. 4:14cv200-RH (N.D. Fla. Nov. 30, 2022) (federal habeas)

United States Court of Appeals for the Eleventh Circuit:

Gary Richard Whitton v. Secretary, Florida Department of Corrections, No. 23-10786 (11th Cir. May 6, 2025) (denial on appeal of federal habeas)

Supreme Court of the United States:

Gary Richard Whitton v. Florida, 516 U.S. 832 (1995) (denial of petition for certiorari of direct appeal)

Gary Richard Whitton v. Florida, 586 U.S. 922 (2018) (denial of petition for certiorari of successive state postconviction)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished but is attached at Pet. App. 1a-64a and is available on Westlaw at 2025 WL 1305158. The Eleventh Circuit's order denying rehearing is unpublished but is attached at Pet. App. 156a. The opinion of the United States District Court for the Northern District of Florida is unpublished but is attached at Pet. App. 65a-121a. The opinion of the Florida Supreme Court is attached at Pet. App. 122a-155a and is reported at 161 So. 3d 314.

JURISDICTION

The Eleventh Circuit entered its judgment on May 6, 2025. Pet. App. 1a. The Eleventh Circuit denied a timely petition for rehearing *en banc* on July 15, 2025. Pet. App. 156a. On October 7, 2025, Justice Thomas granted an extension of time to file a petition for a writ of certiorari to November 12, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant statutory and constitutional provisions are reproduced in the appendix at Pet. App. 157a-161a.

INTRODUCTION

The Eleventh Circuit deemed the *Giglio* violation at petitioner's capital trial immaterial by relying on DNA retesting the State conducted a decade after the verdict—evidence never admitted in any court, never subjected to adversarial scrutiny, and flatly inconsistent with the DNA evidence presented to the jury at the actual trial. The decision below is in direct conflict with three other circuits and a state supreme court, each of which has squarely held that post-verdict evidence *cannot* be considered

when conducting a prejudice analysis. The extraordinary departure from due process and the right to jury trial countenanced by the court below warrants this Court's review. The Court should grant certiorari and reverse.

Petitioner Gary Whitton has been on Florida's death row since 1992 for the murder of his friend James Maulden. A jury found that Gary murdered James on the basis of circumstantial evidence and the testimony of two jailhouse informants who testified that Gary said, "I stabbed the bastard." Both informants later recanted. The Eleventh Circuit found below that the prosecutor knew that one of the informants was lying about his criminal record during his cross examination but did nothing to correct it, in clear violation of *Giglio v. United States*, 405 U.S. 150 (1972). Pet. App. 34a-67a.

There can be little doubt that, without the informants' testimony, the State faced a realistic prospect of an acquittal. The other evidence in the trial left open the reasonable possibility that someone else murdered James. James was brutally killed over the course of a half-hour struggle for his life with his assailant wherein he was stabbed repeatedly and bled profusely. But Gary, arrested the next day, did not have a mark on him. Gary had some specks of blood on his boots, but Florida's own DNA examiner testified that the blood was not from Gary or James. Gary testified that he was at the scene of the crime that night but that he was there to check on James, not to murder him, and when he arrived the door was open and James was dead. No one witnessed the crime. No murder weapon was found. And Gary had no obvious motive to kill his friend, whom he had been hosting and driving around for the previous few days during James's shore leave. The jailhouse informant testimony was *the* linchpin of the prosecution's case at the trial that actually took place.

The Eleventh Circuit found that the prosecutor's decision to permit one of the informants to commit

perjury caused no prejudice because, ten years *after* the trial, the State of Florida retested the blood on Gary's boots and determined that in fact some of the blood did come from James. The Eleventh Circuit found this DNA evidence highly inculpatory. Now matched to James's DNA, "Whitton can't rebut the State's blood-spatter evidence." Pet. App. 41a. "[T]he blood-spatter evidence [on the boots] ties Whitton directly and firmly to Maulden's murder." Pet. App. 42a. The blood on the boots "has no explanation other than one that is consistent with the defendant's guilt." Pet. App. 42. This new DNA evidence was never admitted by any court and has never been rigorously evaluated by a defense expert. And more importantly, it has nothing to do with the *actual* trial that hinged on the informant testimony because the DNA evidence at that trial made the blood-spatter evidence entirely irrelevant.

Just recently in *Glossip v. Oklahoma*, 604 U.S. 226 (2025), this Court refused to consider post-verdict evidence as part of the prejudice analysis because the court cannot consider "extra-record materials . . . , including a recent unsworn statement." 604 U.S. at 254. The decision below conflicts with that holding in *Glossip*, and with the holdings of three courts of appeals and a state high court. This petition presents an ideal and urgent vehicle to resolve this question nationwide. The Eleventh Circuit affirmed a death sentence by declaring a *Giglio* error immaterial only after incorporating extra-record DNA testing conducted a decade after the verdict. The Court should grant certiorari to restore uniformity to federal law, vindicate due process and the right to a jury verdict based on admissible evidence, and ensure that capital convictions rest on trials conducted within constitutional bounds.

STATEMENT OF THE CASE

1. This case starts with a friendship born in recovery. In 1989, petitioner Gary Whitton met James Maulden at a halfway house for recovering alcoholics in Pensacola, Florida. Pet. App. 66a. The two became friends during the months they spent together at the facility and maintained contact afterwards. Pet. App. 66a. In October 1990, James spent a couple of nights at Gary's house in Pensacola, Florida. Pet. App. 66a. James worked offshore and had no home or car, but he was back onshore for R&R. ROA Vol. IX, at 1816-1819.[1]

2. James was murdered sometime in the evening hours on Tuesday, October 9, 1990.

That morning, James asked Gary to drive him to his bank in Destin, Florida, because James "had lost some money Sunday night from a situation where he had picked somebody up."[2] ROA Vol. IX, at 1818-1821. Destin is over an hour from Pensacola, but it was the only place James could withdraw money from his account because he had lost his passbook. Pet. App. 123a. The bank told James the only way he could withdraw money was if he closed the account, so James withdrew the full balance of $1,135.88 and closed the account. Pet. App. 66a.

James then asked if Gary would drop him off at a motel somewhere in Destin. ROA Vol. IX, at 1823. They chose the Sun and Sand Motel. ROA Vol. IX, at 1824.

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[1] Citations to the record on petitioner's direct appeal from his conviction to the Florida Supreme Court take the format "ROA Vol. ##, at ##."

[2] A postconviction witness testified that a sex worker had robbed James days before his murder. Pet. App. 99a.

Photo of the exterior of the motel. Photo taken Oct. 10, 1990.

James, who had fallen off the wagon and been drinking heavily the last few days, was already intoxicated, so Gary completed the check-in paperwork. Pet. App. 66a. As part of the check-in, Gary, rather than write his own license plate down, tried to write down a fake license plate number on the form. Pet. App. 6a. A motel employee noticed, and another employee, John Anthony Maleszewski ("Tony"), corrected it. ROA Vol. VII, at 1426.

Gary and James then checked out the room, walked to a convenience store, and bought cigarettes and a bottle of wine. Pet. App. 66a. They returned to the room to hang out and smoke briefly before Gary headed back to Pensacola. Pet. App. 66a-67a. Shortly after Gary left,

James ordered a cab and left the motel room for the afternoon. Pet. App. 67a.[3]

On his way back to Pensacola, Gary stopped at the home of a mutual friend, Maureen Fitzgerald, to relay a message from James. ROA Vol. IX, at 1828-1829. Maureen told Gary that James's mother had stopped by that morning looking for him. ROA Vol. IX, at 1830-1831. They tried to call James's mother to let her know James was at the motel to no avail. ROA Vol. IX, at 1830-1831. Gary then made a few stops in the Pensacola area and continued trying to call James's mother to tell her about James's situation. ROA Vol. IX, at 1831-1832. Gary eventually decided he should return to Destin to check on James. ROA Vol. IX, at 1834.

The parties dispute what happened when Gary returned to the motel that night. But the parties do not dispute that Gary went back to Pensacola sometime after midnight.

Around 11:00 a.m., Tony, the motel employee, discovered James's body. Pet. App. 68a.[4] There was blood everywhere; blood covered the floor, soaked the carpet, and splashed across the furniture, walls, and ceiling of the motel room. Pet. App. 3a. James had been violently and repeatedly stabbed during a protracted struggle with an assailant and had his skull fractured. Pet. App. 3a. Tony contacted law enforcement and provided them the license

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[3] The cab driver who picked James up testified in postconviction proceedings that James was looking to solicit a prostitute and asked where he could find one. Pet. App. 10a. When James paid the cabbie, he took out enough cash that the cabbie warned James against flashing so much cash in that part of town. Pet. App. 10a.

[4] According to the district court, the medical examiner determined, "in effect," that James was murdered at 11:00 p.m. Pet. App. 68a, 95a. In reality, the medical examiner testified that James died during a twenty-four hour window from 11:00 a.m. on October 9 to 11:00 a.m. on October 10. ROA Vol. III, at 597; ROA Vol. VIII, at 1698-1699.

plate information from the check-in form, which led police to Gary's home in Pensacola. Pet. App. 3a.

At 1:30 a.m. on October 11, police found Gary at his home and requested he accompany them to the sheriff's office for further questioning. Pet. App. 125a. The officers interrogated him from 2:00-5:15 a.m. Pet. App. 69a. Before invoking his right to remain silent, Gary told officers he took James to the motel that morning and returned later that evening to check on him and found him dead. Pet. App. 3a-4a.

2. The State indicted Gary for capital murder and robbery. Pet. App. 70a. He was convicted in August 1992. ROA Vol. X, at 2034-2035.

Before the trial, the prosecutor offered to have Gary plead to second-degree murder and robbery and within-guidelines sentencing. ROA Vol. V, at 871-872. But in April 1992, two jailhouse informants emerged, claiming that Gary had confessed James's murder to one of them in the other's presence.[5] ROA Vol. V, at 871-872. After securing this additional testimony, the prosecutor withdrew the plea offer and pursued a first-degree murder charge and the death penalty. Pet. App. 4a.

a. The prosecutor pursued a robbery-murder theory at the trial. Pet. App. 4a. According to the prosecutor, this was a crime of opportunity turned bad. Pet. App. 40a. Gary was behind on his bills and saw James's withdrawal of $1,135.88 in cash as an opportunity to pull off an easy robbery. Pet. App. 40a. Gary initially left James at the motel but later decided to rob him and returned that night to do so. Pet. App. 96a. When Gary arrived, the two got into a struggle and Gary fractured James's skull and stabbed him to death. Pet. App. 3a. Gary then fled the

[5] One of the informants—Kenneth McCollough—was engaged to be married to the prosecutor's mother, and the two moved in together after McCollough's early release. Pet. App. 9a.

scene before stopping at a gas station around 3:00 a.m. in Pensacola. Pet. App. 5a, 40a.

The prosecution called Tony, who testified that Gary's car was in the motel parking lot potentially as early as 10:30 p.m. and potentially as late as 12:20 a.m. Pet. App. 5a-6a. The prosecution established that Gary visited a gas station in Pensacola around 2:37 a.m. and paid utility bills in cash the day after the murder. Pet. App. 5a, 40a.

The prosecution presented forensic evidence showing that James was conscious and suffered self-defensive injuries during thirty minutes of "violent combat" prior to his death. Pet. App. 3a. The prosecution showed that Gary's fingerprints were found in the room. Pet. App. 4a.

Photo of James Maulden between north bed and north wall of motel room. Photo taken Oct. 10, 1990.

The prosecution called a witness who testified that small amounts of blood found in and on Gary's boots and in his car matched James's blood type. Pet. App. 68a. The prosecution further called a blood-spatter expert who testified that the blood spatter on the boots was consistent only with Gary's boots being off when the "blood splatter occurred on the interior of" them. ROA Vol. VIII, at 1722.

"1991 FDLE Photo 2 of Boots," State's Exhibit X at Evidentiary Hearing. Photo taken on Oct. 11, 1990.

The prosecution could neither offer a precise time of death nor track James's whereabouts for most of the day leading up to his death. It did not present the murder weapon(s). It did not introduce or trace the remainder of the cash that Gary supposedly stole. It did not present any

evidence of injury to Gary—a substantially smaller man than James—after a murder described as thirty minutes of "violent combat." It did not present any evidence of significant amounts of blood on Gary's person, car, or cash despite Gary allegedly stabbing and bashing James to death, leaving a room drenched in blood on every surface. It never provided any evidence that the DNA from the small amounts of blood found in Gary's boots and in his car actually matched James's DNA.

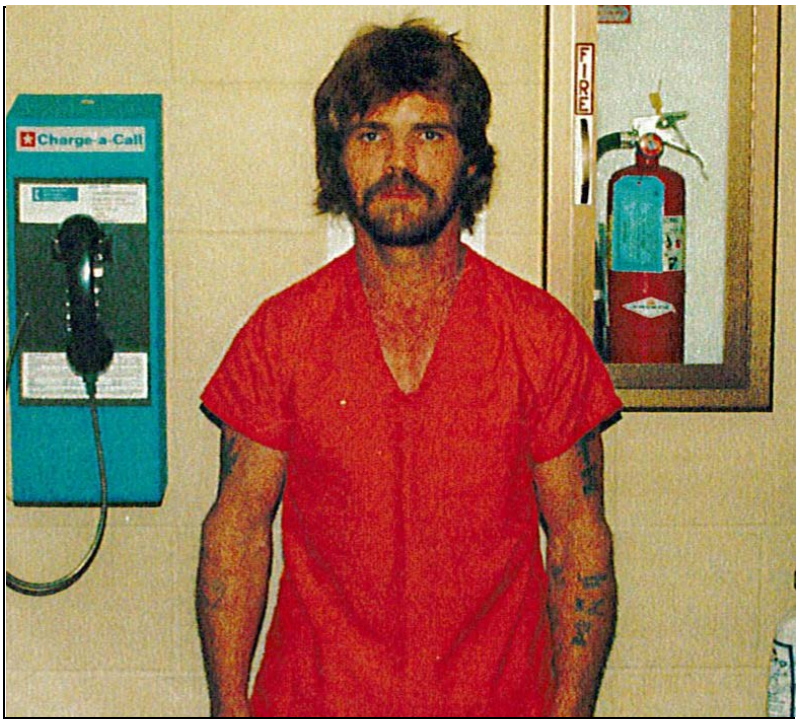

Photo of Gary Whitton during intake on Oct. 11, 1990.

To drive its circumstantial case over the line, the prosecution called the two jailhouse informants—Jake Ozio and Kenneth McCollough—to testify that Gary confessed that he murdered James to McCollough within earshot of Ozio. Pet. App. 5a. There were numerous

indications that McCollough and Ozio were lying. *See* Pet. App. 13a-14a & n.7. Nonetheless, the prosecution called both to provide exceptionally prejudicial testimony against Gary. They purported to relay Gary's callous dismissal of his murder of James: "I stabbed the bastard." Pet. App. 5a, 27a.

b. The defense pursued a theory that there was another killer. The defense conceded all of the circumstantial facts alleged by the State—that Gary took James to the bank and motel, provided a false license plate number at check-in, spent some time at the motel, left, returned late that night, and got gas on the way home. ROA Vol. X, at 1964-1969. However, it offered a completely different explanation for those events.

Gary testified. Pet. App. 6a. He testified that he and James were friends and that he was driving James that day as a favor. ROA Vol. IX, at 1815, 1819, 1845-1846. He testified that he provided a false license plate because he was worried he would be liable for any damage James might cause. ROA Vol. IX, at 1825. Gary testified that, after learning from Maureen that James's mother was looking for him, he spent the afternoon trying to track down James's mother so he could tell her about James's situation. ROA Vol. IX, at 1830-1832, 1834.

Gary testified that, after spending the day trying to contact James's mother, he returned to the motel to check on his friend and let James know his mother was looking for him. ROA Vol. IX, at 1834-1835. He testified that, upon arriving at James's room, he found the door ajar, entered, observed a bloody scene, and saw a body wrapped in a blanket that, when uncovered, revealed James's bloody face. ROA Vol. IX, at 1835-1836. Terrified and panicked, Gary fled. ROA Vol. IX, at 1836-37. In shock and not wanting to be swept up in the situation, he told no one what he had found. ROA Vol. IX, at 1837. As to the utility payments, Gary testified that the money came from his paycheck and from a friend and former housemate who

shared responsibility for the bill. ROA Vol. IX, at 1844-1845.

To rebut the forensic evidence, the defense called a DNA analyst from the Florida Department of Law Enforcement. Pet. App. 6a. The analyst testified that the DNA of the blood on Gary's boots did *not* match James *or* Gary.[6] ROA Vol. IX, at 1904. The defense showed that the blood-type evidence was virtually irrelevant because Gary's and James's blood types are shared by the overwhelming majority of the U.S. population. ROA Vol. VIII, at 1744-1746.[7] Furthermore, fingerprints found on items in the room that had been purchased that day belonged to neither Gary nor James. Pet. App. 4a. Cigarettes found in the room were tested for saliva, which determined that one of the cigarettes was potentially smoked by someone other than Gary or James. Pet. App. 68a. Therefore, the presence of blood from a third person was not just consistent with Gary's story, Pet. App. 87a, but, along with the fingerprints and DNA on the cigarettes, significantly bolstered his account by suggesting that there was another person at the crime scene, ROA Vol. X, at 1975.

The defense, however, had no evidence to rebut Ozio's and McCollough's testimony. The defense attempted to undermine the credibility of their testimony by cross-

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[6] DNA testing of the blood in the car was inconclusive due to an "insufficient amount of high molecular weight human DNA." Pet. App. 91a.

[7] At the original trial, the State attempted to prevent the DNA analyst from testifying. The federal district court viewed the DNA testimony presented at the trial as so critical to Gary's case that, had the State successfully prevented the testimony, it would have resulted in automatic vacatur. "The state made an inexcusable attempt to block Ms. Zeigler from testifying. Had the state succeeded, the conviction would now be vacated. Period. The only issue would be which officer or attorney should be sanctioned, and how." Pet. App. 87a-88a.

examination. The defense explicitly asked if they had any expectation of reward for testifying against Gary. ROA Vol. VIII, at 1616, 1646, 1653-1654. Both answered that they did not. ROA Vol. VIII, at 1616, 1646, 1653-1654. Both the prosecution and the defense explicitly asked Ozio if he had any criminal history. ROA Vol. VIII, at 1617, 1633. He said that he did not. ROA Vol. VIII, at 1617, 1633.

3. The jury returned a guilty verdict on the murder and robbery counts. Pet. App. 7a. The advisory jury later returned a unanimous death recommendation and the judge sentenced Gary to death. Pet. App. 7a.

Gary appealed his conviction, but the Florida Supreme Court affirmed. *Whitton v. State*, 649 So.2d 861 (Fla. 1994). During the appeal, Gary's appellate counsel received letters from McCollough expressing his desire to recant his testimony, which he said was false and coached by prosecutors in exchange for leniency. Pet. App. 8a. Despite informing Gary that she would pursue the lead, appellate counsel never contacted McCollough and he died before Gary's state postconviction proceedings began. Pet. App. 8a-9a.

4. In 1997, Gary moved for state postconviction relief. Pet. App. 10a. The state postconviction court summarily dismissed about one-third of his claims immediately and held an evidentiary hearing in 2005 on those remaining. Pet. App. 10a-11a. It eventually denied all claims in 2011. Pet. App. 71a. As relevant here, Gary sought relief under *Giglio v. United States*, 405 U.S. 150 (1972), with respect to Ozio's and McCollough's testimony. Pet. App. 11a.

In support of his *Giglio* claim, Gary secured an affidavit from Ozio admitting his trial testimony was false in two critical respects: Ozio had in fact never heard Gary confess to McCollough, and Ozio fabricated the confession after a law-enforcement officer threatened him with five years in prison. Pet. App. 9a. Ozio initially agreed to return to Florida to testify in the postconviction

proceedings but backed out after the State failed to provide assurances he would not be prosecuted for perjury-by-contradictory-statements even if his recantation was true. Pet. App. 9a, 15a. At the State's request, the postconviction court refused to admit a deposition or remote testimony. Pet. App. 9a. Notwithstanding the affidavit, the state postconviction court denied the claims, finding that Ozio and McCollough did not testify falsely and that, even if they had, the prosecution was unaware they intended to do so. *State of Florida v. Gary Richard Whitton*, No. 90-0429-CF (Fla. Cir. Ct. June 2, 2011).

In 2002, the State retested the blood on Gary's boots. Pet. App. 6a n.5.[8] The results allegedly showed that the inside of the right boot contained blood from a "mixture of two or more individuals" with the "major donor" matching James's "DNA profile." Pet. App. 6a n.5. The testing also identified James as a DNA contributor to one area on the left boot and as a possible contributor to another area on the right boot. Pet. App. 6a n.5. The State never introduced the test results into the record.[9]

Gary appealed to the Florida Supreme Court, maintaining his *Giglio* challenge to Ozio's and McCollough's testimony. Pet. App. 129a-132a. Gary also filed a state petition for habeas corpus arguing that

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[8] The Florida Supreme Court twice declined to intervene to prevent the State from retesting Gary's boots. Pet. App. 10a. The defense sought to prevent retesting to preserve the samples, not because it opposed retesting. Postconviction Record Vol. VII, at 1214-1215.

[9] A postconviction record transcript of a conversation between a Walton County Sheriff's Office lieutenant and the third-party serologist that the State retained for the 2002 testing suggests the testing was done to achieve a specific result. The lieutenant repeatedly described the 1992 test results that found no match to James or Gary as a "problem" that he expected the serologist to fix. Postconviction Supplemental Record Vol. I, at 47, 49-56, 58, 63.

counsel was ineffective in failing to investigate McCollough's desire to recant. Pet. App. 151a-152a. The court affirmed and denied habeas corpus. Pet. App. 154a. In doing so, it held that Gary could not establish prejudice from the McCollough *Giglio* violation because "Ozio's testimony would still have provided the jury with evidence that Whitton admitted to murdering Mauldin [sic]. That, coupled with the overwhelming evidence against Whitton, makes it extremely unlikely that McCollough's recantation would have changed the outcome of the trial." Pet. App. 153a.

5.a. In April 2015, Gary filed a timely initial federal 28 U.S.C. § 2254 habeas petition in the Northern District of Florida, raising his exhausted claims. Pet. App. 12a-13a. The district court first allowed Ozio to be deposed and then held an evidentiary hearing in September 2022 at which Ozio testified remotely. Pet. App. 13a. Ozio confirmed that his testimony was false, was coached by the prosecution, and that he gave it in the hopes of obtaining leniency, which he did, in fact, receive. Pet. App. 13a-15a & n.7. He also confirmed that prosecutors were aware of his criminal record. Pet. App. 15a.

The district court concluded that Ozio's testimony about Gary's confession was in fact false and that Ozio's testimony that he lacked a criminal record was also false. Pet. App. 79a. But it denied relief, holding that prosecutors did not violate *Giglio* because prosecutors did not actually know Ozio's testimony was false and "the circumstances did not show conclusively or with a high probability that it was false." Pet. App. 76a, 79a.

The district court granted a certificate of appealability as to three claims, including that the State knowingly presented false testimony from Ozio in violation of *Giglio*, and the Eleventh Circuit added a fourth claim as to whether counsel was ineffective in

failing to investigate McCollough's desire to recant. Pet. App. 16a.

b. The Eleventh Circuit affirmed. Pet. App. 64a. On the question of whether prosecutors violated *Giglio* by allowing Ozio to testify even though they should have known his testimony was likely to be false, the Eleventh Circuit held that prosecutors do not violate *Giglio* unless they have *actual* knowledge that a witness will testify or did testify falsely. Pet. App. 23a, 25a. The claim failed "because Whitton ha[d]n't shown that either the prosecutors or any relevant state official actually knew Ozio fabricated Whitton's confession when he testified to it." Pet. App. 25a.

The Eleventh Circuit, however, held that the State *had* violated *Giglio* when it permitted Ozio to testify that he lacked a violent criminal record, even though prosecutors *knew* that to be false at the time. Pet. App. 34a-37a. This evidence would have undermined Ozio's credibility and bolstered the defense's argument that Ozio was testifying in exchange for leniency. Pet. App. 35a-36a & n.11.

The Eleventh Circuit thus turned to *Giglio*'s prejudice element, recognizing that the Florida Supreme Court "did not directly address prejudice flowing from Ozio's testimony." Pet. App. 37a-38a. The court nonetheless looked to the state court's harmless error analysis about *McCollough*'s testimony, asserting that, under the Antiterrorism and Effective Death Penalty Act, it owed generalized deference to the state court's factual determinations. Pet. App. 38a-39a. The Eleventh Circuit concluded that it was not unreasonable for the Florida Supreme Court to conclude that there was "overwhelming evidence" of Gary's guilt even apart from the informant testimony. Pet. App. 37a-38a, 42a-43a. As a consequence, any *Giglio* violation did not prejudice Gary.

In reaching that result, the Eleventh Circuit focused virtually exclusively on the blood found on Gary's boots.

Pet. App. 39a-43a. The evidence supporting the "overwhelming" evidence determination consisted of:

> the motel clerk saw Whitton's car parked at the motel, and Whitton admitted he was at the motel; Whitton's boots and his car were stained with blood that, *after later retesting*, matched Maulden's DNA; the blood stains on and inside Whitton's boots are consistent with "a stabbing or a beating"; Whitton could not explain the downward blood spatter on the inside of his boots; and Whitton's car contained a power and gas receipt and a car wash ticket for 2:37 a.m. October 10, 1990, the night of the murder.

Pet. App. 40a (emphasis added).

The Eleventh Circuit found this evidence persuasive because, "*after retesting the DNA on Whitton's boots*, the State confirmed that the inside of Whitton's right boot contained blood from a 'mixture of two or more individuals' with the 'major donor' matching 'the DNA profile of James Maulden.'" Pet. App. 42a (emphasis added) (citations omitted). This blood evidence was the crux of the Eleventh Circuit's finding of no prejudice. Pet. App. 41a-42a ("In particular, Whitton can't rebut the State's blood-spatter evidence. . . . [T]he blood-spatter evidence ties Whitton directly and firmly to Maulden's murder."). In the Eleventh Circuit's final analysis: "[E]ven if the 'call[ ]' is ultimately 'debatable,' it's within the realm of fair-minded disagreement, that blood spatter evidence—which has no explanation other than one that is consistent with the defendant's guilt—will surely convince a jury of the defendant's guilt." Pet. App. 42a (citations omitted).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit considered evidence developed after trial in direct violation of *Napue*, *Giglio*, *Chapman*, and *Brecht*; in direct conflict with multiple other courts;

and in sharp tension with this Court's recent decision in *Glossip*. The decision below has no basis in this Court's precedents, raises grave Fifth and Sixth Amendment concerns, makes no sense as a matter of basic logic, and would be impossible to administer in practice. The Court should grant certiorari and reverse.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS

This case squarely presents a conflict over a fundamental question of federal law: whether a court assessing trial prejudice may rely on evidence the jury never saw. The Eleventh Circuit says yes. Every other court to confront the issue says no.

A. The Eleventh Circuit Treats Post-Verdict Evidence as Relevant to Whether a Defendant Suffered Prejudice from a Constitutional Violation at Trial

In the decision below, the Eleventh Circuit held that a *Giglio* violation can be deemed harmless on the basis of DNA evidence developed a decade after trial. While the Eleventh Circuit acknowledged that the State's jailhouse informants gave false testimony at Gary's capital trial, it held that the error was harmless because of evidence that did not exist until years after the verdict—evidence which explicitly contradicts the evidence the jury heard in 1992.

That DNA testing was the linchpin of the Eleventh Circuit's prejudice analysis. Pet. App. 39a-43a. In rejecting Gary's *Giglio* claim, the court reasoned that, even without the perjured confessions, "the Florida Supreme Court reasonably determined that the record contained 'overwhelming evidence' of Whitton's guilt." Pet. App. 39a-40a. The court then listed as "evidence" which "suggests Whitton committed the murder" the post-trial DNA results. Pet. App. 40a. The court described the results as proof that Gary's boots "contained blood from a mixture of two or more individuals with the major

donor matching the DNA profile of James Maulden." Pet. App. 42a. The Eleventh Circuit relied on DNA retesting conducted a decade after Gary's conviction to conclude that the "blood-spatter evidence ties Whitton directly and firmly to Maulden's murder." Pet. App. 42a. On that basis, the Eleventh Circuit concluded that any constitutional error was harmless under *Brecht v. Abrahamson* because the "blood-spatter evidence . . . will *surely convince a jury* of the defendant's guilt." Pet. App. 42a (emphasis added).

This post-trial DNA testing was conducted under different conditions, by different experts, and decades removed from the original proceeding. Yet the Eleventh Circuit relied on the DNA testing for dispositive proof that any *Giglio* violation "did not prejudice Whitton." Pet. App. 20a. The court expressly treated that after-developed record as part of the *Giglio*-prejudice inquiry, blending new forensic evidence into the trial record to affirm a conviction the State had obtained through admittedly false testimony. Pet. App. 39a-43a. In other words, the Eleventh Circuit upheld a death sentence by relying on evidence the defense never tested—nor had reason to test—the jury never saw, and the trial court never admitted (in fact, *no court* ever admitted).

B. The Second, Sixth, and Tenth Circuits, and the North Carolina Supreme Court, Have Expressly Rejected the Eleventh Circuit's Rule

The Eleventh Circuit's approach cannot be reconciled with decisions from the Sixth, Tenth, and Second Circuits, or the North Carolina Supreme Court, each of which has expressly rejected reliance on post-trial materials when determining prejudice. Each of those courts has drawn the same bright line: when a court evaluates prejudice, it must confine itself to the record that was before the jury. It cannot rely on evidence developed years after the

verdict to retroactively declare that trial error was nonprejudicial.

1. Start with the Sixth Circuit's decision in *Apanovitch v. Bobby*, 648 F.3d 434 (6th Cir. 2011), a case that could not be more closely aligned with Gary's. There, as here, the State committed a *Brady* violation in a capital prosecution and later sought to argue there was no prejudice by pointing to "highly inculpatory" DNA evidence developed twenty-five years after the trial. *Id.* at 437. The Sixth Circuit flatly rejected that approach. "The results of a DNA test performed two decades after the trial has concluded *shed no light* on the question of whether there is a probability that the jury in 1984 would have reached a different result had the *Brady* evidence not been withheld by the prosecution." *Id.* (emphasis added).

Later testing might speak to "actual innocence," the Sixth Circuit reasoned, but "it is not enlightening as to the probability that a petitioner would have—at trial—been acquitted." *Id.* That is *this case*.

In direct conflict with *Apanovitch*, the Eleventh Circuit treated post-trial DNA evidence as dispositive proof that the constitutional violations it acknowledged occurred during petitioner's trial caused no prejudice and were thus harmless. Pet. App. 42a. The Sixth Circuit's analysis forecloses that reasoning. Both courts faced the same question: whether post-trial DNA evidence can be used to excuse a violation of due process which occurred at trial. The Sixth Circuit said no. The Eleventh Circuit said yes. The conflict could not be clearer or more direct.

2. The Tenth Circuit reached the same result as the Sixth Circuit in *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013). The court held that, "in the *Brady* context . . . it is inappropriate to consider evidence developed post-verdict" because the question is whether the wrongly withheld evidence "might have affected the jury in light of all other evidence it heard." *Id.* at 1104. As

the Tenth Circuit explained, "if our analysis necessarily looks to what might have changed had the *Brady* evidence been disclosed before trial, then it would make no sense to account for evidence that was *not* available before trial." *Id.* at 1105. The principle that prejudice is about what the jury saw, not what it did not and could not have seen, cannot be squared with the Eleventh Circuit's decision below.

3. The Second Circuit has long taken the same view. In *United States v. Jean-Baptiste*, the government urged the court to uphold a conviction based on an affidavit it proffered "during the pendency of [the] appeal" which "was not before the jury." 166 F.3d 102, 108 (2d Cir. 1999). The Second Circuit flatly rejected that argument, declaring that "it is transparently obvious that a verdict cannot be based on 'evidence' which the jury does not see or hear." *Id.* (citation omitted).

The constitutional guarantee to a trial by a jury of one's peers is rendered meaningless if an appeals court can declare that evidence "which the jury does not see or hear" can serve as the basis for the jury's verdict. *Id.* Harmlessness, the Second Circuit emphasized, must be assessed "on the basis of what other evidence the government did introduce at trial, not on the basis of the evidence it could have introduced." *Id.* The Eleventh Circuit's decision cannot be reconciled with the Second Circuit's rule.

4. The North Carolina Supreme Court followed the same approach in *State v. Best*, a case on all fours with this one. 376 N.C. 340, 852 S.E.2d 191 (2020). In *Best,* the Court addressed a capital case where the State, after suppressing exculpatory evidence, argued the *Brady* violation was not prejudicial on the basis of highly inculpatory postconviction DNA testing. *Id.* at 349 & n.4, 852 S.E.2d at 198 & n.4. The Court rejected that argument outright. It held that "[e]very criminal defendant in this state is entitled to a fair trial with full opportunity to

confront the evidence against him and to attempt to rebut the charges of which he is accused," *id.* at 354-355, 852 S.E.2d at 202, and that "we cannot … consider new evidence produced after conviction which may tend to support or negate either guilt or innocence," *id.* at 349 & n.4, 852 S.E.2d at 198 & n.4. Because the postconviction DNA results "did not exist until decades after the trial took place," the court necessarily concluded "it could not have affected the outcome of the trial," and therefore "we do not consider it here." *Id.* That rule cannot be reconciled with the Eleventh Circuit's decision below, which did the very thing *Best* forbids: rely on post-trial DNA testing to declare the constitutional violations in petitioner's trial harmless.

Taken together, these decisions demonstrate an unmistakable and entrenched conflict. The Sixth Circuit, the Tenth Circuit, the Second Circuit, and the North Carolina Supreme Court all apply the same bright-line rule: prejudice and harmlessness must be judged by reference to the trial record alone. None permit appellate courts to speculate about the probability there will be a finding of guilt at a future trial based on new evidence developed years later. The Eleventh Circuit has now adopted the opposite rule, holding that post-trial DNA testing can retroactively cure due-process violations at trial.

The split is direct and outcome-determinative. In one set of jurisdictions, Gary's conviction and death sentence would have been vacated. In the Eleventh Circuit, they stand. Only this Court can resolve that conflict and restore uniformity to a question that governs every criminal case involving harmless-error or prejudice review.

II. THE DECISION BELOW IS WRONG

A. The Prejudicial Effect of a Trial Error Must Be Assessed on the Basis of the Record Developed at the Trial

This Court's precedents, constitutional avoidance, logic, and practical consequences all establish that post-verdict evidence cannot be considered when conducting a prejudice analysis.

This Court's precedents make clear that a prejudice analysis is conducted by looking exclusively to the events at trial. This Court's decisions are unequivocal that the test for harmlessness requires a court to ask whether "the error did not influence *the jury*, or had but very slight effect." *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) (emphasis added); *see Bollenbach v. United States*, 326 U.S. 607, 614-615 (1946); *Weiler v. United States*, 323 U.S. 606, 611 (1945); *Bihn v. United States*, 328 U.S. 633, 638-639 (1946).[10] This is true regardless of the threshold for relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-638 (1993) (applying *Kotteakos*'s "substantial and injurious" prejudice standard); *Chapman v. California*, 386 U.S. 18, 24 (1967); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (applying *Giglio* materiality); *see also Kyles v. Whitely*, 514 U.S. 419, 434 (1995) (applying *Brady* materiality). Never has the Court permitted the consideration of post-verdict evidence in conducting a prejudice analysis. Not under *Chapman*. Not under *Brady*. Not under *Giglio*. Not under *Napue*. Not under *Brecht*. Not ever.

This Court's decision in *Glossip*, 604 U.S. 226, and Justice Sotomayor's concurrence in *Greer v. United*

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[10] *See also, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991); *Harrington v. California*, 395 U.S. 250, 254 (1969); *Schneble v. Florida*, 405 U.S. 427, 432 (1972); *Delaware v. Van Arsdell*, 475 U.S. 673, 684 (1986).

States, 593 U.S. 503 (2021), confirm that the prejudice analysis must be limited to the evidence presented at trial. As Justice Sotomayor explained in *Greer*: "Incriminating evidence the jury never considered is irrelevant to th[e] [harmlessness] inquiry. Appellate courts cannot find errors harmless simply because they believe inculpatory evidence the Government never put before the jury . . . is sufficient to find that the defendant is guilty." 593 U.S. at 517 (Sotomayor, J., concurring) (citation omitted). And as the Court held in *Glossip*, materials filed by the victim's relatives were irrelevant to the prejudice analysis because the court cannot consider "extra-record materials . . . , including a recent unsworn statement." 604 U.S. at 254.

Any rule which permits the introduction of unlimited postconviction evidence in the prejudice analysis would raise profound constitutional concerns. It would convert the prejudice analysis into a *de facto* retrial in the court of appeals—one conducted without the constitutional safeguards that attend a criminal trial. Upholding a conviction on the basis of evidence the jury never saw or facts the jury never found violates the Fifth and Sixth Amendments' core guarantees.

That the prejudice analysis must look only to the events at trial follows from the nature of the inquiry itself. It is chronologically impossible for information that did not exist, or was not presented, to have influenced jurors' deliberations. The prejudice inquiry asks whether what happened in the courtroom undermines confidence in the verdict, not whether later-discovered facts might make the verdict look more or less correct in hindsight. Post-trial material may speak to broader questions of guilt or innocence, but it cannot retroactively alter the dynamics of a trial that has already occurred. Folding such evidence into the analysis turns a rule designed to ensure due process into one that rewards whoever can build the most persuasive record after the fact.

Allowing courts to consider post-verdict evidence would also be unworkable in practice. Once the verdict is in, the trial record becomes a closed universe, carefully built through rules of evidence, cross-examination, and adversarial testing. Post-verdict materials—affidavits, lab reports, or expert analyses—exist beyond that universe. Courts have no reliable way to judge their credibility or weight because the witnesses were never cross-examined, the experts were never vetted, and the evidence was never subject to the ordinary checks that make trial factfinding meaningful. There are no procedural rules for admitting, excluding, or contextualizing new evidence at this stage. *Crawford* does not apply. *Daubert* does not apply. As a result, any judicial attempt to weigh post-verdict evidence amounts to guesswork, untethered from the tools that make such judgments legitimate. Petitioner has never seen the supposed expert who conducted the retesting which the Eleventh Circuit relied on to determine the constitutional violations at his trial were harmless.

The costs of allowing post-verdict evidence into the prejudice analysis would be immense. Courts would be required to imagine not just the persuasive power of the evidence, but the trial that would have been built around it. Suppose a post-verdict lab memo "clarifies" a serology result. The postconviction court would need to guess whether the analyst would have stood up to cross or the defense would have called a rebuttal expert. Imagine a fresh affidavit claims an alternative suspect. The court would have to hypothesize how demeanor, motive, prior inconsistent statements, bias, and impeachment by prior convictions might affect a jury's assessment of that witness's new testimony. Assume a new forensic technique produces a result the prosecution says is inculpatory. The court would need to determine whether the evidence would be admitted and how the defense might have responded (which did not happen here).

Asking courts to imagine how a future jury would react to evidence in a trial that has not happened invites speculation layered upon speculation. The court must predict how jurors will perceive the evidence, how defense counsel might impeach it, and how the defense might reframe its case. That is not a fair reconstruction; it is an exercise in fiction. Limiting the analysis to the trial record keeps courts grounded in real events, preserves the integrity of the jury's role, and ensures that a conviction rests only on evidence the defendant had the opportunity to confront and contest in the actual trial.

This case exemplifies the practical problems with permitting consideration of post-trial evidence in the prejudice analysis. The Eleventh Circuit embraced allegedly inculpatory postconviction evidence proffered by the State without considering any of the exculpatory evidence that has come to light since petitioner's trial. Prejudice analysis that uses newly developed evidence never subjected to the crucible of adversarial presentation invites selective incorporation and arbitrariness.

B. The *Giglio* Errors in this Case Were Prejudicial

The *Giglio* violations here were prejudicial. The Eleventh Circuit acknowledged that the State allowed Ozio to deny any criminal history while knowing that denial was false, yet it concluded the due process violation caused no prejudice. That is wrong. Setting aside the Eleventh Circuit's improper reliance on post-trial DNA testing, the trial record shows that concealing Ozio's criminal history had a substantial and injurious effect on the verdict.

On the record the jury actually saw, Gary satisfies both *Giglio* and *Brecht*. *Giglio* asks whether undisclosed impeachment "could in any reasonable likelihood have affected the judgment of the jury." 405 U.S. at 154

(citation omitted). And under *Brecht*, relief is warranted if the federal court itself harbors "grave doubt" that the error affected the verdict's outcome. *Brown v. Davenport*, 596 U.S. 118, 135-136 (2022) (citation omitted).

Those standards are met here. Before Ozio and McCollough surfaced, the State's case was threadbare: no injuries to Gary (no bruises on his body, no blood under his fingernails, *etc.*); no eyewitnesses; no murder weapon; no accurate time of death; no plausible motive; no recovered proceeds; no direct forensic evidence tying Gary to the killing, and no confession. Only after the informants appeared did the prosecutor withdraw a second-degree plea with a guidelines sentence and pursue a capital conviction. The case turned on the informants; their supposed report of a confession was its cornerstone.

And Ozio's testimony, alongside McCollough's, was devastating. *See Glossip*, 604 U.S. at 248 (recognizing the "determinative" role of testimony that furnishes direct evidence of guilt). Gary's defense that he arrived in the room after the murder to find his friend dead, bloody, and beaten to death was completely eviscerated by McCollough's and Ozio's claim that he told them he "stabbed the bastard"—a confession that never happened.

Catching the State's star witness in a lie about his background would have completely changed the trial in ways large and small. Once a witness is shown to have lied about himself, jurors instinctively doubt everything else he says. The jurors' assessment of Ozio's credibility was key to their verdict. That is especially so in *this* case, where the jury was led to believe Ozio was an especially credible witness—one with no criminal past, no motive to lie, and no reason to curry favor with prosecutors—particularly as compared to the thoroughly untrustworthy McCollough. The truth was the opposite: Ozio had a record, fabricated testimony after being threatened with imprisonment, and expected leniency.

Had the jury known any of that, its view of the case would have shifted fundamentally in a trial that turned on credibility. Moreover, discrediting Ozio's testimony would have discredited McCollough's as well because the two purportedly heard the same confession together. If jurors thought Ozio was lying, it would have affected their perception of McCollough's truthfulness as well.

The possibility that Ozio's impeachment may have changed the outcome of the trial is bolstered by the fact that both McCollough and Ozio later admitted that they were lying about Gary's confession. Given Ozio was lying, it is difficult to know how Ozio might have reacted to a devastating cross that hammered his criminal history and his incentive to curry favor with prosecutors. He might very well have admitted to his fabrication right then and there. And with Ozio discredited, the jury could have rejected his and McCollough's accounts altogether.

Giglio and *Brecht* do not demand mathematical certainty. They ask whether this Court can have confidence that the verdict was unaffected. In a case like this—where the State's unconstitutional use of false testimony supplied the only direct evidence of guilt—those standards compel reversal.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT REVIEW IN THIS CASE

A. The practical and legal significance of the questions presented cannot be overstated. Prejudice analysis is the fulcrum of postconviction review: it appears in virtually every federal habeas case and in the overwhelming majority of state collateral proceedings. Whether courts should measure prejudice by what happened or instead by what can be reconstructed afterward will affect not only the petitioner here, but the administration of justice in every jurisdiction in the Nation. Virtually every constitutional trial claim—from

ineffective assistance of counsel and *Brady* and *Giglio* violations to juror misconduct and Confrontation Clause errors—ultimately turns on a prejudice inquiry. A single rule governing how courts conduct that inquiry will affect the analysis of thousands of constitutional claims across the criminal justice system.

As a practical matter, the Eleventh Circuit's approach to prejudice review makes postconviction practice in that Circuit fundamentally different from postconviction practice in every other jurisdiction nationwide. Under the rule announced below, courts can uphold convictions and death sentences based on evidence developed after the fact—DNA tests, forensic analyses, or new witness statements that were never presented to a jury and never tested through adversarial process. Under the Eleventh Circuit's rule, the habeas inquiry is not a retrospective review of whether a constitutional error calls into grave doubt the outcome of a trial but instead is an ongoing reassessment of whether, in hindsight, the conviction seems "right." In the Eleventh Circuit, the State can save a constitutionally defective trial by introducing new forensic reports or affidavits no jury ever saw and that the defendant had no opportunity to confront, cross-examine, or test. Courts in the Eleventh Circuit may now rely on those materials to declare constitutional errors "harmless."

Whatever the correct rule is, its consequences for the administration of habeas corpus in the United States is enormous. Federal district courts currently review thousands of habeas petitions each year involving *Brady* or *Giglio* violations, claims of ineffective assistance, and other trial errors subject to prejudice review. The rule governing prejudice review dictates what evidence is developed and presented in each and every one of those petitions. Under the backward-looking trial-record rule, that analysis is difficult but cabined. Courts look to how the trial unfolded and ask whether the trial might have

been different in the absence of the constitutional violation. Under the forward-looking rule used in the Eleventh Circuit, the question is utterly unbounded. Courts look to how much evidence there is and whether it would inevitably result in a conviction in a future trial.

The forward-looking approach shifts the function of postconviction review. What has long been a process for ensuring the fairness of trials is instead a process for validating convictions. The distinction between trial and appellate adjudication blurs, the adversarial safeguards of trial erode, and the finality that habeas law seeks to protect rests on speculation about a future trial rather than a meticulous reassessment of the evidence before the jury in the trial that already happened.

The Eleventh Circuit's rule also erodes the prosecutorial duty of candor and the judicial system's ability to police misconduct. When the government can later defend a conviction by pointing to new evidence, the deterrent effect of *Giglio* and *Brady* disappears. The government can nullify a blatant intentional constitutional violation simply by developing new evidence outside the trial record that "proves" the verdict was correct. Death-sentenced inmates—whose cases often involve decades of evolving forensic science—would be particularly affected, as prosecutors could use new testing to insulate tainted trials from any meaningful remedy.

A conviction obtained through constitutionally deficient means remains deficient even if later evidence suggests guilt. The remedy for discovering such evidence post-trial is retrial with full protections, not retrospective validation of a flawed proceeding.

B. This case is the ideal vehicle to resolve the questions presented. This case cleanly and squarely presents the questions on which the courts are divided. The Eleventh Circuit expressly held that it could rely on post-trial evidence—the results of DNA retesting conducted a decade after the petitioner's trial—to

conclude that an unconstitutional use of false testimony was "harmless." The court's reliance on that later-developed evidence was outcome-determinative. The question whether such evidence can be considered in prejudice review is therefore unavoidable and dispositive here.

This case's posture ensures that the Court can resolve the issue cleanly, without threshold complications. The case arises from a final judgment in a federal habeas proceeding under 28 U.S.C. § 2254. The constitutional question was raised, briefed, and decided at every level. The Eleventh Circuit adopted the forward-looking, record-supplemented approach that petitioner challenges here.

This is the rare case in which the constitutional error is established and the only question concerns the proper standard for assessing prejudice. If this Court holds that prejudice must be measured by the record before the jury, then petitioner is entitled to relief; if the Court agrees with the Eleventh Circuit that post-trial evidence may be considered, then the judgment can stand. Either way, the Court's decision will definitively resolve the question presented.

Finally, this case is an ideal vehicle because of its gravity. The judgment under review is a death sentence imposed after a concededly tainted trial. The rule the Eleventh Circuit adopted will govern every habeas proceeding in that circuit—and, if left unreviewed, will invite other jurisdictions to follow. This Court's intervention now, in a case that squarely presents the issue and implicates the most consequential of interests, is the only way to restore uniformity to federal law and prevent further erosion of the guarantees that protect the fairness and finality of criminal trials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX