No. 25-580

In the Supreme Court of the United States

GARY RICHARD WHITTON, PETITIONER,
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
RESPONDENT.

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

BRIEF OF RETIRED JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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*.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal and state judges with decades of combined experience on the bench.[2] *Amici* have devoted much of their professional lives to improving the justice system. As relevant here, *amici* maintain a continuing interest in ensuring that the rules governing criminal proceedings are both administrable by courts and protective of the constitutional rights of defendants. Based on their deep experience as judges at both the trial and appellate levels, *amici* submit this brief to emphasize that the rule adopted by the Eleventh Circuit in the decision below is unworkable in practice. Permitting the introduction of post-trial evidence into the post-conviction prejudice analyses would invite extensive speculation and inject unpredictability into the criminal legal system. *Amici* believe these considerations take on a heightened importance in the context of capital cases, where courts must decide whether a person can legally be put to death by the State.

Amici are:

Judge Mark. W. Bennett (Ret.)—District Judge (1994-2015), Chief Judge (2000-2007), Senior Judge (2015-2019) for the United States District Court for the Northern District of Iowa; Magistrate Judge (1991-1994) for the United States District Court for the Southern District of Iowa.

Judge LaDoris Hazzard Cordell (Ret.)—Judge

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[1] Under this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The views expressed in this brief are those of the *amici* only and do not necessarily reflect the views of any institution with which *amici* are currently or have been affiliated.

(1988-2001) for the Santa Clara County Superior Court; Judge (1982-1988) for the Santa Clara County Municipal Court.

Judge T. John Ward (Ret.)—District Judge (1999-2011) for the United States District Court for the Eastern District of Texas.

SUMMARY OF ARGUMENT

In the decision below, the Eleventh Circuit held that a court assessing prejudice may rely on post-verdict evidence that the jury never saw and no trial judge ever admitted. In so holding, the Eleventh Circuit has required judges considering a post-conviction motion to effectively conduct a retrial. And in that hypothetical retrial, the court must not only estimate the persuasive value of post-verdict evidence but also imagine how its hypothetical admission would have altered every aspect of the original trial.

By adopting this rule, the Eleventh Circuit asks judges to do the impossible: to assess the credibility and weight of evidence without any procedural safeguards, to reconstruct counterfactual trials that never occurred based on post-verdict evidence, and to predict the reactions of juries to these hypothetical trials while lacking any principled way to account for the complex human dynamics that shape verdicts. The guesswork mandated by the Eleventh Circuit's rule is the opposite of the clear rules that promote fair and efficient criminal trials. Indeed, given that the Eleventh Circuit's rule relies on extensive and layered speculation, arbitrary outcomes are inevitable. That is particularly true in the context of capital cases, where the Eleventh Circuit's rule is likely to require judges to assess the credibility of ever-evolving forensic techniques based on little more than their own intuition.

The Eleventh Circuit also fails to provide any limiting principle on parties' ability to proffer post-verdict evidence or any standards to guide a judge's determination of which pieces of post-evidence will be admitted into the prejudice analysis. This unpredictability is especially intolerable in capital cases, where error is irrevocable and the Constitution demands

heightened care. *See Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("[T]he severity of the [capital] sentence mandates careful scrutiny in the review of any colorable claim of error."). The Eleventh Circuit's unworkable rule risks undermining the consistency and fairness of the criminal justice system when the stakes are at their highest.

This Court has repeatedly rejected proposed rules of criminal procedure as "[un]acceptable" when they "would lead . . . to an unworkable standard." *Montejo v. Louisiana*, 556 U.S. 778, 783 (2009); *see also Arizona v. Roberson*, 486 U.S. 675, 680 (1988) ("[o]ne of the principal advantages" of a rule of criminal procedure "is the ease and clarity of its application"). It should do so again in this case by granting the petition for a writ of certiorari and reversing the Eleventh Circuit's decision.

ARGUMENT

THE RULE ADOPTED BY THE ELEVENTH CIRCUIT IS UNWORKABLE

A. The Eleventh Circuit's Rule Requires Judges to Make Unreliable Determinations About Post-Verdict Evidence

When it comes to the admission of evidence in a criminal proceeding, procedure matters. As *amici* can attest, although judges are trained in the rules of evidence, "a mere judicial determination regarding the reliability of evidence is no substitute for the constitutionally prescribed method of assessing reliability." *Hemphill v. New York*, 595 U.S. 140, 152 (2022) (quotations omitted). Our system of criminal justice is in many ways built around the notion that

adversarial testing "beats and bolts out the Truth much better" than mere judicial instinct. M. Hale, History and Analysis of the Common Law of England 258 (1713). Consistent with that principle, this Court has rejected arguments that constitutional safeguards around the admission of evidence can be disregarded in the name of efficiency, irrespective of how reliable the evidence may appear. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317-18 (2009) (quotations omitted) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

The Eleventh Circuit's rule makes precisely that kind of impermissible tradeoff. It circumvents the adversarial procedures prescribed by the Constitution and replaces them with unguided judicial judgement, all for the apparent sake of avoiding additional proceedings during a remand. Judges will have to determine the credibility and weight of post-verdict evidence in a procedural vacuum, free of the array of procedural rules meticulously followed at trial to create the universe of facts.

This case illustrates the problems with the Eleventh Circuit's novel approach. Respondents introduced new forensic evidence that retested the blood on Petitioner's boots more than a decade after Petitioner's conviction. The Eleventh Circuit relied on that forensic evidence to conclude that the use of a perjured confession at Petitioner's trial was harmless. Yet the allegedly critical forensic evidence was never admitted into evidence by any court. And for the same reason, it was never subjected to the crucible of adversarial testing at any point.

Those departures from the standard evidentiary process raise serious concerns about the reliability of the

evidence that formed the core of the Eleventh Circuit's prejudice analysis. As this Court has recognized, "[f]orensic evidence is not uniquely immune from the risk of manipulation." *Melendez-Diaz*, 557 U.S. at 318. Indeed, "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id.* (citing National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 23-24 (2009)). And even a well-intended forensic analysis may have serious methodological deficiencies; errors, intentional or otherwise, are bound to occur. It is in recognition of these unavoidable pitfalls that our criminal justice system subjects even arguably empirical, "objective" evidence to the adversarial process. But the Eleventh Circuit rejected the wisdom of this Constitutional design when it deemed itself capable of assessing Respondent's new forensic analysis without the aid of any checks of the adversarial process.

The same concerns apply to the use of other forms of post-verdict evidence in prejudice analyses. In all cases, judges will have to assess post-verdict evidence with no established standards or procedures. If a party introduces new expert testimony, a judge will have to assess the expert's credibility and subject matter expertise without the *Daubert* hearing and cross-examination that would otherwise allow the opposing party to excavate the expert's bias, unreliability, or lack of credibility. *Melendez-Diaz*, 557 U.S. at 320 (noting that an expert's "lack of proper training or deficiency in judgment may be disclosed in cross-examination"). If a party introduces a new affidavit, a judge will have to assess the testimony therein without any of the additional context generated by cross-examination.

Barred from utilizing the typical tools and checks of the fact-finding process, judges run the risk of making determinations about post-verdict evidence that lack a credible foundation. This is especially troubling in the context of federal habeas capital cases. This Court has long acknowledged that "[t]here is no question that death, as a punishment, is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to ensure that every safeguard is observed." *Gregg*, 428 U.S. at 187 (plurality) (citations omitted). Forced to assess and weigh new post-verdict evidence without any procedural safeguards, judges will be left searching in the dark when reviewing "the gravest sentence our society may impose" on a person. *Hall v. Florida*, 572 U.S. 701, 724 (2014).

B. The Eleventh Circuit's Rule Requires Judges to Conduct Counterfactual Mini-Trials Involving the Parties' New Evidence

The Eleventh Circuit's rule further complicates matters by requiring judges to predict how the hypothetical admission of post-verdict evidence would have impacted the original trial. In other words, not only will a judge have to speculate on the persuasive power of the post-verdict evidence, but she will also have to ask numerous "what if" questions to assess how the rest of the trial would have unfolded after the admission of the new evidence. This is plainly unworkable.

Consider, for example, the introduction of a new witness' affidavit by the State. Initially, a judge would have to evaluate how persuasive the witness's testimony would have been when initially presented to the jury. That assessment includes speculating about the strength of the witness's testimony, while also considering any supporting exhibits and demonstratives that the State claims it would have introduced through the new witness.

Then, the judge would have to imagine how defense counsel would have responded to the new evidence. What would have been the substance of the cross-examination, and how successful would it have been? Would the defendant have introduced additional witnesses in response to the State's witness's testimony? And if so, would *those* witnesses have been impeached or otherwise discredited on cross-examination?

Beyond these complicated and potentially unanswerable questions, a prudent judge would also have to imagine how defense counsel might have restructured their theory of the case in response to the new evidence. For instance, if the new witness purports to have seen the defendant commit the crime, would the defendant have conceded the offense but argued mitigation? Or would the defendant have opted to deny any role in the crime and attack the witness's testimony? Even for a routine crime, a judge would likely struggle to work through all the permutations required by the Eleventh Circuit's rule. Such speculation is all the more challenging in the context of a capital case, where the trial record is likely to be lengthy and the jury is required to make determinations beyond simple guilt or innocence.

At bottom, the Eleventh Circuit's rule ignores the reality the even the most skilled and experienced judge cannot retrospectively invent the live courtroom context that would have accompanied the introduction of the evidence during trial. For example, jurors and judges frequently use nonverbal cues, such as eye contact, facial expressions, and gestures, to assess counsel and witness credibility. Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 Minn. L. Rev. 573, 582 (2008). Indeed, the notion that courtroom demeanor is important in deciding witness credibility is entrenched in American jurisprudence. Mark W. Bennett, *Unspringing*

the Witness Memory and Demeanor Trap, 64 Am. U. L. Rev. 1331, 1346 (2015); *see also* Fed. R. Evid. Art. VIII Advisory Committee Notes ("The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues."); Olin Guy Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075, 1104 (1991) ("The notion that viewing the appearance and demeanor of a witness significantly assists a trier of fact to determine the truthfulness of the witness's testimony appears to be as ancient as testimony itself."). Any single comment, gesture, or impression made by a witness could change a trial in ways small or large. Under the Eleventh Circuit's rule, however, judges will have to make predictions while reviewing evidence devoid of the live context that would have accompanied its hypothetical introduction.

C. The Eleventh Circuit's Rule Will Produce Inconsistent Outcomes in Similar Cases

Predictability and uniformity are essential to a fair criminal legal system. *See Davis v. United States*, 160 U.S. 469, 488 (1895) (explaining that "it is desirable that there be uniformity of rule in the administration of the criminal law"). A prejudice analysis that permits the kind of extensive and layered speculation called for by the Eleventh Circuit undermines those twin aims. Because imagining a counterfactual trial based on post-verdict evidence is an entirely subjective practice, different judges will naturally come to different conclusions. The incorporation of post-verdict evidence with no procedural guardrails or limiting principles will thus inevitably produce arbitrary outcomes.

This Court has already recognized the pitfalls of rules that permit judges to "attach[] the same significance to opposite facts." *Crawford v. Washington*, 541 U.S. 36, 63 (2004). In *Crawford*, for example, the Court held that the nine-factor *Roberts* test for reliability was "so

unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations." *Id.* The Court provided several examples to demonstrate that "[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them." *Id.*

That rationale applies with equal force here: a judge's prediction about the impact of post-verdict evidence depends heavily, and impermissibly, on the factors the judge considers and the weight that individual jurist accords each of them. One judge may find a statement made by a witness in custody more persuasive to a hypothetical jury because the statement was clearly against the witness's penal interest. Another judge may find a witness's statement more persuasive because the witness was *not* a suspect or in custody. *See id.* One judge may find a forensic analysis conducted the day of the crime more persuasive because of its immediacy. Another judge may find a forensic analysis conducted years later more persuasive on the assumption that more recent methodologies tend to be more advanced. The rampant unpredictability that would result from the Eleventh Circuit's rule is an "unpardonable vice"—especially in capital cases where a defendant's life hangs in the balance. *Id.* at 63.

Moreover, the Eleventh Circuit proposes no limiting principle for its rule, thereby inviting selective incorporation of post-verdict evidence. Again, this case is a perfect example: the Eleventh Circuit embraced inculpatory postconviction evidence offered by the State without incorporating any of the *exculpatory* evidence defense counsel had uncovered since Petitioner's trial. It is untenable to expect judges to incorporate unlimited additional post-verdict evidence into a prejudice analysis; accordingly, judges will be forced to employ their own

discretion, unguided by any uniform standards, to determine which pieces of post-verdict evidence will be incorporated. In practice, then, the Eleventh Circuit's rule imposes several layers of arbitrariness: first in the threshold decision of what post-verdict evidence will be incorporated into the prejudice analysis, and then in the assessment of the evidence's persuasiveness and its hypothetical impact on a trial. That result would be untenable in a routine criminal case. It is unthinkable in the context of a capital case like this one.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should grant the petition for certiorari and reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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