No. 25-580

IN THE

Supreme Court of the United States

GARY RICHARD WHITTON,

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

BRIEF OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL AND CRIMINAL LAW IN SUPPORT OF PETITIONER

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December 17, 2025

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are professors of constitutional and criminal law at institutions across the United States. *Amici* have a professional interest in ensuring that the Court is fully informed of the important constitutional and criminal law issues in this case. Specifically, *amici* submit this brief to explain that the Eleventh Circuit opinion in this case raises significant and serious constitutional issues that warrant this Court's review.

The *amici* are:[2]

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1. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to fund its preparation or submission. The parties' counsel of record received timely notice of intent to file this brief.

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SUMMARY OF ARGUMENT

This Court has "consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair" because it "involve[s] a corruption of the truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 103–04 (1976). Here, the Eleventh Circuit acknowledged that the state committed a *Giglio* violation when it permitted a jailhouse informant to falsely testify at trial that he lacked a violent criminal record despite prosecutors knowing that he did. The Eleventh Circuit deemed this violation harmless, however, based on its erroneous consideration of a DNA test which was conducted years after the trial and was never admitted into evidence or subjected to adversarial testing. But, as this Court has explained, "it is not the appellate court's function . . . to speculate upon probable reconviction and decide according to how the speculation comes out." *Kotteakos v. United States*, 328 U.S. 750, 763 (1946). By doing precisely that, the Eleventh Circuit erred, and its decision conflicts with the decisions of this Court, other circuits and state courts.

Review of the Eleventh Circuit's decision is especially warranted because it raises serious Confrontation Clause concerns. It is inconsistent with due process principles for an appellate court's harmless error analysis in a death penalty case to consider unadmitted allegedly inculpatory DNA evidence that was never presented to a jury or subject to cross-examination.

ARGUMENT

I. The State's *Giglio* Violation Should Not be Held Harmless Based on Evidence Never Put Before the Jury and Never Subjected to Adversarial Testing.

A. The Eleventh Circuit's Harmless Error Analysis Relied on Unadmitted Evidence.

In the decision below, the Eleventh Circuit correctly held that the State committed a *Giglio* violation by failing to correct a jailhouse informant's false testimony that he had never been arrested despite prosecutors knowing he had been "charged with assault with bodily injury against his father, terroristic threats against his mother, and at least one other burglary." Pet. App. 34a. The panel acknowledged that, had the witness's testimony been impeached, it would have seriously undermined his credibility. Pet App. 34a-35a.[3]

Nonetheless, the panel held this *Giglio* error harmless, giving deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA") to the Florida Supreme Court's rejection of petitioner Whitton's habeas petition based on that court's determination that there was "overwhelming evidence against Whitton." Pet. App. 37a-39a. In finding the Florida Supreme Court's assessment reasonable, the decisive factor for the Eleventh Circuit was the State's "blood-spatter evidence." Pet. App. 42a. At trial, the State's DNA examiner testified that a sample of blood on Whitton's boots was *not* a match for either Whitton or the victim. *See* Pet. App. 70a, 87a.

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3. That witness later recanted his testimony that Whitton had confessed to the crime. Pet. App. 34a.

But, years after the trial, the State had new DNA tests performed on samples of blood from Whitton's boots, which showed a match to the victim. *See* Pet. App. 10a. The Eleventh Circuit panel stated:

> [A]fter 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." In short, the blood-spatter evidence ties Whitton directly and firmly to Maulden's murder.

Pet. App. 42a (internal citations omitted). The panel concluded:

> [E]ven if the "call[]" is ultimately "debatable," it's within the realm of fair-minded disagreement, *Pye*, 50 F.4th at 1042, 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, *see Brecht*, 507 U.S. at 638. *See, e.g., State v. Perkins*, 1999 WL 334974, at *3 (Ohio Ct. App. May 28, 1999) (holding "blood spattered" on defendant's "T-shirt and jeans," as well as DNA testing proving the spatter matched the victim, "presented overwhelming evidence of" the defendant's guilt).

Pet. App. 42a-43a.

But the Eleventh Circuit's decision improperly overlooked the fact that these critical DNA test results

were never put before the jury and never admitted into evidence. *See* 15-CV-200-RH Docket entry No. 73-13 at 245 (N.D. Fla. Jan. 25, 2022). And the Florida Supreme Court's decision denying Whitton's first post-conviction petition (the decision cited in the Eleventh Circuit's harmless error analysis) does not even mention them. *See generally* Pet. App. 122a-155a.

Rather than seek the admission of the DNA testing into evidence before the state court, the State instead made an oral proffer of these post-trial DNA test results to the district court during federal habeas proceedings. *See* 15-CV-200-RH Docket entry No. 114-1 at 2 (N.D. Fla. Sept. 27, 2022); *see generally* 15-CV-200-RH Docket entry No. 114-4. The district court did not rely on or even discuss these DNA test results in its order denying relief.[4] *See generally* Pet. App. 65a-121a. Indeed, in permitting the State to make a proffer concerning the DNA tests, the district court observed that "I just don't think the DNA evidence, certainly, isn't going to affect the *Giglio* issue very much . . . But I treat it as proffered." 15-CV-200-RH Docket entry No. 116 at 271:24-272:1 (N.D. Fla. Oct. 13, 2022). Nonetheless, before the Eleventh Circuit, the State heavily relied on these DNA test results, arguing that the results justified denial of habeas relief. *See* Gov't Answer Br. at 48-49, 54, *Whitton v. Florida*, No. 23-10786-P

4. The State's proffer of the results of the DNA tests simply preserved any evidentiary ruling for appellate review; the proffer did not result in the admission of the DNA tests. *See Blackwood v. State*, 777 So. 2d 399, 410-11 (Fla. 2000) (holding that proffer of excluded evidence necessary to preserve objection for appeal); Florida Stat. § 90.104(1)(b) (permitting proffers of excluded evidence to preserve objection).

(11th Cir. Feb. 13, 2024).[5] Bafflingly, the Eleventh Circuit treated this unadmitted, untested evidence as fact for purposes of assessing whether the *Giglio* violation was harmless.

B. The Eleventh Circuit's Harmless Error Analysis Is Inconsistent with Decades of This Court's Precedent and Conflicts with Other Circuit and State Court Decisions.

The Eleventh Circuit's harmless error analysis contravenes core constitutional values and decades of this Court's precedent and also conflicts with other circuit and state court decisions. In relying on unadmitted DNA testing conducted years after the trial to find Whitton was not prejudiced by the State's *Giglio* violation, the Eleventh Circuit flouted bedrock due process principles, and subverted the jury's function as a factfinder.

Due process rights—such as the right to a fair trial, which *Brady*, *Giglio, Napue*, and related cases protect—are foundational to our constitutional order. This Court has long rejected the notion that prejudice in the context of harmless error review is equivalent to the question of

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5. The State has also referred to these unadmitted test results in its briefing before the Florida Supreme Court in regard to Whitton's second successive state habeas petition. *See* Gov't Answer Br. at 63-64, *Whitton v. Florida*, No. SC2025-1357 (Fla. Oct. 17, 2025). Notably, despite urging the Eleventh Circuit to consider these unadmitted DNA test results, the State acknowledges in the briefing before the Florida Supreme Court that "[i]t is not at all clear that regular *Giglio* analyses permit consideration of newly discovered evidence of guilt that the trial jury never heard." *Id*. at 87.

guilt or innocence, because the right to a fair trial exists independent of guilt or innocence. *See, e.g.*, *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) ("And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.").

Put another way, this Court's decisions make clear that whether the *Giglio* violation the Eleventh Circuit found in this case violated Whitton's due process rights depends on how the error affected the outcome *of his trial*. *See, e.g.*, *Kotteakos*, 328 U.S. at 764; *Giglio v. United States*, 405 U.S. 150, 153–54 (1972) ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .") (quoting *Napue v. People of State of Ill.*, 360 U.S. 264, 270 (1959); *United States v. Agurs*, 427 U.S. 97, 112 (1976) ("The proper standard of materiality must reflect our overriding concern with the justice *of the finding of guilt*.") (emphasis added); *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) ("[T]he standard for determining whether habeas relief must be granted is whether the [] error 'had substantial and injurious effect or influence in determining the jury's verdict.'") (quoting *Kotteakos,* 328 U.S. at 776); *Strickler v. Greene*, 527 U.S. 263, 298–99 ("We first essayed a partial definition [of materiality] in *United States v. Agurs,* [] where we identified three situations arguably within the ambit of *Brady* and said that in the first, involving knowing use of perjured testimony, reversal was required if there was "any reasonable likelihood" that the false testimony *had affected the verdict*.") (emphasis added).

The Eleventh Circuit's harmless error analysis in this case is inconsistent with this well-established precedent. As recognized in the circuit and state court decisions Whitton cites, *see* Pet. 20-22, evidence that was never put before the jury cannot support a finding that the State's violation (here, the erroneous failure to correct false testimony) was harmless. Such evidence has no bearing on whether the false testimony affected the outcome of defendant's trial.

C. The Eleventh Circuit's Decision Is Contrary to the Confrontation Clause.

The Eleventh Circuit's consideration of DNA testing conducted years after the trial and which was never introduced into evidence is also inconsistent with the Confrontation Clause because it runs afoul of the fundamental right that a defendant has to confront the witnesses against him.

The "central" purpose of the Confrontation Clause "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding." *Lilly v. Virginia*, 527 U.S. 116, 123–24 (1999) (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990)); *see also Tennessee v. Street*, 471 U.S. 409, 415 (1985) (explaining that the "very mission" of the Confrontation Clause is "to advance 'the accuracy of the truth-determining process in criminal trials'") (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). "The opportunity for cross-examination . . . is critical" to achieve this goal. *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). Indeed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The Confrontation Clause addresses "the paradigmatic evil" of "trial by affidavit." *Dutton v. Evans*, 400 U.S. 74, 94 (1970); *see also California v. Green*, 399 U.S. 149, 156 (1970) ("[T]he particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates."). A face-to-face encounter combats this great "vice" by allowing the accused "to directly challenge the accuser's testimony before the factfinder." *Id.* at 192 (Brennan, J., dissenting) (citing J. Wigmore, EVIDENCE §§ 1364, 1365 (3d ed. 1940)); *see also Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (emphasizing the importance of "a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief").

The Eleventh Circuit's decision cannot be reconciled with the Confrontation Clause. The State decided not to introduce the DNA test into evidence or to call the person who administered the test as a witness during the post-conviction evidentiary hearing. Given that choice, a court cannot, consistent with the Confrontation Clause, rely upon that unadmitted, unsponsored test to support a lack of prejudice under *Giglio*. And yet, that is exactly what the Eleventh Circuit did to conclude that the *Giglio* violation was harmless.

Indeed, permitting the Eleventh Circuit's decision to stand would encourage sandbagging. It would allow the

state to forgo admitting questionable evidence during post-conviction proceedings and then later rely upon that unadmitted, untested evidence to argue that any error is harmless. At the same time, it would deprive the defense of the opportunity to challenge that evidence through cross-examination or the submission of contrary evidence. This approach is fundamentally unfair and contrary to due process and the Confrontation Clause.

The Eleventh Circuit's opinion also runs headlong into this Court's precedent. In *Smith v. Arizona*, the defendant was charged with several drug-related offenses after police found him "with a large quantity of what appeared to be drugs and drug-related items." 602 U.S. 779, 779 (2024). The forensic analyst who conducted testing on the seized substances did not testify at the trial because she "stopped working at the lab." *Id.* at 780. So the state called another analyst who "conveyed to the jury what [the original analyst's] records revealed about her testing." *Id.* The Court held that the substitute analyst's testimony violated the Confrontation Clause because "[a] [s]tate may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her." *Id.* at 802–03. Like the defendant in *Smith*, Whitton never had the opportunity to cross-examine the analyst who developed the DNA evidence against him.[6] In fact, Whitton never had any opportunity to contest the evidence because it was merely proffered and never admitted into evidence. That the Eleventh Circuit relied on such

6. There is no indication in the record that the person who conducted the testing was unavailable to testify about the results.

evidence during post-conviction proceedings does not change this fundamental problem and reflects an improper end-run around the constitutional protections guaranteed by the Confrontation Clause.

CONCLUSION

The Eleventh Circuit erred when it concluded the State's *Giglio* error was harmless. This Court should grant certiorari and reverse the Eleventh Circuit's decision.

Respectfully submitted,

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