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 U.S. Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Petitioner was convicted of capital murder, and the Florida state courts rejected his habeas claims. On federal habeas review, petitioner raised a new claim under *Giglio*, asserting that a witness testified falsely about his arrest record. The state courts were never presented with and never passed on that claim. Instead, the Florida Supreme Court rejected petitioner's other claims and held that the evidence against petitioner was "overwhelming." In so doing, the Florida Supreme Court never mentioned or relied on newly discovered inculpatory DNA evidence against petitioner.

In assessing petitioner's newly raised federal habeas claim, the Eleventh Circuit held that the Florida Supreme Court's finding of "overwhelming evidence" amounted to a holding that the jury would have reached the same result. After reviewing the evidence against petitioner, the Eleventh Circuit concluded that the Florida Supreme Court's finding was not unreasonable, and thus that it was owed deference under AEDPA. In so doing, the Eleventh Circuit also mentioned the newly discovered inculpatory DNA evidence.

The question presented is whether the Eleventh Circuit was correct that the Florida Supreme Court's finding of overwhelming evidence against petitioner was reasonable under AEDPA's deferential standard of review.

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STATEMENT

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits the role of federal courts in reviewing state criminal convictions. A federal court shall not grant habeas relief unless "the applicant has exhausted the remedies available in the courts of the State," subject to exceptions not at issue here. 28 U.S.C. § 2254(b)(1)(A); *see Ex parte Royall*, 117 U.S. 241 (1886).

Beyond exhaustion, a federal court "shall not" grant habeas relief on a "claim that was adjudicated on the merits in State court proceedings" unless the State decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362 (2000).

As to Section 2254(d)(1), a "state court decision is contrary to clearly established federal law if the state court either arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Davis v. Sellers*, 940 F.3d 1175, 1185 (11th Cir. 2019) (cleaned up). The "state court's ruling" must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

As to § 2254(d)(2), federal courts must "accord the state trial court substantial deference" to its factual determinations. *Brumfield v. Cain*, 576 U.S. 305, 314 (2015); *see Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (courts must review "the specific reasons given by the state court and defe[r] to those reasons if they are reasonable"). Federal courts cannot grant relief "even if some of the state court's individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an unreasonable determination of the facts and isn't based on any such determination." *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (quotation omitted). And "a determination of a factual issue made by a State court shall be presumed to be correct," rebuttable by a petitioner only upon "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). These standards require federal courts to give the "benefit of the doubt" to merits decisions issued by the courts of the sovereign States. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam).

2. James Maulden was found stabbed to death in his room at the Sun and Sand Motel in Destin, Florida, on October 10, 1990. Pet. App. 3a. Along with a skull fracture, he had sustained three fatal stab wounds to the chest and other stab wounds on his body. *Id.* The motel room was covered in blood spatter, consistent with "significant bleeding" and "violent combat." *Id.*

According to a motel clerk, Maulden had checked in the day before after arriving in another man's car. *Id.* That man had helped Maulden check in, as Maulden was intoxicated. *Id.* After doing so, the man

left; the clerk, however, saw someone get into the man's car, parked near Maulden's room, later that night, and gave police the car's license-plate number. *Id.* That led police to petitioner Gary Richard Whitton. *Id.*

At the police station, petitioner told the officers that he knew Maulden from rehab and acknowledged that he had dropped Maulden off at the motel the previous afternoon. Pet. App. 4a. After denying that he had gone back to the motel later, petitioner admitted that he had returned to Maulden's room, discovered him dead, and fled in a panic. *Id.* Petitioner's fingerprints were found on a bag near Maulden's body. *Id.*

Police found "medium velocity" blood "spatter" consistent with "a stabbing or a beating," targeted by "forceful bloodshed," inside of petitioner's boots. *Id.*; *see* Pet. 9. The blood spatter traveled "from top to bottom" inside the boots, belying petitioner's claim that blood from the motel seeped into his socks from "between his boot soles" and "uppers." Pet. App. 4a. The blood stains matched Maulden's blood type, as did blood stains in petitioner's car. *Id.*

3. At trial, the State offered evidence that the day before Maulden was found dead, Maulden had asked petitioner to drive him to Maulden's bank. Pet. App. 5a. Maulden, intoxicated, withdrew his account balance of $1,135.88. *Id.* When the two arrived at the motel, petitioner wrote down a false license-plate number on the registration, but the clerk noticed and corrected it. *Id.* The next day, petitioner bought gas at 2:37 a.m., paid his car registration fee, and paid two utility bills, totaling about $228. Pet. App. 5a, 40a.

The State also called two witnesses, Jake Ozio and Kenneth McCullough, who were incarcerated with petitioner. Pet. App. 5a. Both testified that petitioner confessed to the murder. *Id.* Ozio had been arrested for burglary and possession of a short-barrel shotgun, but shortly before petitioner's trial he was released on probation and his firearm charge was reduced to a misdemeanor. *Id.* He testified at trial that he had overheard petitioner tell McCullough that he had "stabbed the bastard." *Id.* McCullough, who was serving a 15-year sentence for seven felony convictions, corroborated Ozio's account. *Id.* He also admitted that he was a "close personal friend" of the prosecutor's mother. Pet. App. 6a.

Petitioner testified in his own defense, claiming that he had returned to the motel to tell Maulden that his mother was looking for him and that he fled after he found Maulden dead. *Id.* He added that a former tenant had recently given him $200 to pay off utility bills. *Id.*

The defense also called a DNA analyst from the Florida Department of Law Enforcement, who testified that although the blood on petitioner's boots was Maulden's blood type, the DNA matched neither petitioner's nor Maulden's DNA.[1] *Id.*

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[1] In 2002, the State retested the blood on petitioner's boots and determined that the inside of the 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. 6a n.5. The State also determined that Maulden was a DNA contributor to one area on the left boot and a possible contributor to another area on the right boot. *Id.*

The jury found petitioner guilty of murder and robbery. Pet. App. 7a.

At the penalty phase, the advisory jury unanimously recommended a death sentence. *Id.* After finding five aggravating circumstances and several non-statutory mitigating factors, the sentencing court imposed the death penalty. Pet. App. 7a–8a.[2] The Florida Supreme Court affirmed on direct appeal. Pet. App. 8a.

4. In 1997, petitioner filed for state postconviction relief. Pet. App. 10a. As relevant here, petitioner claimed that because Ozio allegedly recanted his trial testimony that petitioner confessed to him in prison, the State violated his rights under *Giglio v. United States*, 405 U.S. 150 (1972). Pet. App. 11a. The state postconviction court denied relief on all of petitioner's claims, and the Florida Supreme Court affirmed. Pet. App. 12a.

As for petitioner's *Giglio* claim, the Florida Supreme Court found that petitioner "failed to present any evidence in support of his claim." Pet. App. 131a. He "failed to demonstrate that" Ozio's testimony "was false" because "Ozio refused to testify [in the postconviction proceedings] and [petitioner] did not seek to have Ozio's affidavit submitted into evidence." *Id.* And "even if Ozio's trial testimony was

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[2] The five aggravators were: (1) petitioner murdered Maulden while on parole for an armed robbery; (2) petitioner was previously convicted of another felony involving the use or threat of violence; (3) the crime was committed to avoid arrest; (4) the crime was committed for pecuniary gain; and (5) the crime was heinous, atrocious, or cruel. *Whitton v. State*, 649 So. 2d 861, 864 (Fla. 1994).

false, [petitioner] ha[d] not demonstrated that the State was aware that Ozio intended to present false testimony." *Id.*

Petitioner did not claim in state court—as he does now—that the State violated his *Giglio* rights by allowing Ozio's false testimony regarding his arrest record to go uncorrected. As a result, the Florida Supreme Court did not address this new claim.

In the course of rejecting petitioner's other claims, the Florida Supreme Court held that petitioner's appellate counsel did not perform deficiently and that petitioner could not establish prejudice given the "overwhelming evidence against" him. Pet. App. 153a.

After a successive state habeas petition based on *Hurst v. Florida*, 577 U.S. 92 (2016) was rejected, petitioner sought federal habeas relief. Pet. App. 12a.

5. In petitioner's federal habeas petition, he again pressed his *Giglio* claim regarding Ozio's testimony. Pet. App. 13a. But he added a new claim: That Ozio testified he had "never previously been arrested" (before his most recent arrest). Pet. App. 79a. Ozio had a juvenile record, and the State's files included this information. *Id.* After holding an evidentiary hearing, the district court found that this did not give rise to a *Giglio* violation because, in its view, a juvenile arrest "ordinarily would not be admissible to impeach a witness" and thus the false testimony "could not have made a difference." *Id.* The district court denied habeas relief on all of petitioner's claims, but granted a certificate of appealability as to a few issues, including petitioner's *Giglio* claim regarding Ozio's false testimony. Pet. App. 121a.

On appeal, the Eleventh Circuit concluded that (1) Ozio's testimony about his arrest record was false; (2) the State had those records; and (3) the State "capitalized on the false testimony by portraying Ozio as a young kid with no criminal past." Pet. App. 34a–35a. The State argued that petitioner failed to exhaust this claim in state court, but the Eleventh Circuit declined to address that argument because it concluded that petitioner's claim failed on the merits. Pet. App. 35a n.10. The Eleventh Circuit rejected the district court's conclusion that the *Giglio* violation would not have made a difference, explaining that the impeachment evidence likely would have been admissible and that Ozio's juvenile record would have undermined his credibility. Pet. App. 35–36a. As a result, the Eleventh Circuit could not "affirm the district court's decision on its finding of harmless error." Pet. App. 36a.

The Eleventh Circuit affirmed the rejection of petitioner's claim, however, on the other basis advanced by the State: That under AEDPA, the court "owe[d] deference to the Florida Supreme Court's determination that, even without [petitioner's] confession, the State marshalled overwhelming evidence that would have caused the jury to reach the same result." Pet. App. 37a. In reaching that conclusion, the Eleventh Circuit examined the voluminous evidence considered by the Florida Supreme Court. Pet. App. 40a–42a. It also noted that after retesting the DNA, the State confirmed that the inside of petitioner's boot contained blood matching the victim's DNA profile. Pet. App. 42a.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

Petitioner contended, for the first time on federal habeas review, that the State violated his rights under *Giglio v. United States*, 405 U.S. 150 (1972), by failing to correct a witness's false statement at trial that he had never been arrested before. Petitioner never presented this claim in Florida state court and therefore the Florida Supreme Court never considered it when concluding that petitioner was not entitled to habeas relief. Nor did he present any evidentiary basis for that claim to the Florida state courts.

In reviewing the Florida Supreme Court's decision under Section 2254, the Eleventh Circuit declined to reach whether petitioner had exhausted this new claim (or whether he was entitled to develop it factually for the first time in federal court) and instead rejected it on the merits. The Eleventh Circuit held that even assuming that petitioner established a *Giglio* violation based on that testimony, he was not entitled to federal habeas relief because the Florida Supreme Court reasonably determined that overwhelming evidence supported the guilty verdict. That determination, the Eleventh Circuit explained, was an implicit holding that the (unexhausted) *Giglio* violation would not have been prejudicial. Under AEDPA, the Eleventh Circuit was bound to defer to the Florida Supreme Court's finding of overwhelming evidence unless it was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020).

After reviewing the evidence canvassed by the Florida Supreme Court—evidence that did *not* include

the retested DNA—the Eleventh Circuit held that the Florida Supreme Court's prejudice determination was reasonable. In so doing, the Eleventh Circuit also mentioned that the retested DNA evidence helped support its *own* conclusion that the Florida Supreme Court's decision was reasonable.

Whether or not the Eleventh Circuit's reliance on the retested DNA was proper, its holding does not conflict with any decision, cited by petitioner or otherwise. Instead, the cases cited by petitioner hold that when assessing prejudice for *Brady*-type errors, courts may not rely on evidence that the jury never saw. But the Florida Supreme Court relied only on evidence that the jury saw, and the Eleventh Circuit held only that the Florida Supreme Court's implicit lack-of-prejudice decision was reasonable, *not* that the *Giglio* error was harmless because of evidence not before the jury.

In any event, the decision below was correct. Even setting aside the retested DNA evidence, the Eleventh Circuit reviewed the evidence that the jury did see and correctly concluded that the Florida Supreme Court's finding of overwhelming evidence against petitioner was not so obviously wrong as to be beyond fairminded disagreement. Although petitioner strains to suggest that the retested DNA evidence was critical to that analysis, reading the Eleventh Circuit's decision and the evidence it relied on rebuts that notion.

Certiorari is also unwarranted because the question presented (as framed by petitioner) was not briefed, argued, or analyzed below. In other words, the Eleventh Circuit never considered whether it was

proper to rely on the retested DNA evidence in applying AEDPA deference. And the centerpiece of petitioner's claim for relief—the *Giglio* claim based on the false arrest-record testimony—was never exhausted or factually developed in state court. Striking the portion of the Eleventh Circuit's opinion discussing the retested DNA evidence thus could not result in petitioner receiving federal habeas relief. It would instead amount to mere opinion revision.

The petition should be denied.

I. THIS CASE DOES NOT IMPLICATE ANY CIRCUIT SPLIT.

Petitioner argues that the Eleventh Circuit's decision created a conflict with other circuits and a state court of last resort. It did not. Instead, petitioner's asserted conflict is based on a holding that the Eleventh Circuit never issued.

Petitioner's sole remaining claim is a *Giglio* claim based on Ozio's false testimony regarding his arrest record. To prove that claim on direct review, petitioner must have shown "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment." *United States v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017) (quotation omitted). Under *Chapman v. California*, before a *Giglio* error "can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. 18, 24 (1967). Petitioner did not raise a *Giglio* claim based on Ozio's false

arrest-record testimony either on direct review or state collateral review, however.

"[I]n order to obtain federal habeas relief, a state prisoner must 'show far more' than 'clear error.'" *Klein v. Martin*, 607 U.S. ___, 2026 WL 189976, at *4 (2026) (per curiam) (quoting *Shinn*, 592 U.S. at 118). Petitioner must have established that the *Giglio* error "resulted in actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quotation omitted). "Under this test, relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (quotations omitted). Put another way, "[t]he habeas claimant must . . . establish that the state court 'blunder[ed] so badly that every fairminded jurist would disagree' with the decision." *Klein*, 607 U.S. ___, 2026 WL 189976, at *4 (quoting *Mays v. Hines*, 592 U.S. 385, 392 (2021)). This standard "reflects the view that a State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Ayala*, 576 U.S. at 268.

Yet even that does not end the matter. The Florida Supreme Court held that, even setting aside McCullough's or Ozio's testimony regarding petitioner's confessions, the evidence against petitioner was "overwhelming." Pet. App. 153a. As the Eleventh Circuit explained, "a lack-of-prejudice holding immediately follows" from that conclusion because "errors are harmless 'under the *Brecht*

standard where . . . other evidence of guilt is overwhelming.'" Pet. App. 39a. The Florida Supreme Court's implicit *Chapman* holding, concluding that any error was harmless, is reviewed under AEDPA. *Ayala*, 576 U.S. at 268–69; *see Johnson v. Williams*, 568 U.S. 289, 300 (2013) (federal courts have "no authority to impose mandatory opinion-writing standards on state courts").

And "[w]hen a *Chapman* decision is reviewed under AEDPA, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Ayala*, 576 U.S. at 269; *see Wilson*, 584 U.S. at 125 (AEDPA requires courts to review "the specific reasons given by the state court and defe[r] to those reasons if they are reasonable"). Petitioner thus bore the burden to establish that the state court's decision to reject his claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Ayala*, 576 U.S. at 269–70. As the Eleventh Circuit correctly held, and as discussed below, petitioner did not meet that burden.

Petitioner's claim of conflict on the question of "whether a court assessing trial prejudice may rely on evidence the jury never saw," Pet. 18, is thus illusory. The Eleventh Circuit was not assessing trial prejudice when it rejected petitioner's claim; when it *did* assess trial prejudice, it concluded that the *Giglio* violation was *not* harmless. Pet. App. 36a. Nor did the Eleventh Circuit "h[o]ld that a *Giglio* violation can be deemed harmless on the basis of DNA evidence developed a decade after trial." Pet. 18. Instead, the Eleventh

Circuit held that even though the error was *not* harmless, the Florida Supreme Court's conclusion that the evidence against petitioner was "overwhelming" was reasonable and thus owed deference under AEDPA, precluding habeas relief.[3] Pet. App. 43a. That fact-bound determination is not worthy of this Court's review.

Even the reading of the Eleventh Circuit's decision most charitable to petitioner does not give rise to a conflict. Nothing in the Eleventh Circuit's decision purports to give dispositive or outcome-determinative weight to the retested DNA evidence in assessing the reasonableness of the Florida Supreme Court's decision. For good reason: The Florida Supreme Court never relied on it or mentioned it. But even if

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[3] Although the Florida Supreme Court did not purport to reject petitioner's exhausted *Giglio* claims regarding Ozio's testimony (not at issue here) on this basis, the Eleventh Circuit properly concluded that it should not "accept readings of AEDPA that 'strictly limit[]' a state court 'to the particular justifications' it 'memorialized in its written opinion.'" Pet. App. 39a (quoting *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1039 (11th Cir. 2022)); *see also Klein*, 607 U.S. ___ 2026 WL 189976, at *4 ("a federal court must 'carefully consider all the reasons and evidence supporting the state court's decision'" (quoting *Mays*, 592 U.S. at 391)); *Blankenship v. Hall*, 542 F.3d 1253, 1272 (11th Cir. 2008) (explaining "implicit findings of fact are entitled to deference under § 2254(d) to the same extent as explicit findings of fact"). The Florida Supreme Court expressly concluded that the evidence against petitioner was "overwhelming" even without the testimony regarding his confessions. Pet. App. 153a. And "a lack-of-prejudice holding immediately follows" from that conclusion. Pet. App. 39a. *See Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (A state court "need not make detailed findings addressing all the evidence before it."). Under AEDPA, the Eleventh Circuit owed that conclusion deference.

petitioner could show that the Eleventh Circuit could not have concluded that the Florida Supreme Court reasonably determined that the evidence was "overwhelming" without the DNA evidence, the Eleventh Circuit's reliance on that evidence in this context does not give rise to a circuit split.

In *Apanovitch v. Bobby*, the Sixth Circuit explained that the results of a recent DNA test were irrelevant to the analysis of whether a *Brady* error was prejudicial. 648 F.3d 434, 437 (6th Cir. 2011). And in *State v. Best*, the North Carolina Supreme Court likewise concluded that later-developed DNA evidence was irrelevant to the *Brady* prejudice analysis. 852 S.E.2d 191, 198 n.4 (N.C. 2020). Neither case addressed whether it was permissible to consider later-developed DNA evidence in assessing the distinct question of whether a state court's decision was reasonable under AEDPA.

In determining that the evidence against petitioner here was "overwhelming" (therefore precluding a finding a prejudice), moreover, the Florida Supreme Court did not rely on or even mention the retested DNA evidence. And the Eleventh Circuit's holding rejecting petitioner's habeas claim was limited to a determination that the Florida Supreme Court's decision was reasonable under AEDPA. Pet. App. 43a. *That* holding does not conflict with either the Sixth Circuit's holding or the North Carolina Supreme Court's holding that evidence not available at trial is irrelevant to the prejudice inquiry under *Brady* (which is distinct from the inquiry under AEDPA).

The conflict analysis with *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013), is similar. There, the Tenth Circuit concluded that only *Brady* evidence available before trial was relevant to the *Brady* materiality analysis. *Id.* at 1104. But the ultimate question answered by the Eleventh Circuit here was not whether petitioner established a *Giglio* violation—the Eleventh Circuit held that he had because the testimony was not harmless (Pet. App. 36a)—but whether the Florida Supreme Court reasonably determined that "Ozio's testimony, overall, was immaterial to the jury's verdict" (Pet. App. 36a) because the evidence against petitioner was overwhelming (Pet. App. 37a). In other words, in determining that the *Giglio* violation was not harmless (like the *Trammell* court determined that the *Brady* violation was material), the Eleventh Circuit did not consider any evidence not available at trial. It did so only when considering the distinct question of whether the Florida Supreme Court's finding of overwhelming evidence against petitioner was reasonable, precluding relief *despite* any knowing use of false testimony. The *Trammell* court simply never confronted the question of whether that would have been proper under AEDPA because the state court there had made no overwhelming-evidence finding.

The Second Circuit's decision in *United States v. Jean-Baptiste*, 166 F.3d 102 (2d Cir. 1999), is even farther afield. There, the court held that a conviction could not be upheld on direct appeal based on evidence contained in an affidavit proffered during the appeal. *Id.* at 108. That a conviction can be sustained only

based on evidence presented to the jury has no bearing on the AEDPA-deference question here.

Even petitioner characterizes the cases supporting his purported conflict as "draw[ing] the same bright line: when a court evaluates prejudice, it must confine itself to the record that was before the jury." Pet. 19. That is what the Florida Supreme Court did. And the Eleventh Circuit itself concluded that the *Giglio* violation was not harmless based only on the record before the jury. Pet. App. 36a. But the Eleventh Circuit did not reject petitioner's claim on that basis; it held that the Florida Supreme Court's lack-of-prejudice evaluation—*itself confined to the record before the jury*—was reasonable under AEDPA's deferential standard. Pet. App. 43a. No conflict exists.

At bottom, petitioner's asserted conflict rests on the proposition that the Eleventh Circuit denied habeas relief because it held that petitioner was not prejudiced by any knowing use of false testimony. *E.g.*, Pet. 30–31 ("The Eleventh Circuit expressly held that it could rely on post-trial evidence . . . to conclude that an unconstitutional use of false testimony was 'harmless.'"). That proposition is wrong even on the face of the Eleventh Circuit's opinion. Pet. App. 36a ("[W]e cannot affirm the district court's decision on its finding of harmless error."). The petition either elides or ignores the standard of review under AEDPA applied by the Eleventh Circuit: whether the Florida Supreme Court's decision was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Pye*, 50 F.4th at 1041–42 (quoting *Shinn*, 592 U.S. at 118); *see also Harrington*, 562 U.S. at 101. In other words, the question

answered by the Eleventh Circuit was *not* whether the *Giglio* error "had a prejudicial effect on the outcome of a trial"; it was whether the Florida Supreme Court reasonably determined as much under AEDPA's deferential standard. Pet. App. 43a. And it did—without relying on any evidence not before the jury.

Last, even if any tension existed between the decision below and the decisions on which petitioner relies, the Eleventh Circuit's decision is unpublished. In the Eleventh Circuit, "unpublished decisions are not binding authority and they are persuasive only to the extent that a subsequent panel finds the rationale expressed in that opinion to be persuasive after an independent consideration of the legal issue." *Koletas v. United States*, 159 F.4th 813, 820 (11th Cir. 2025) (quotation omitted).[4] Petitioner thus cannot establish any conflict worthy of this Court's review—let alone on any issue that petitioner actually exhausted in state court, *see infra* at 21.

II. THE DECISION BELOW WAS CORRECT.

The Eleventh Circuit's decision to defer to the Florida Supreme Court's rejection of petitioner's *Giglio* claim was mandated by AEDPA: The Florida Supreme Court's holding that the evidence of petitioner's guilt was "overwhelming" was manifestly reasonable. In determining that the Florida Supreme Court's decision—which did not rely on or even mention the retested DNA evidence—was reasonable, the Eleventh Circuit relied on the following facts:

[4] Petitioner thus errs in suggesting that the Eleventh Circuit's drive-by reliance on the new DNA evidence will "govern every habeas proceeding in that circuit," Pet. 31.

- "The undisputed facts place[d] [petitioner] at the scene of the crime the night that Maulden was killed," Pet. App. 40a;
- "[T]he motel clerk saw [petitioner's] car parked at the motel, and [petitioner] admitted he was at the motel," *id.*;
- Petitioner's "boots and his car were stained with blood," *id.*;
- That blood, "after later retesting, matched Maulden's DNA,"; *id.*;
- "[T]he blood stains on and inside [petitioner's] boots are consistent with 'a stabbing or a beating,'" *id.*;
- Petitioner "could not explain the downward blood spatter on the inside of his boots," *id.*; and
- Petitioner's "car contained a power and gas receipt and a car wash ticket for 2:37 a.m. . . . the night of the murder, *id.*

Even setting aside one piece of evidence that the Eleventh Circuit considered—the retested DNA that later matched Maulden's DNA—the evidence was indeed "overwhelming." As the Eleventh Circuit explained, petitioner "can't rebut the State's blood-spatter evidence." Pet. App. 41a. The inside of petitioner's boots contained blood matching Maulden's blood type and were the "'target for forceful bloodshed' and 'medium velocity' blood spatter consistent with a "stabbing or a beating.'" *Id.* The evidence also suggested that "the blood traveled from the top of [petitioner's] boots to the bottom, directly contradicting [his] testimony that he was in Maulden's room for only a minute before fleeing." *Id.* And "the State's expert rebutted [petitioner's] theory that blood seeped into his boots through their bottoms

by testifying that some of the downward blood spatter had dried before [petitioner] put his boots back on; [petitioner] could not have been wearing his boots when 'the blood spatter occurred on the interior of them.'" *Id.* at 41a–42a. Whether or not the DNA matched Maulden, the blood spatter evidence was consistent only with petitioner's guilt. The State also "introduced expert testimony that effective washing can eliminate traces of blood" that might logically have appeared elsewhere on petitioner's clothing and evidence that petitioner "attempted to wash away the blood he collected in Maulden's room." Pet. App. 42a.

After concluding that petitioner "can't rebut the State's blood-spatter evidence," and rejecting petitioner's counterarguments, Pet. App. 41a–42a, the Eleventh Circuit mentioned that retesting of the DNA on petitioner's boots confirmed that the inside of the boots contained blood with Maulden's DNA, Pet. App. 42a. But even without the DNA evidence, the court concluded that the blood spatter evidence "has no explanation other than one that is consistent with the defendant's guilt." Pet. App. 42a. The blood spatter was consistent with "a stabbing or a beating"; it "traveled from the top of [petitioner's] boots to the bottom"; and petitioner "could not have been wearing" the boots "when the blood spatter occurred on the interior of them." Pet. App. 41a–42a.

The Eleventh Circuit's discussion of all this evidence makes clear that, even before it considered the retested DNA evidence, it viewed the evidence as overwhelming—or, at the very least, that the Florida Supreme Court was not "so obviously wrong" to conclude that it was. *See id.* Petitioner is thus simply

incorrect in stating that the Eleventh Circuit determined that the Florida Supreme Court's holding was reasonable based "almost entirely on the basis of" the DNA evidence, Pet. i, or that it treated the retested DNA as "dispositive proof," Pet. 20, or "outcome-determinative, Pet. 31. Even without the retested DNA evidence, the "call" was at least "debatable," and therefore well within the realm of fairminded disagreement. Pet. App. 42a.

That the call was debatable is buttressed by McCullough's unrebutted testimony that petitioner confessed to killing Maulden. The Florida Supreme Court concluded that "the only evidence that McCollough may have wanted to recant his trial testimony" that petitioner confessed "was hearsay evidence presented by a third party." Pet. App. 130a. The Florida Supreme Court noted that "recantations are not credible." Pet. App. 153a. It also expressly held that the evidence against petitioner was "overwhelming," even without the testimony about his confession. *Id.* Add in the unrebutted testimony about the confession, and the Florida Supreme Court's determination of overwhelming evidence was eminently reasonable.

In sum, petitioner's repeated assertions that the Eleventh Circuit's "reliance on that later-developed [DNA] evidence was outcome-determinative" (Pet. 31) are incorrect. Nothing supports petitioner's ipse dixit that, without considering that evidence, the Eleventh Circuit would have held that the Eleventh Circuit would have found that the Florida Supreme Court's "overwhelming evidence" determination—made

without reliance on the DNA evidence—was unreasonable.

Next, Petitioner attempts to cast the Florida Supreme Court's denial of habeas relief as unreasonable based on Ozio's testimony that he had "never been arrested before." Pet. 26–28. That attempt runs into two insurmountable obstacles.

First, petitioner did not exhaust his *Giglio* claim regarding Ozio's testimony about his arrest record in state court, and the Florida Supreme Court never had an opportunity to consider it. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring exhaustion); *Ex parte Royall*, 117 U.S. 241 (1886). Petitioner never raised the arrest-record claim in his state habeas petition or before any Florida state courts. *See* Petition, *Whitton v. State of Florida*, No. SC12-2522, 2012 WL 9502913 (Fla. Dec. 5, 2012); *Whitton v. State*, 161 So. 3d 314, 323–24 (Fla. 2014) (assessing only petitioner's claim that Ozio falsely testified about petitioner's confession). Nor did he develop the factual basis for it in state court.

The State raised this exhaustion argument below, *see* Answer Br., *Whitton v. Sec'y, Fla. Dep't of Corrs.*, No. 23-10786, Dkt. 31, at 55, 72–73 (11th Cir. Feb. 13, 2024), but the Eleventh Circuit declined to address it because the court resolved the merits of petitioner's *Giglio* claim instead. *See* Pet. App. 35a n.10. Because the Florida Supreme Court was never given a chance to address the arrest-record claim, the Eleventh Circuit could not have granted habeas relief on that claim. 28 U.S.C. § 2254(b)(1)(A).

Second, because the Florida Supreme Court determined that petitioner's guilt was supported by "overwhelming evidence" at trial, petitioner's arguments about the prejudicial nature of Ozio's testimony that he had "never been arrested before" (Pet. 26–28) are beside the point. The Eleventh Circuit disagreed that the *Giglio* violation was harmless here, Pet. App. 36a, but it appropriately deferred to the Florida Supreme Court's implicit conclusion that it was—or would have been had it been exhausted. "[E]ven if undisclosed evidence 'entirely discredit[s]' a prosecution witness, the failure to turn over the evidence is not material if 'considerable' other evidence 'link[s]' the defendant to the crime and the record provides 'strong support' that the defendant would have been convicted anyway." *Klein*, 607 U.S. ___, 2026 WL 189976, at *4 (quoting *Strickler v. Green*, 527 U.S. 263, 292–94 (1999)); *see Mansfield v. Sec'y, Dep't of Corrs.*, 679 F.3d 1301, 1313 (11th Cir. 2012) ("[T]he erroneous admission of evidence is likely to be harmless under the *Brecht* standard where there is significant corroborating evidence, or where other evidence of guilt is overwhelming." (citations omitted)). Thus, the Florida Supreme Court's reasonable determination that the evidence of guilt was overwhelming constituted a holding that any *Giglio* violation (had it been preserved) would have been harmless.

III. THIS CASE IS A POOR VEHICLE.

For several reasons, this case also does not present an appropriate vehicle for addressing whether a court can rely on subsequently tested DNA evidence in this particular AEDPA context. Petitioner presents the

Eleventh Circuit's consideration of the retested DNA evidence as a "linchpin" "holding" of its decision. Pet. 18. Reading the relevant portion of the unpublished opinion, however, clarifies that at most the Eleventh Circuit considered it to be just one more factor supporting the reasonableness of the Florida Supreme Court's prejudice determination. *See* Pet. App. 41a–42a.

In any event, whether it was proper to consider the retested DNA evidence was not briefed below or analyzed by the Eleventh Circuit.[5] So the Eleventh Circuit never assessed, with the aid of adversarial argument, whether considering that evidence would be appropriate in applying AEDPA deference. Nor did it engage with other courts that have held—albeit in the distinct context of a *Brady* prejudice determination—that considering such evidence would be improper. Instead, it simply considered that evidence to be yet another factor supporting the reasonableness of the Florida Supreme Court's decision.

That is why petitioner can assert only that "[t]he *constitutional question*"—i.e., his *Giglio* claim—"was raised, briefed, and decided at every level," at least in

[5] At most, the parties briefed the question of whether the retested DNA supported affirming the denial of relief because "law and justice" did not require relief under *Brown v. Davenport*, 596 U.S. 118, 134 (2022). *See* Answer Br., *Whitton v. Sec'y, Fla. Dep't of Corrs.*, No. 23-10786, at 34–35 (11th Cir. Feb. 13, 2024); Reply Br., *id.*, at 23–24. Neither party discussed whether the Eleventh Circuit should or could consider it in its analysis of whether the Florida Supreme Court's finding of overwhelming evidence was reasonable under AEDPA. As a result, the Eleventh Circuit never analyzed that question.

the federal courts. Pet. 31 (emphasis added). (It was *not* raised, briefed, or decided at *any* level in state court, however, and is thus procedurally barred under Section 2254(b)(1)(A).) Unlike the *Giglio* claim, the question he *presents*, miscast as it is, was never briefed in either the district court or in the Eleventh Circuit. That the issue of considering retested DNA evidence during the AEDPA deference analysis was never briefed or even analyzed by the Eleventh Circuit *in this case* shows that much more percolation is needed before this Court's intervention is warranted.

Also contrary to petitioner's assertion, if "this Court holds that prejudice must be measured by the record before the jury," Pet. 31, petitioner would *not* be entitled to relief. The Florida Supreme Court never measured prejudice by anything other than the record before the jury, and all the Eleventh Circuit held was that the Florida Supreme Court's decision survived AEDPA's deferential standard of review.

Petitioner, moreover, failed to exhaust his *Giglio* claim in state court and thus the Eleventh Circuit could not grant relief on remand. *See supra* at 21. So a decision from this Court would not "definitively resolve" this case. Pet. 31. What petitioner seeks is not to correct a reasoned holding by the Eleventh Circuit but merely to blue-pencil the court's opinion by erasing its tacked-on discussion of the retested DNA evidence.

What is more, the only evidence supporting petitioner's *Giglio* claim was developed in the federal evidentiary hearing in the district court. Because it resolved petitioner's claim on the merits, however, the

Eleventh Circuit did not address the State's argument that the district court erred in allowing petitioner to develop that evidence in the first place because he "failed to develop the factual basis of [his] claim in State court proceedings." 28 U.S.C. § 2254(e)(2); *see Shinn v. Ramirez*, 596 U.S. 366, 371 (2022). Perhaps because he did not exhaust this *Giglio* claim in state court, petitioner did not present any evidence of his juvenile record in state court and thus failed to develop the factual basis for that claim. Nor can he explain why his postconviction counsel could not have obtained his prior arrest record while litigating in state court. Even if this Court were to reverse, petitioner would not be entitled to habeas relief on an unexhausted claim based on evidence not developed or presented to the state courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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