

No. 25-580

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*

REPLY BRIEF FOR PETITIONER

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The State does everything it can to confuse the issues and make this look like a messy vehicle. But it cannot escape the simple fact that the Eleventh Circuit found a *Giglio* violation, then relied on post-verdict evidence to excuse it. The State concedes it over and over again: the Eleventh Circuit “reli[ed] on the retested DNA,” Opp. 9, “reli[ed] on that evidence,” Opp. 14, “reli[ed] on the new DNA evidence,” Opp. 17 n.4, “relied on the following facts: . . . [t]hat [the] blood, ‘after later retesting, matched [the victim’s] DNA,’” Opp. 17-18.

The DNA retesting on which the Eleventh Circuit relied is post-verdict evidence never admitted in any court, never subjected to the scrutiny of trial, and inconsistent with the DNA evidence presented to the jury. The Eleventh Circuit concededly relied on it in finding that the Florida Supreme Court reasonably concluded that the *Giglio* violation would not have affected the jury’s guilty verdict. Opp. 9. That should be the end of the matter. The Court should exercise its “painstaking” and “exacting” care in this capital case, *Kyles v. Whitley*, 514 U.S. 419, 422 (1995), and reverse.

ARGUMENT**I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS**

A. The State’s opposition rests on the untenable claim that the Eleventh Circuit did not rely on the post-verdict DNA evidence to assess *prejudice*. See Opp. 10-17. According to the State, “[t]he Eleventh Circuit was not assessing trial prejudice when it rejected [Gary’s] claim.” Opp. 12. Instead, the Eleventh Circuit was merely relying on “the retested DNA evidence [to] help[] support its *own* conclusion that the Florida Supreme Court’s decision was reasonable.” Opp. 9.¹

Whatever distinction the State thinks it is drawing is not one. The Eleventh Circuit was required to answer, said it was answering, and then did answer one question: what does the evidence show about whether there was trial prejudice? The Eleventh Circuit said the evidence showed that the Florida Supreme Court reasonably found no prejudice because, “[*i*n particular, Whitton can’t rebut the State’s blood-spatter evidence.” Pet. App. 41a (emphasis added).

The Eleventh Circuit was obviously holding that post-verdict DNA evidence is relevant to determining trial

¹ No less than five times, the State incorrectly asserts that the Eleventh Circuit “held that . . . the [*Giglio*] error was *not* harmless” but was required to defer to the Florida Supreme Court’s contrary conclusion. Opp. 7, 12-13, 15, 16, 22. To be sure, the Eleventh Circuit rejected the district court’s holding that the *Giglio* violation was harmless because the withheld evidence would have been inadmissible. Pet. App. 34a-35a. But the Eleventh Circuit then separately analyzed whether, even if the evidence had been used, there would have been prejudice. Pet. App. 37a-43a. The Eleventh Circuit held that the *Giglio* violation caused no prejudice because the Florida Supreme Court reasonably found that the evidence against Gary was “overwhelming.” Pet. App. 40a-43a. It reached that conclusion by looking to blood-spatter evidence relevant only because of later post-verdict DNA testing. Pet. App. 40a-43a.

prejudice when it said things like “Whitton can’t rebut the State’s blood-spatter evidence,” Pet. App. 41a; “the blood-spatter evidence ties Whitton directly and firmly to [the victim]’s murder,” Pet. App. 42a; and “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. On the State’s reading, the Eleventh Circuit was “not assessing trial prejudice” when it made these statements. Opp. 12, 16-17. That beggars belief.

It is of no moment that “the Florida Supreme Court did not rely on or even mention the retested DNA evidence.” Opp. 14. It is of no moment that the trial prejudice question was lensed through AEDPA. *Contra* Opp. 10-17. What matters is what the Eleventh Circuit said federal law permits a court to do when it assesses trial prejudice arising from a federal constitutional error. And what the Eleventh Circuit said is that courts can look at post-verdict evidence to determine whether there was prejudice. Pet. App. 40a-43a.

B. The State’s contention that “this case does not implicate any circuit split,” Opp. 10, thus crumbles. The State has no other argument for distinguishing the cases in the split. *See* Opp. 14-16. In fact, without the irrelevant distinction that the AEDPA posture makes a difference, the split is admitted. *See* Opp. 14; *see also* Opp. 9, 23. As the State explains, both *Apanovitch v. Bobby*, 648 F.3d 434, 437 (6th Cir. 2011), and *State v. Best*, 852 S.E.2d 191, 198 n.4 (N.C. 2020), held that “later-developed DNA evidence [is] irrelevant to the *Brady* prejudice analysis.” Opp. 14. And the holding in *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013), “is similar.” Opp. 15.

Indeed, even under the State’s version of what counts as a conflict, it is difficult to fathom how *Browning* is not a conflict: it arose in the exact same AEDPA posture and came out exactly the opposite way. *Browning* was an AEDPA case, just like this case. 717 F.3d at 1102. And

there, as in this case, the Tenth Circuit confronted the same question the Eleventh Circuit did here: whether it should look at post-verdict evidence in assessing whether “the Oklahoma courts reasonably conclude[d]” that the *Brady* violation caused no prejudice because the violation did not “undermine[] confidence in the verdict.” *Id.* at 1104, 1106. The Tenth Circuit held that it *could not* consider post-verdict evidence in making that determination because doing so “would make no sense.” *Id.* at 1104. *Browning* confirms the obvious: a federal court cannot assess the reasonableness of a state court’s prejudice determination without determining what evidence can be used to establish prejudice in the first instance.

C. Finally, even if there were no conflict, “this Court routinely grants certiorari on important questions in capital cases without any split at all.” *Crawford v. Mississippi*, 146 S. Ct. 33, 37 (2025) (Sotomayor, J., dissenting from denial of cert.); *e.g.*, *Glossip v. Oklahoma*, 604 U.S. 226 (2025).

II. THE ELEVENTH CIRCUIT ERRED

The State claims “the decision below was correct” but actually argues that Gary should lose for reasons *other* than those reflected in the decision below. Opp. 17-22.

The State claims that even if the Eleventh Circuit erred in relying on the DNA evidence, the other evidence against Gary was still overwhelming. Opp. 18-19. That is false. *See* Pet. 16-17.² It is also irrelevant. No federal court has ever made a determination whether the evidentiary record as a whole in this case, correctly limited to the

² The State claims that the blood-spatter evidence is somehow independent evidence of Gary’s guilt—but it is only relevant if the blood matches Gary’s or the victim’s DNA. That is why the district court was adamant that the DNA testimony at the actual trial was so important to Gary’s defense. Pet. 12 n.7.

evidence that may be considered in determining trial prejudice, in fact supports the conclusion that the evidence against Gary was overwhelming. The State is free to make that argument to the Eleventh Circuit once the decision below is vacated and remanded for reconsideration under the appropriate legal standard. But it is no basis to let the Eleventh Circuit's erroneous decision remain in place.

The State argues that the decision below is correct because Gary "did not exhaust his *Giglio* claim." Opp. 21. But a failure to exhaust is not a basis for denying a federal habeas petition where the evidence that gave rise to the "new" unexhausted claim arose at an evidentiary hearing in the federal case. Instead, the correct outcome is stay-and-abeyance to give the state courts the chance in the first instance to provide relief. See *Rhines v. Weber*, 544 U.S. 269, 277 (2005). But the decision below was not a *stay* to permit the state courts to adjudicate the claim in the first instance; it was a denial of the claim under 28 U.S.C. § 2254(b)(2). Thus, even if the claim were unexhausted, denying habeas relief would not be "correct."³

³ The claim is also clearly not unexhausted under basic AEDPA principles. As the district court found, the *Giglio* claim based on Ozio's false testimony was "diligently" presented to the state courts, but "the [state] court[s] refused, at the state's insistence, to allow Mr. Whitton to develop the factual basis for the claim." NDFL-ECF 82 at 2, 5. Because the district court found the state courts' treatment of the *Giglio* claim unreasonable under AEDPA, the claim was properly developed and reviewed *de novo* in federal court. There is no requirement in AEDPA that a state court, having unreasonably blocked development of a federal constitutional claim in the first instance, then be given a second opportunity to review the issue following factual development in federal court. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (exhaustion only requires giving state courts "one full opportunity to resolve any constitutional issues"). Viewing the *Giglio* claim as unexhausted would be especially perverse in this case given that the State initially blocked development of the claim by threatening Ozio with "possible arrest and

Last, the State argues that the Florida Supreme Court reasonably concluded that the *Giglio* error caused Gary no prejudice. Opp. 22. That is jarring given the State's assertion in the immediately preceding paragraph that this claim is unexhausted. Opp. 21. In any event, it is wrong.

III. THE STATE'S WAIVER, EXHAUSTION, AND VEHICLE ARGUMENTS ARE MERITLESS

The State's procedural arguments are baseless.

First, the State nods at waiver, asserting that Gary "did not raise a *Giglio* claim based on Ozio's false arrest-record testimony either on direct review or state collateral review." Opp. 10-11. That's easily cast aside since this Court "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted). The Eleventh Circuit passed upon this question. Pet. App. 34a-43a. Beyond that, the *Giglio* violation was not fully uncovered until the federal proceedings, so it could not have been raised in state court. *See* Pet. App. 9a-10a, 13a, 15a.

The State alternatively complains that "whether it was proper to consider retested DNA evidence was not briefed below." Opp. 23. That is audacious given that the State is the one that injected this evidence into the case. The State concedes that it put the DNA evidence in front of the Eleventh Circuit as part of its effort to persuade the court to hold that extrinsic evidence may be used to hold that "law and justice" do not require habeas relief in otherwise-meritorious AEDPA cases. Opp. 23 n.5. Thus, "[n]either party discussed whether the Eleventh Circuit should or could consider it" in assessing *Giglio* prejudice. Opp. 23 n.5.

prosecution for testifying, even if truthfully," about the many lies he told Gary's jury. NDFL-ECF 82 at 8.

Failing to anticipate and rebut an error neither party anticipated the Eleventh Circuit would make is obviously not a barrier to this Court’s review. Faulting Gary “for not raising an argument about the lack of reasoned consideration displayed by a decision not yet in existence . . . is facially nonsensical.” *Indrawati v. U.S. Att’y Gen.*, 779 F.3d 1284, 1299 (11th Cir. 2015); *Reyes-Colón v. Banco Popular de P.R.*, 110 F.4th 54, 66 n.14 (1st Cir. 2024) (no waiver where party could not have been expected to proactively address the issue); *Duncan Place Owners Ass’n v. Danze, Inc.*, 927 F.3d 970, 974 (7th Cir. 2019) (similar); *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003) (similar).

Second, the State hangs its hat on exhaustion. Opp. 8, 21, 24. But as explained *supra* at 5, if the problem here is that Gary’s claim is unexhausted, then the correct result is a remand to the district court with instructions to stay the case and hold it in abeyance until Gary can exhaust the claim in state court. So this does not even furnish an alternative ground for affirmance because the decision below would *still* be incorrect even if the claim is unexhausted. (Though it is not. *See supra* n.3)

Regardless, as the United States has long recognized, “the existence of a potential alternative ground to defend the judgment is not a barrier to review.” Gov’t Cert. Reply Br. at 9, *Comm’r v. Est. of Jelke*, 555 U.S. 826 (2008) (No. 07-1582); *accord* Gov’t Cert. Reply Br. at 3, *United States v. Bean*, 537 U.S. 71 (2002) (No. 01-704) (same); *see also* Cert. Reply Br. at 2, *Kisor v. Wilkie*, 588 U.S. 558 (2019) (No. 18-15) (similar).

In *Harris v. Reed*, for instance, the Court granted certiorari over the United States’ vehicle objections to review the court of appeals’ holding that a habeas claim was procedurally barred, despite the district court’s alternative holding—not addressed by the court of appeals—that it would deny the claim on the merits. 489 U.S. 255, 258-59 & n.3 (1989). The same principle holds

here. The Eleventh Circuit did not address exhaustion—meaning it is, at best, a question for remand. Pet. App. 35a n.10.

Finally, the State’s vehicle arguments fare no better. As noted, the State’s waiver and exhaustion arguments are without merit. So is the supposition that an unpublished decision does not warrant review. Opp. 17, 23. Whether a decision is “unpublished carries no weight in [the Court’s] decision to review the case.” *Comm’r v. McCoy*, 484 U.S. 3, 7 (1987); Shapiro et al., *Supreme Court Practice* §4.11 (11th ed. 2019) (“[T]he Court grants certiorari to review unpublished and summary decisions with some frequency.”). Otherwise, courts could insulate erroneous decisions from review. *See Plumley v. Austin*, 574 U.S. 1127, 1131-32 (2015) (Thomas, J., dissenting from denial of cert.); *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting). The Eleventh Circuit’s designation of this death penalty case as unpublished is no basis to deny review.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT REVIEW

The State’s opposition loses sight of this case’s critical importance.

A. This case’s legal importance is underscored by the many scholars and retired jurists supporting this petition. *See* Ret. Judges Amicus Br. 4, 9-11 (“The Eleventh Circuit’s unworkable rule risks undermining the consistency and fairness of the criminal justice system when the stakes are at their highest.”); Professors of Const. & Crim. L. Amicus Br. 7 (“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.”). The number of cases where courts have been called upon to reject the very argument the Eleventh Circuit

embraced shows that this is a recurring and important legal error. Post-verdict evidence is frequently placed before courts in an effort to persuade them to embrace other claims—such as actual innocence or, as here, that “law and justice” should be invoked to deny relief. This Court’s guidance is vital to ensuring that the use of such evidence is properly cabined.

That a holding from this Court would affect all post-conviction cases throughout the United States going forward refutes the State’s unfounded assertion that this case is unimportant because Gary seeks “merely to blue-pencil the court’s opinion by erasing its tacked-on discussion of the retested DNA evidence.” Opp. 24. There is every reason to believe that Gary will succeed in his claim. But even if that were not the case, the legal principle at stake transcends this case: due process—not to mention common sense—requires that trial prejudice be assessed on the basis of the evidence at the trial. If that seems self-evident—so *obviously* right that this Court should not have to say it—it plainly is not as obvious as it seems, as the decision below confirms. The temptation to put additional evidence in front of appellate courts is powerful, as this Court saw firsthand in *Glossip*, 604 U.S. at 254.

B. The Court has recognized that the gravity of capital punishment makes these cases important to review in their own right.⁴ Nowhere must the State turn sharper corners than where it seeks to impose capital punishment. *See Kyles*, 514 U.S. at 422 (“Because ‘[o]ur

⁴ As the Court well knows, Florida metes out its capital sentences. *See Execution List 2025*, Death Penalty Info. Ctr., <https://perma.cc/2LAS-SJQZ> (last updated Dec. 19, 2025) (showing that Florida executed nearly four times as many people as did the next leading State in 2025); *id.* (showing more executions occurred in the Eleventh Circuit in 2025 than in the rest of the country combined).

duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,' we granted certiorari" (alteration in original) (quoting *Burgher v. Kemp*, 483 U.S. 776, 785 (1987)); cf. *Taylor v. Alabama*, 335 U.S. 252, 258-59 (1948) ("Because of the importan[ce] . . . of . . . due process of law . . . , especially in capital cases, we granted certiorari."); see also *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality op.) ("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 question presented is straightforward and consequential. Because the Eleventh Circuit held that courts may look to post-verdict evidence in determining trial prejudice arising from a constitutional violation—in direct conflict with other courts and in a capital case—certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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