No. _______

# In the Supreme Court of the United States

GARY RICHARD WHITTON,

*Applicant*,

*v.*

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS.

## APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

1. Pursuant to Supreme Court Rule 13.5, Applicant Gary Whitton respectfully requests a 60-day extension of time, to and including December 12, 2025, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Eleventh Circuit issued an unpublished opinion on May 6, 2025. A copy of the opinion is attached as Exhibit A. The Eleventh Circuit denied a timely petition for rehearing and for rehearing en banc on July 15, 2025. A copy of that Order is attached as Exhibit B. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on October 13, 2025. This application is being filed more than ten days in advance of that date, and no prior application has been made in this case.

3. This case seeks review of a decision by the Eleventh Circuit affirming a denial of habeas relief on a 28 U.S.C. § 2254 petition seeking to set aside Applicant's state-court murder conviction. The Eleventh Circuit held that Applicant's trial was tainted by a serious *Giglio* error. *Whitton v. Sec'y, Fla. Dep't of Corrs.*, No. 23-10786, 2025 WL 1305158, at *16 (11th Cir. May 6, 2025). But, the Eleventh Circuit held that the "testimony, overall, was immaterial to the jury's verdict," *id.*, because "the Florida Supreme Court reasonably determined that the record contained 'overwhelming evidence' of Whitton's guilt," *id.* at *18.

4. The Eleventh Circuit recognized that virtually all of the evidence in the case relied on an interconnected web of "credibility determinations on which the jury could easily side with Whitton," *id.*, and that "[a] jury may well find some of [Whitton's] points to be persuasive," *id.* But the Eleventh Circuit held that the evidence could be deemed "overwhelming" because "Whitton can't rebut the State's blood-spatter evidence." *Id.* The blood-spatter evidence was absolutely crucial to the Eleventh Circuit's harmlessness determination. Wrote the Eleventh Circuit: "[E]ven if the call is ultimately debatable, it's within the realm of fair-minded disagreement . . . that blood spatter evidence—which has no explanation other than one that is consistent with the defendant's guilt—will surely convince a jury of the defendant's guilt." *Id.* at *19 (cleaned up).

5. But in holding that the blood-spatter evidence was overwhelming, the Eleventh Circuit appears to have committed a grievous error. The Eleventh Circuit considered the strength of the blood-spatter evidence against Whitton *not* by looking to the evidence presented at the actual trial, but rather by assessing the strength of the evidence

against Whitton on the basis of DNA testing done many years *after* the trial. That analysis did not focus on whether a reasonable jury that heard the evidence at the *actual* trial in this case would have found the untainted evidence overwhelming. The Eleventh Circuit repeatedly explained that its consideration of the persuasiveness of the blood-spatter evidence hinged on "later retesting" of the blood that showed it "matched [the victim's] DNA." *Id.* at *18; *see also id.* at *19 (explaining that post-trial DNA retesting "ties Whitton directly and firmly to [the victim]'s murder"). That is because, at the *actual* trial in this case, unrebutted testimony established that the DNA on the boots "matched neither [the victim's] nor Whitton's" DNA. *Id.* at *3. In other words, the only testimony the jury ever heard in Whitton's case was that he had blood spatter on his boots, but not from the victim—that is not "overwhelming" evidence.

6. The harmless-error standard requires a court to assess whether, absent the evidence tainted by error, the evidence upon which the jury *actually rested its guilty verdict* was sufficient to establish the defendant's guilt beyond a reasonable doubt. *See Yates v. Evatt*, 500 U.S. 391, 404-05 (1991) (explaining that the harmlessness inquiry has "two ... distinct steps": first, the court "must ask what evidence the jury actually considered in reaching its verdict"; second, the court must assess "whether the jury actually rested its verdict on evidence establishing [guilt] beyond a reasonable doubt, independently of [the error]"). It is irrelevant whether, in light of later-adduced evidence that the jury never saw, there is *presently* "overwhelming evidence" of the defendant's guilt (or whether there was "overwhelming evidence" of guilt before the state court in postconviction proceedings). Evidence not presented to the jury *at trial* is logically immaterial to the analysis.

Examining the errors that occurred at trial for harmlessness in light of post-trial evidence disregards the jury's role of hearing the facts and rendering a verdict based on that evidence. *See Kotteakos v. United States*, 328 U.S. 750, 764 (1946) ("To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. 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."). This role is never more important than in a capital case.

7. The Eleventh Circuit's error is especially serious in this case because the State's new DNA evidence purporting to link the blood on Whitton's boots to the victim has never undergone the adversarial testing of a criminal trial. Moreover, its persuasiveness depends on a jury agreeing that the blood-spatter evidence is inconsistent with Whitton's account of what happened—which is that the victim's blood got onto his boots because he stumbled upon the bloody crime scene after the murder. At a new trial, Whitton would be able to develop testimony of his own establishing the pattern of the blood spatter on the boots is consistent with his story of what happened. This is why *Giglio* materiality cannot be judged based on later-developed evidence but must be judged based on the trial that *actually happened*—it is impossible to tell based on one purported piece of later-developed evidence whether that evidence really would render a *Giglio* error immaterial. The only

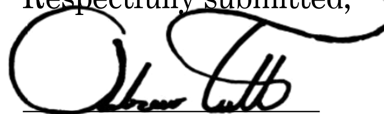
reliable way to assess *Giglio* materiality, as this Court's cases recognize, is by asking whether it could have affected the actual trial that actually happened.

8. Applicants respectfully request an extension of time to file a petition for a writ of certiorari. A 60-day extension would allow counsel of record, who was recently retained, sufficient time to thoroughly examine the consequences of the Eleventh Circuit's decision, research and analyze the issues presented, and prepare the petition for filing. The heavy press of counsel's work, including preparation for oral argument in *Berk v. Choy*, No. 24-440 (U.S.), necessitated this request. Undersigned counsel also has a number of other pending matters that will interfere with counsel's ability to file the petition on or before October 13, 2025.

*Wherefore,* Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to and including December 12, 2025.

Dated: October 2, 2025

Respectfully submitted,



Andrew T. Tutt
*Counsel of Record*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

*Counsel for Applicant*
*Gary Richard Whitton*