background or apparent criminal ties and no obvious reason to lie. (*See* Thomas' trial testimony, *id. at* 00135-201.)

Detective Frye also testified against Zeigler at trial about his investigation of the Homicides. Frye reaffirmed that he spoke to Thomas, and not Foster, on the night of the Homicides. (*Id.* at 00175.) On cross examination, Zeigler's attorneys again asked Frye who Robert Foster was. Frye testified that he did not know a Robert Foster and that no one named Robert Foster was part of the Zeigler investigation. (*Id.* at 00215.) According to Frye, the name "Robert Foster" on the Arrest Report was simply a "mistake." (*Id.*) Chief Thompson testified for the State as well, limiting his testimony about events in the area of the Zeigler Store to those commencing with meeting with another officer at 8:30 p.m. at a restaurant near the Zeigler Store. (*Id.* at 00122.)

The jury initially was deadlocked – six jurors voted to acquit. *State v. Zeigler*, 494 So.2d 957, 960 (Fla. 1986). However, shortly before the July 4 holiday, the jury returned four guilty verdicts, although at least one juror subsequently testified that she "still feel[s] he's innocent" and that she voted to convict only because she "couldn't take any more". TT at 2838.[3] Two weeks later, a short sentencing hearing was held. The State did not offer any evidence; the Defense

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[3] The last holdout juror to switch her vote to guilty, Mrs. Brickel, twice requested permission to speak with the trial judge outside the presence of the other jurors about "other jurors and decisions made before they [were] permitted to make them." TT at 2707. The judge denied these requests even though at one point, Mrs. Brickel fainted because of the pressure in the jury room. TT at 2723, 2739-40. Instead, the judge called Mrs. Brickel's doctor, without advising defense counsel, and convinced him to prescribe Valium for Mrs. Brickel without even examining or speaking with her, as brought to light for the first time in a March 1, 1989 television documentary on Zeigler's case. Shortly after taking the Valium procured for her by the judge, Mrs. Brickel changed her vote to guilty.

called two witnesses and stressed residual doubt about guilt. The jury was out only twenty-five minutes before returning with an advisory sentence of life imprisonment on all counts. The trial judge, however, overrode the jury's recommendation and sentenced Zeigler to death. The convictions and death sentence were affirmed. *Zeigler*, 402 So.2d at 365. Numerous post-conviction proceedings have occurred.

C. Newly Discovered Evidence

In January 2011, an investigator in St. Petersburg, Florida named Lynn Marie Carty ("Carty") began researching Zeigler's case. (ROA, at 00053.) On or about April 11, 2011, she held a press conference to describe her findings. (*Id.*) Shortly after the press conference ended, a woman named Susan Ambler Graden ("Graden") contacted Carty and told her that on the evening of December 24, 1975, she and her mother were the victims of an attempted armed robbery of the Gulf gas station and convenience store that her mother managed (the "Gulf Station"). (*Id.* at 00068-69; Supplement to Record on Appeal, hereafter "Supplement to ROA," at 1.) The Gulf Station was diagonally across from the Zeigler store where the Homicides occurred. (ROA, at 00068.)

According to Graden, sometime after dusk on the night of the Homicides, a large African-American male armed with a gun unsuccessfully tried to rob the Gulf Station. (Supplement to ROA, at 1.) Graden's mother drove the assailant off and called the police, and Chief Thompson arrived "within minutes," explaining that he "heard about her call over the police radio." (*Id.*) Thompson spoke to Graden's

mother about the robbery and took out a notebook, in which he made notes. (*Id.*) Graden's account of the attempted Gulf Station robbery was corroborated by another individual who lived near the Gulf Station in 1975. (ROA, at 00062.)

Graden gave Carty a detailed physical description of the man who tried to rob the Gulf Station. (*Id.* at 00054.) Using this description and other information she knew about the Zeigler case, Carty searched the internet and found an individual named Robert Milton Foster, born July 31, 1949, who had a criminal record and fit Graden's detailed physical description. (*Id.*) Foster was in prison in North Carolina in the early 1970s but was released on parole on July 17, 1975. (*Id.* at 000354.) Foster confirmed directly to Carty and another investigator working with her that Foster was working in Orange County after his release from prison in 1975 doing the same work as Thomas and Mays – migrant fruit picking. (*Id.* at 00056, 00066.)

Carty showed Graden Robert Foster's mug shot in May 2011, and Graden positively identified him as the person who had attempted to rob the Gulf Station. (*Id.* at 00055, 00069.) She also identified Foster as one of the individuals in a photograph of a crowd of people who gathered around the Zeigler Store shortly after the Homicides occurred. (*Id.* at 00055, 00069.) When shown the same picture of Foster, Zeigler responded by stating that he knew this individual by sight (not name) and recalled seeing him during the winter of 1975, usually in the company of Mays. (*Id.*)

Leigh McEachern ("McEachern"), who in 1975 was Chief Deputy Sheriff at the Orange County Sheriff's Office, also recently came forward to state that on or

about December 26, 1975, the Orange County Captain of Detectives advised him "that a black male named Robert Foster had come to us seeking protection because he believed that someone was trying to kill him for what he knew about the homicides that took place on the evening of December 24, 1975." (*Id.* at 00084-85.) McEachern was also advised that "Robert Foster had been admitted into the county jail in a special section that we set aside for the protection of material witnesses." (*Id.*)

Not a single piece of any of this newly discovered evidence was ever disclosed to Zeigler or his defense counsel. Zeigler's lead trial attorney, Ralph Hadley ("Hadley"), has stated plainly, "I had never known of an attempted armed robbery that occurred across the street from the Zeigler furniture store on the same evening as the homicides for which Mr. Zeigler was convicted." (*Id.* at 00080.) Hadley also states that "I never knew about the events that Mr. McEachern describes in his affidavit until this was recently told to me." (*Id.*)

D. Zeigler's New Evidence Motion

On April 10, 2012, Zeigler filed a Motion to Vacate Judgment of Convictions and Sentences Based on Newly Discovered Evidence (the "Motion") pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851. (*See* ROA, at 00001-45.) Zeigler argued in the motion that the State had impermissibly suppressed critical information relevant to his defense and had presented and failed to correct false or misleading testimony in violation of *Brady*, *Giglio*, and the Due Process Clause of

the U.S. Constitution.[4] (*Id.*) Zeigler included eight sworn affidavits in support of the Motion to provide the circuit court with a summary of the type of evidence of State misconduct he would present at an evidentiary hearing. (*See id.* at 00046-89.) Amongst this evidence would be that:

- The state suppressed the very existence of Robert Foster, a key witness and possible suspect for the Homicides. The state also suppressed the facts that Foster provided key witness statements to the police regarding the Homicides and that Foster came to the police the day after the Homicides seeking protection because he believed someone was trying to kill him because of what he knew about the Homicides.
- Detective Frye committed perjury when he denied the existence of Robert Foster and testified that the inclusion of the name Robert Foster on the Arrest Report was a "typographical error."
- The state suppressed the fact that the Gulf Station robbery occurred across the street from the Homicides on the same evening, and suppressed all investigatory records relating to this robbery.
- Chief Thompson committed perjury by omitting his investigation of the Gulf Station robbery from his testimony regarding the events of Christmas Eve, 1975.

The circuit court issued on November 13, 2012 a decision summarily denying Zeigler's motion and refusing to grant Zeigler an evidentiary hearing. (Pet. App.

[4] Zeigler also brought a state law newly discovered evidence claim that both the circuit court and the Florida Supreme Court denied.

14a.) The circuit court held that "the newly discovered evidence does not meet the first prong [favorability] of ether *Brady* or *Giglio*." (*Id.* at 12a.) Zeigler appealed to the Florida Supreme Court the circuit court's denial of his claims without an evidentiary hearing, despite the fact that, under Florida law, a court should not refuse to grant an evidentiary hearing unless the record conclusively refutes the defendant's claims, and that when determining whether a hearing is required, the court must assume the truth of the defendant's allegations. On November 13, 2013 the Florida Supreme Court affirmed the circuit court's denial of Zeigler's *Brady* and *Giglio* claims without an evidentiary hearing, finding that both claims failed on materiality grounds. (*Id.* at 2a.) The Florida Supreme Court found that, given the remaining non-perjured testimony in the record, there would still have been sufficient evidence to convict Zeigler, and thus the *Brady* and *Giglio* materials Zeigler proffered were not material. (*Id.* at 1a.)

REASONS FOR GRANTING THE WRIT

In *Kyles*, this Court held that the materiality standard for a *Brady* claim is not whether "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 435. Several high state courts have followed *Kyles* correctly by refraining from conducting an analysis that focuses exclusively on the sufficiency of remaining evidence to support a conviction. But the Florida Supreme Court and a number of other state high courts are conducting exactly the type of analysis *Kyles* proscribes and are denying *Brady* claims by simply pointing to remaining evidence in the record that may have been sufficient to convict. These courts justify their analyses by ignoring *Kyles* and instead focusing on this Court's holding in *Bagley* that suppressed evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). This Court must grant certiorari to clarify the materiality standard for *Brady* claims in order to ensure the application of a uniform standard.

This Court should also grant certiorari to ensure that states do not conflate *Brady's* materiality standard with that applicable to *Giglio* claims, as the Florida Supreme Court did below. Indeed, the Florida Supreme Court's analysis of Zeigler's *Giglio* claims is virtually identical to its analysis of his *Brady* claims, even though this Court has clearly held that because the use of perjured testimony to obtain a conviction "involves a corruption of the truth-seeking function of the trial process...perjured [testimony] is considered material unless failure to disclose it

would be harmless *beyond a reasonable doubt.*" *Bagley*, 473 U.S. at 679-680 (emphasis added).

The fact that the Florida Supreme Court continues to apply the wrong *Giglio* standard is especially troubling in light of that court's decades-long pattern of "improper[ly] merging...the *Giglio* and *Brady* materiality standards." *Guzman v. State*, 868 So.2d 498, 506 (Fla. 2003). While the Florida Supreme Court self-diagnosed this problem over ten years ago, its failure to correct it is ongoing. Indeed, just three years ago, the Eleventh Circuit found in that same case that "the Florida Supreme Court's materiality determination was more than just incorrect—it was an objectively unreasonable application of clearly established Supreme Court precedent." *Guzman v. Secretary, Dept. of Corrections*, 663 F.3d 1336, 1349 (11th Cir. 2011). Florida's unwillingness or inability to apply the correct *Giglio* standard persists, and will continue to persist, absent intervention from this Court. This Court should grant certiorari to end this pattern and ensure that Florida (which accounts for 13% of the nation's death row population[5]) applies the proper, defense friendly materiality standard this Court has established for *Giglio* claims.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE CONFLICTING INTERPRETATIONS OF THE *BRADY* MATERIALITY STANDARD IT ESTABLISHED IN *KYLES V. WHILEY*, 514 U.S. 419, 435 (1995)

First and foremost, this Court should grant certiorari to prevent conflicting interpretations of the *Brady* materiality standard it established in *Kyles* and ensure

[5] As of April 1, 2013. *See* Death Penalty Information Center, Death Row Inmates by State and Size of Death Row by Year, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year.

that courts do not use incorrect standards to render *Brady* relief impossible to obtain. Although *Kyles* clearly held that a defendant need not prove the insufficiency of remaining evidence to establish a *Brady* claim, there are presently several jurisdictions such as Florida that have misinterpreted *Kyles* as permitting denial of a *Brady* claim so long as untainted evidence remains that could have supported conviction. That is contrary to this Court's holding in *Kyles* and *Brady* precedents from the high courts of several other states interpreting *Kyles*, all of which permit relief on *Brady* claims even where there potentially remains sufficient evidence to convict. This Court must act to clarify the materiality standard for *Brady* claims in order to resolve this disparity among state high courts and ensure a uniform materiality standard for *Brady* claims.

In *Kyles*, this Court held that the materiality standard for a *Brady* claim is not whether "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict" because "[t]he possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Kyles* at 435. Many state high courts are complying with this holding by granting *Brady* relief where the prosecution's misconduct undermines confidence in the verdict or renders the defendant's trial unfair, even where there may remain sufficient evidence to convict after taking into account the *Brady* materials. Courts in these states faced with evidence similar to that which Zeigler provided granted *Brady* relief in numerous cases, despite the fact that evidence sufficient to convict may have remained. *See In re Stenson*, 174 Wash.2d

474 (Wash. 2012) (suppressed evidence is material if "one juror *might have* had reasonable doubt that [the defendant] was guilty or deserving of the death penalty" had the jury been presented with the evidence) (emphasis added); *see also Aguilera v. State*, 807 N.W.2d 249, 258 (Iowa 2011) (finding suppressed *Brady* impeachment materials to be material despite the fact that "much of their value is speculative" because the "the State's failure to turn over clearly exculpatory material handicapped not only the defendant, but also the trier of fact."); *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 128 (Mo. 2010) (suppressed "impeachment information, especially when coupled with the impeachment information presented at the time of trial, could have led the jury to a different assessment of [witness's] credibility" and was thus material); *Com. v. Bussell*, 226 S.W.3d 96, 102 (Ky. 2007) (finding alternative suspect *Brady* materials to be material and rejecting the argument that "alternative suspect information is not exculpatory unless it eliminates the defendant as the culprit") (internal quotations omitted); *State v. Brown,* 2007-Ohio-4837, 115 Ohio St. 3d 55, 873 N.E.2d 858 (Ohio 2007) (finding suppressed evidence "that suggests that [defendant] did not pull the trigger and that a different party was responsible for the deaths" to be "inherently" material for Brady purposes, despite eyewitness evidence that the defendant committed the murders and forensic evidence that the murder weapon was a gun found on defendant's person upon arrest); *Smith v. Com.*, 2001-CA-002712-MR, 2003 WL 21948171 (Ky. Ct. App. Aug. 15, 2003) (granting evidentiary hearing on *Brady* claim regarding the existence of

potentially suppressed witnesses to drug transaction despite existence of eyewitness testimony that the defendant conducted the drug transaction at issue).

By contrast, the standard that the Florida Supreme Court applied to Zeigler's *Brady* claim was that the State's suppression of evidence was immaterial if there remained a possibility that the jury could still have convicted based on the remaining evidence. The Florida Supreme Court focused on this Court's language in *Bagley* that suppressed evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (cited at Pet. App. 1a).[6] The Florida Supreme Court did not conduct any assessment regarding the probative value of the suppressed evidence Zeigler proffered or what its impact on Zeigler's defense would have been. The court also did not consider whether the suppressed evidence could have potentially swayed one or more jurors – which is significant in this case because the jury initially deadlocked even in the absence of the suppressed evidence. Instead, the Florida Supreme Court justified its finding that the suppressed evidence was not material by pointing to the existence of other testimony in the record that could have possibly been used to convict Zeigler. The Florida Supreme Court thus engaged in the type of sufficiency of the evidence analysis that *Kyles* explicitly states is not the proper standard.

[6] Potentially adding to the confusion amongst various states and jurisdictions regarding the proper materiality standard for *Brady* claims is the fact that *Kyles* quotes this language from *Bagley* while also stating that "sufficiency of evidence (or insufficiency) is [not] the touchstone" for granting *Brady* relief. *Kyles*, 15 U.S. at 435.

Florida is just one of many states that have engaged in improper sufficiency of the evidence analyses and dismissed *Brady* claims simply because there may be enough evidence remaining in the record to convict. *See People v. Verdugo*, 236 P.3d 1035, 1053 (Cal. 2010) (denying *Brady* claim based on sufficiency of remaining evidence); *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001) (same); *Kills On Top v. State*, 15 P.3d 422, 431 (Mont. 2000) (same); *People v. Barrow*, 749 N.E.2d 892 (Ill. 2001) (same); People v. Hart, 844 N.Y.S.2d 1, 2 (N.Y. App. Div. 2007) (same); *Brooks v. State*, 929 So.2d 491, 506 (Ala. Crim. App. 2005) (same); *State v. Fugler*, 737 So.2d 894, 896 (La. Ct. App. 1999) (same); *Turner v. State*, 684 N.E.2d 564, 568 (Ind. Ct. App. 1997) (same).

The effect of a sufficiency of the evidence analysis, as the Pennsylvania Supreme Court acknowledged, is that the burden is placed on the defendant to demonstrate that the suppressed evidence "was determinative of [the defendant's] guilt or innocence." *Com. v. Marinelli*, 810 A.2d 1257, 1273 (Penn. 2002). Such a high burden is far afield from the standard this Court announced in *Kyles*. This Court must act to clarify the materiality standard for *Brady* claims, lest defendants in certain states continue to be subjected to a materiality standard much higher than that announced by this Court.

II. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT FLORIDA APPLIES THE CORRECT, DEFENSE FRIENDLY MATERIALITY STANDARD TO *GIGLIO* CLAIMS RATHER THAN ERRONEOUSLY APPLYING *BRADY*'S HIGHER MATERIALITY STANDARD

This Court must act to end the Florida Supreme Court's pattern of ignoring the defense friendly materiality standard for *Giglio* claims and instead applying the

higher *Brady* materiality standard. The standard for relief on a *Giglio* claim is clear and defense friendly: "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is *any reasonable likelihood* that the false testimony could have affected the judgment of the jury." *Agurs,* 427 U.S. at 103 (emphasis added). Further, "perjured [testimony] is considered material unless failure to disclose it would be harmless *beyond a reasonable* doubt." *Bagley,* 473 U.S. at 680 (emphasis added). The *Giglio* materiality standard is lower than the materiality standard applied to a *Brady* claim. *See Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1348 (11th Cir. 2011) (noting that "*Giglio*'s materiality standard is more defense-friendly than *Brady*'s").

The Florida Supreme Court did not apply the correct *Giglio* materiality standard to Zeigler's case. Instead, the court applied the same standard it used to deny Zeigler's separate *Brady* claim, finding Zeigler's *Giglio* claim invalid because some non-perjured evidence of guilt remained upon which a jury might have convicted Zeigler. Specifically, the Court found that there was no reasonable likelihood that Detective Frye or Chief Thompson's false testimony could have affected the jury's judgment because the jury would still have heard testimony from other witnesses implicating Zeigler. But the court ignored the fact that perjured testimony is considered material unless the State can prove it was harmless beyond a reasonable doubt, and conducted no analysis as to this part of the standard. The Court also ignored the fact that a lower materiality standard applies to *Giglio* claims than to *Brady* claims.

This is not the first time that the Florida Supreme Court has applied too high of a materiality standard to a *Giglio* claim. Rather, it is part of an at least two decade long pattern of the Florida Supreme Court conflating the two different materiality standards for *Giglio* and *Brady* claims. The court admitted in 2003 that its *Giglio* precedents dating back to 1991 had "improper[ly] merge[d]...the *Giglio* and *Brady* materiality standards." *Guzman v. State*, 868 So.2d 498, 506 (Fla. 2003). The court then remanded the *Giglio* claim at issue (brought by a death-sentenced defendant) to the lower court because the lower court, relying on these erroneous precedents, had failed to assess whether "the State had demonstrated that the false evidence was harmless beyond a reasonable doubt," as required for a *Giglio* materiality analysis. *Id.* at 507. On remand, the lower Florida court again denied the *Giglio* claim on materiality grounds and the Florida Supreme Court affirmed. *Guzman v. State,* 941 So.2d 1045, 1050-52 (Fla. 2006). On a habeas petition, the Middle District of Florida and, ultimately, the Eleventh Circuit found that the Florida Supreme Court's affirmance was an "unreasonable application of clearly established federal law" because the court had either ignored or unreasonably discounted the significance of the perjured testimony. *Guzman v. Sec'y, Dept. of Corr.*, 663 F.3d at 1349-55.

In denying Zeigler's *Giglio* claim on materiality grounds, the Florida Supreme Court again misstated the law by conflating the different materiality standards for *Giglio* and *Brady* claims and ignoring the required analysis of whether the State has demonstrated that the false evidence was harmless beyond a

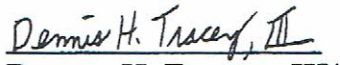
reasonable doubt. The Florida Supreme Court's failure to apply the proper legal standard to Zeigler's *Giglio* claim is just one example of the court's long standing failure to apprehend and apply the proper standard for such claims. Given the stakes at issue—Florida accounts for 13% of the nation's death row population—Florida simply cannot be allowed to continue to apply an incorrect and unduly high standard to what this Court has made clear is a defense friendly claim.

This Court has justified its defense friendly materiality standard for *Giglio* claims by noting that "the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves a corruption of the truth-seeking function of the trial process." *Bagley,* 473 U.S. at 679. Without courts applying the proper standard, defendants like Zeigler who stand to lose everything will be denied an effective means to challenge severe misconduct inflicted upon their trial process. This Court must intervene to ensure that the proper standard is applied to Zeigler's, and other defendants', crucial constitutional claims. Otherwise, Florida's courts will continue to abdicate their roles in policing prosecutorial misconduct.

CONCLUSION

For the foregoing reasons, Zeigler's petition for a writ of certiorari should be granted and merits briefing ordered.

Respectfully submitted,



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