No. 19-7309

In The Supreme Court of the United States

JAMES MILTON DAILEY,

Petitioner,

v.

FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* FORMER OR CURRENT PROSECUTORS AND ATTORNEYS GENERAL WHO HAVE SOUGHT OR DEFENDED DEATH SENTENCES, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, *Amici*, former or current prosecutors or attorneys general who have sought or defended the death penalty, respectfully move for leave to file the accompanying *amici curiae* brief in support of the petition. Petitioner, James Milton Dailey, has consented to the filing of this *amici curiae* brief. Respondent, State of Florida, does not consent to the filing of this brief. Accordingly, this motion for leave to file is necessary.

Amici have either sought or defended the death penalty on behalf of state governments throughout this country. Some of us support the death penalty and some of us no longer support the death penalty. But all of us believe in the integrity of the criminal justice system and that we have a responsibility to speak out when we have good reason to believe that a mistake, particularly one that results in the execution of an innocent man, is about to be made.

Amici all have experience with jailhouse informants that we believe can inform the Court's judgment on Mr. Dailey's case. We know, from experience, that there are times when a prosecutor, with a weak and circumstantial-evidence case, must resort to presenting these informants as witnesses, even in a capital case. But we also know that jailhouse informants are inherently unreliable and that their use must proceed with extreme caution.

Because of the unreliability of these informants, the jury can only perform its truth-seeking mission if it is fully informed of the benefits bestowed and motives to lie. *Amici* believe that this was not done in this case. Because of our experience with jailhouse informants, as former or current prosecutors and attorneys general who have sought or defended the death penalty, we believe that we are in a uniquely-suited position to file an *amici curiae* brief to elucidate the inherent difficulties in presenting these witnesses. The problems that we have encountered are particularly relevant and concerning in this case because evidence now known suggests that a grave injustice has occurred and that Mr. Dailey is an innocent man. We respectfully ask the Court to grant us leave to file this *amici curiae* brief.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

W. J. Michael Cody served as the Attorney General of the State of Tennessee from 1984-1988. During this time, his office defended multiple capital convictions on appeal in the state and federal courts. Cody also served as the United States Attorney for the Western District of Tennessee from 1977 to 1981. Now in private practice, in 2005, he was appointed to serve as Co-Chair of the Tennessee Commission on Ethics. He was a founding member of the Society of Attorneys General Emeritus and elected its co-chair in 2010. Cody was a member of the Tennessee Sentencing Commission, and the American Bar Association's Tennessee Death Penalty Assessment Team. Cody also served as the president of the Southern Association of Attorneys General, in addition to serving as the chair of the Memphis and Shelby County Crime Commissions from 1997-1998. He is the distinguished recipient of the 2007 Francis X. Bellotti Award from the National Association of Attorneys General.

Tim Cole is an Assistant District Attorney for the 271st District of Texas, a position he also held from 2010-2015. He also was elected to four terms as the district attorney for the 97th District of Texas and

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[1] Pursuant to Supreme Court Rules 37.2(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part, no such counsel or party, or anyone other than *Amici Curiae*, its members or counsel, made a monetary contribution intended to fund the preparation or submission of the brief, that the parties have been provided notice of its filing at least 10 days prior to the due date, and that Petitioner has consented to its filing and Respondent has not consented.

sought the death penalty three times during this tenure. Cole has also served as the president and general counsel of the Texas District and County Attorneys Association, and as an adjunct and assistant professor at UNT Dallas College of Law.

Bennett Gershman was an Assistant District Attorney in New York County and then served as a Special Assistant Attorney General in the New York State Attorney General's Office when New York State retained the death penalty. Gershman participated in the appeal of the capital convictions of two defendants accused of murdering police officers. He also served for four years with the Special State Prosecutor investigating corruption in the judicial system. Now a Professor of Law at Pace Law School, Gershman has supervised students in the defense of individuals facing the death penalty in Alabama. He is also one of the nation's leading experts on prosecutorial misconduct and teaches courses on Constitutional Law, Criminal Procedure, and Evidence.

Bruce Jacob began his career as an Assistant Attorney General of the State of Florida, during which he represented Florida before this Court in the seminal right-to-counsel case of *Gideon v. Wainwright* (1963), in addition to defending capital convictions and death sentences. Jacob then joined the firm of Holland, Bevis & Smith, now Holland & Knight, and later joined the faculty at the Emory University School of Law. At Emory, Jacob established the Legal Assistance for Inmates Program, which provided legal assistance to inmates in Atlanta prisons. He also co-founded the

Harvard Prison Legal Assistance Project. From 1978-1981, Jacob served as Dean and Professor of the Mercer University School of Law, and he has held several other positions of leadership at other law schools, in addition to serving on The Constitution Project's National Right to Counsel Committee. Jacob is Dean Emeritus and Professor of Law Emeritus at Stetson University College of Law.

Creighton Horton joined the Salt Lake District Attorney's Office in 1978, and prosecuted cases there for nine years, ending as team leader of the Career Offender Unit, which prosecuted habitual criminals. He was recruited by the Utah Attorney General's Office in 1987, and worked there until he retired in 2009. For seventeen years, he was chief of the Criminal Justice Division, and for two years served as chief of the Violent Crimes and Special Prosecutions Section. During his career, Horton handled capital murder cases and specialized in countering mental defenses in homicide cases in which defendants claimed insanity or diminished mental capacity. Later, Creighton became involved in the innocence movement, as DNA testing began exonerating more and more defendants across the country.

Jim Petro was the Attorney General of the State of Ohio from 2003-2007. As an Ohio legislator, Petro served on the legislative committee that crafted Ohio's current death penalty statute. As Attorney General, he supervised the enforcement of that statute and served as statutory lead counsel in dozens of death penalty cases in post-conviction proceedings in the federal trial

and appellate courts. During Mr. Petro's tenure as Attorney General, nineteen death-sentenced defendants were executed by the State of Ohio.

Stephen D. Rosenthal served as Attorney General of the Commonwealth of Virginia from 1993-1994, as Chief Deputy Attorney General from 1992-1993, and as Deputy Attorney General of the Public Safety and Economic Development Division from 1986-1992. During his eight years in the Attorney General's Office, Virginia executed 18 prisoners. Rosenthal has been involved in several notable cases, including *Murray v. Giarratano* (1989), for which his office served as appellate prosecution counsel before this Court, and which led to the holding that the Constitution does not require the appointment of post-conviction counsel for death row inmates. Rosenthal was later involved in ordering DNA testing that ultimately exonerated Earl Washington, Jr. in 2000, when he was awaiting execution. From 1986-1994, Rosenthal was a member of the Virginia Department of Criminal Justice Services Board, Virginia's premier criminal justice agency, and currently he is a partner at Troutman Sanders in Richmond, Virginia.

Harry Shorstein served as an elected State Attorney from 1991-2008 in the Fourth Judicial Circuit for Duval County, Florida. In Jacksonville, Shorstein obtained convictions in over 30 murder cases and personally sought the death penalty in approximately a dozen capital cases, although the office under his tenure prosecuted many more. Shorstein prosecuted Ernest John Dobbert, Jr., who had killed two of his young children,

resulting in the conviction, death sentencing, and ultimate execution of Dobbert by the State of Florida. After leaving office, Shorstein went on to private practice. He has served as a member of the American Bar Association's Florida Death Penalty Assessment Team, and has testified before the Florida Legislature in support of a bill to require unanimous jury decisions in capital sentencing.

SUMMARY OF ARGUMENT

Amici, all former or current prosecutors or attorneys general who have worked on behalf of various state governments in seeking or defending the death penalty, strongly believe in the integrity of our jury system. But we know that there are times when a jury verdict is not a just result, and that in rare instances, innocent defendants are convicted. We believe that this is such a case.

The prosecution's case rested on scant circumstantial evidence with one exception. Three jailhouse informants claimed that Mr. Dailey had confessed to them.

Because jailhouse-informant testimony is inherently unreliable, the system is forced to rely on the jury to ferret out the truth. But to do that, jurors must be informed of the motives for the testimony to resolve what to believe and what to discount. Mr. Dailey's jurors were not so informed.

Not only did the jurors not receive what is now a Florida standard jury instruction alerting them to the unreliability of informant testimony, they were told the precise opposite. The jury was advised that the informants were testifying solely out of altruistic motives, received meager if any benefit for their testimony, and actually testified to their significant detriment. The jury was also told that these men had no reason to lie and could never "con" the experienced homicide detective who took their statements. This was untrue.

There is now evidence that convincingly and substantially undermines the informants' testimony: each informant received substantial benefits about which the jury never heard. And it is the height of irony that the lead jailhouse informant's testimony, which was hammered on excessively in closing argument and portrayed as particularly worthy of belief, has now been revealed as particularly mendacious. The prosecutor discovered, after reviewing the informant's subsequent prosecutorial-misconduct allegations, that the informant was a liar, and the prosecutor now admits that she could not and would not ever use him again. Yet, his testimony remains the centerpiece of Mr. Dailey's trial.

For our justice system to work, particularly in a capital case, there must be confidence that the conviction and sentence are grounded on reliable evidence. Now, with the discovery of compelling evidence that significantly undermines that which the jury heard in an otherwise weak and circumstantial case, there is only intolerable uncertainty.

The only thing that is worse than a belated exoneration is an exoneration that is warranted but never comes. *Amici* believe that there are such fundamental questions about the integrity and fairness of the proceedings in this case, that we join Mr. Dailey in urging the Court to hear the merits of his constitutional claim that a new trial is mandated.

ARGUMENT

BECAUSE MR. DAILEY'S CONVICTION AND DEATH SENTENCE ARE PREMISED ON UNRELIABLE JAILHOUSE-INFORMANT EVIDENCE AND BECAUSE HIS JURY DID NOT HEAR THE TRUTH ABOUT THE BENEFITS RECEIVED AND MOTIVES TO LIE, MR. DAILEY SHOULD BE GRANTED A NEW TRIAL TO AVOID THE UNACCEPTABLE RISK OF EXECUTING AN INNOCENT MAN.

A. We know, as former or current prosecutors and attorneys general, the inherent risk that jailhouse informants give false testimony to gain personal benefits. Typically, these witnesses' credibility is a jury question, but this is only true if the jury hears all evidence of the benefits received and motives to lie.

The *Amici* are former or current prosecutors or attorneys general who have worked on behalf of state governments in seeking or defending the death penalty. Some of the *Amici* believe in the continued enforcement of the death penalty and some do not. But

all concur that there can be no fair administration of the ultimate penalty where the conviction and sentence could not stand without jailhouse-informant testimony, which is of questionable veracity by its very nature, and is definitively undermined in Mr. Dailey's case by the now-uncovered facts.

1. Generally, the weaker the prosecution's case, the stronger the likelihood that prosecutors will resort to using jailhouse-informant testimony.

Amici know full well that there are times when the prosecution needs the testimony of informants to make its case. It is no secret that, the weaker the case, the stronger the need for jailhouse-snitch testimony. As Professor Steven M. Cohen, a former Assistant United States Attorney for the Southern District of New York, has noted:

> [I]n most situations a cooperator's value increases in inverse proportion to the information in possession of the prosecutor. For obvious reasons, where there is little information in the possession of (or available to) the prosecutor, the defendant's value as a cooperator increases.

Steven M. Cohen, "What Is True? Perspectives of a Former Prosecutor," 23 Cardozo L. Rev. 817, 822 (2002) (hereinafter, Cohen). "Accordingly, jailhouse snitch testimony will typically only be introduced when the prosecutor is concerned about the sufficiency of her case, and the testimony will tend to have the greatest

impact in precisely those cases." Russell D. Covey, "Abolishing Jailhouse Snitch Testimony," 49 Wake Forest L. Rev. 1375, 1391 (2014) (hereinafter, Covey).

At Mr. Dailey's trial, the prosecutor conceded that her case rested on circumstantial evidence. There was no "physical evidence," "no fingerprints," and "no hair or fibers," and so the prosecutor specifically requested that the jurors be provided a special instruction that they could convict Mr. Dailey on "circumstantial evidence." TR1 10: 1261; 1267-68; 1285. Because there was little else, the informants' testimony was quite simply the keystone to the prosecution case.

2. "Jailhouse-snitch" testimony is inherently unreliable.

Jailhouse informants sometimes provide false testimony. As Professor Cohen has bluntly stated, "It is accepted by almost everyone who participates as a professional in the workings of the criminal justice system – prosecutors, defense attorneys, law enforcement agents, and judges – that the use of cooperating witnesses in obtaining convictions is laden with risks." Cohen, 23 Cardozo L. Rev. at 827. "No witness, except of course for the defendant himself, has a greater interest in the outcome of a criminal case." *Id.*

Amici concur with the "numerous scholars and criminal justice experts [who] have found the testimony by 'jailhouse snitches' to be highly unreliable." *Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d Cir. 2004); *see also Fulcher v. Motley*, 444 F.3d 791, 810 (6th

Cir. 2006) (testimony of "jailhouse snitches" should be given little weight). In terms of a trial's "truth-seeking mission," *Amici* know that a confession of an accused, no matter how the confession is obtained or who is its audience, "radically changes the complexion of a case, particularly one lacking other evidence that directly implicates the defendant." Covey, 49 Wake Forest L. Rev. at 1375.

It is now accepted that "informant testimony [is] the leading cause of convictions in cases of death row exonerations, including non-DNA exonerations." Brandon L. Garrett, "Judging Innocence," 108 Columbia L. Rev. 55, 93 n.143 (2008) (citation omitted). The Center for Wrongful Convictions, in 2007, determined that "snitch cases had account[ed] for 45.9% of the then 111 death row exonerations since the death penalty was restored in the 1970s." Paul C. Giannelli, "Brady and Jailhouse Snitches," 57 Case W. Res. L. Rev. 593, 595 (2007).[2]

[2] Since 1973, there have been 167 death-row exonerations nationwide, with Florida in the lead with 29. https://deathpenaltyinfo.org/policy-issues/innocence, last visited on 1/12/2020.

3. Because informant testimony is inherently unreliable, prosecutors have an obligation to present an accurate and complete picture of the benefits received so that jurors can consider in context the credibility to which the testimony is entitled.

More than a half century ago, this Court acknowledged that the use of informants "may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). As a result, "a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions." *Id.*

The Court has articulated that the "potential unreliability of a type of evidence does not alone render its introduction in the defendant's trial fundamentally unfair." *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012). In rejecting the argument advanced in *Perry*, that eyewitness testimony should not be admitted without a judge first determining its reliability, this Court relied in part on a "jailhouse-snitch" case, *Kansas v. Ventris*, 556 U.S. 586 (2009). In that case the Court had refused "to craft a broad exclusionary rule for uncorroborated statements obtained from jailhouse snitches, even though **rewarded informant testimony may be inherently untrustworthy**." *Perry*, 565 U.S. at 245 (quoting *Ventris* at 594 n.*) (emphasis added; internal quotation marks and brackets omitted).

The Court explained its reasoning: it is "the jury, not the judge" that "traditionally determines the reliability of evidence." *Id.* With the safeguards of confrontation and effective assistance of counsel, defense counsel can "expose the flaws in the otherwise unreliable testimony." *Id.* at 245-46.[3]

A jury that is presented with jailhouse snitch testimony is "entitled to weigh, consider, and ultimately believe some or all of his testimony." *United States v. Mann*, 701 F.3d 274, 299 (8th Cir. 2012). But jurors will have a difficult time determining what to believe if the prosecutor presents a distorted view of why an informant is testifying or the informant's motives to lie. Ultimately, "[a] prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). In Mr. Dailey's case, our mission to seek justice has been inexorably compromised.

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[3] The Court observed that in *Ventris*, a reason to resist banning snitch testimony had been the "jury instructions that informed jurors about the unreliability of uncorroborated jailhouse-informant testimony." *Id.* Although Mr. Dailey's jurors were told how they could convict based on circumstantial evidence, they were never given the now-standard Florida jury instruction that jailhouse-informant testimony can be unreliable and must be considered with more caution than the testimony of other witnesses. *See In re Standard Jury Instructions in Criminal Cases – Report No. 2013-03*, 146 So. 3d 1110, 1122 (Fla. 2014).

B. The evidence unveiled after Mr. Dailey's trial about the jailhouse informants and their motives to testify stands in stark contrast to that presented during trial, thus undermining any confidence in the jury's verdict.

Turning to the stories that the jurors heard from the informants, the buttressing testimony from the lead detective, and the prosecutor's specious summation at Mr. Dailey's trial, it is plain that this jury was not afforded the truth. Jurors were denied the information that they needed to know for them to perform their ultimate task of determining whether Mr. Dailey is guilty. The picture portrayed at trial bears little likeness to the truth uncovered after trial. Juxtaposing one against the other is virtually night and day.

At trial, the prosecutor attempted to dispel any notion that the jailhouse informants were receiving any kind of benefit for their testimony. To the contrary, the jury was told that the informants would remain in jail and would not have their sentences significantly reduced, if at all. Jurors learned that not only did these informants not receive a substantial benefit from testifying, but actually their testifying would work to their significant detriment. Indeed, the prosecutor's lead witness, Paul Skalnik, informed the jury that he had testified against inmates many times before and "I was probably treated worse than if I hadn't testified." TR1 9: 1109.

As for their motives for testifying, one informant claimed that it was because he was upset that other

inmates bragged about "beating the charges," one had a daughter and was afraid for Mr. Dailey to be released, and Skalnik explained, as a former police officer, that law enforcement was still in his blood. TR1 9: 1157-59; 1177-87.

Lead Detective Halliday solidified this image of trustworthy informants who were telling the jury the truth. He highlighted how he had used Skalnik in the past "with extremely positive results." TR1 9: 1180-91. He also explained that he had advised the informants that he could promise them nothing in exchange for their testimony. TR1 9: 1179. And he confirmed the informants' testimony that they were putting themselves in a worse position because they were testifying. TR1 9: 1180-91.

The jury never learned that all three informants had greatly profited from their testimony. All three had their sentences significantly reduced because they agreed to testify against Mr. Dailey.

But it was the prosecutor's closing arguments about the informants that was the most misleading of all. TR1 10: 1257-1285. The prosecutor assured jurors that there was no reason to disbelieve the informants, and reiterated their testimony about the little or nothing that they were receiving in terms of their sentences. TR1 10: 1278-79. Rather, the prosecutor insisted, they all had testified to their substantial detriment. TR1 10: 1282.

Detective Halliday, the prosecutor argued, was experienced and could not be conned by any man. TR1 10:

1183. As for Skalnik, the State's star witness, whose testimony to Mr. Dailey's "confession" the prosecutor continually repeated, Detective Halliday had known him for years and "considers him to be reliable enough to bring him to the State Attorney's office with the information he has provided." TR1 10: 1183.

We now have learned that this same prosecutor would no longer use Skalnik's testimony at any trial. After the proceedings in this case, the prosecutor admitted that Skalnik is untrustworthy, has made false claims of prosecutorial misconduct, and would never again be a witness for the State.

One of the reasons informant testimony accounts for the overwhelming percentage of wrongful convictions is that jurors tend to give particular credence to jailhouse-informant testimony "because of implicit or explicit prosecutorial bolstering of the witness's credibility." Covey, 49 Wake Forest L. Rev. at 1394. In this case, the bolstering of the informants was blatant. The prosecutor maintained that "[t]hey were each honest with you about what they expect or hope to receive," and "there was no reason why you shouldn't believe them," as the detective did. TR1 10: 1278-79. But they were not honest and there were surely reasons not to believe their testimony.

C. A new trial is warranted because evidence has been uncovered that undermines confidence in the State's circumstantial-evidence case.

"The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him." Stephen S. Trott, "Words of Warning for Prosecutors Using Criminals as Witnesses," 47 Hastings L. J. 1381, 1394 (1996). "[E]ach contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to 'get' a target of sufficient interest to induce concessions from the government." *Commonwealth of Mariana Islands v. Bouie*, 243 F.3d 1109, 1123 (9th Cir. 2001).

The risk that the three informants who testified against Mr. Dailey mislead the jury with fabricated testimony is very real. On the case as now presented, *Amici* believe that the risk is so substantial that to proceed with an execution on this state of the record is untenable.

Florida leads the nation in exonerations from death row. https://deathpenaltyinfo.org/policy-issues/innocence (last visited January 12, 2020). The only thing worse than an exoneration of an innocent man or woman that comes years after the conviction, is a deserved exoneration that never comes. As Judge Learned Hand observed, "[o]ur procedure has been always haunted by the ghost of the innocent man convicted." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

There is a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Indeed, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). This Court stands as the final bulwark against that injustice in a capital case, and it must stand as such now for James Dailey.

Amici implore this Court to hear the merits of Mr. Dailey's plea for a new trial to avert the substantial likelihood that an innocent man could soon be executed for a crime that he did not commit.

CONCLUSION

Amici respectfully request that the Court grant Mr. Dailey's Petition for Writ of Certiorari.

Respectfully submitted,

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