No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF OF THE INNOCENCE PROJECT AND INNOCENT NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Innocence Project ("Project") is a nonprofit organization and law school clinic dedicated primarily to providing pro bono legal and related investigative services to innocent people wrongly convicted of crimes. Relying on research and analysis regarding such miscarriages of justice, the Project also seeks to prevent future wrongful convictions through reform initiatives that improve accuracy in our criminal legal system. Because wrongful convictions destroy lives and allow actual perpetrators to remain free, the Project's work serves as an important check on the power of the state over criminal defendants and helps to ensure a safer and more just society.

The Innocence Network ("Network") is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 67 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, and Australia. The Network and its members are also dedicated to improving the accuracy and reliability of criminal legal systems. Drawing on the lessons from cases in which innocent persons were convicted, the Network advocates study and

1. The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

reform designed to enhance the truth-seeking functions of criminal process and to prevent future wrongful convictions.

To date, the work of the Project, Network, and affiliated organizations has led to the exoneration of 375 wrongly convicted individuals based on DNA evidence. False informant testimony, including jailhouse informant testimony, is among the leading causes of these wrongful convictions, appearing in 64 of these cases. *See* Innocence Project, *DNA Exonerations in the United States*, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited June 26, 2021) [hereinafter *DNA Exonerations*]. In this case, the New York Court of Appeals' sweeping forfeiture ruling—that the right to confront your accusers is forfeited if you "open the door" to responsive evidence, such that the unconfronted testimonial hearsay of an informant can be introduced against you—profoundly aggravates the already significant wrongful conviction risk posed by informant testimony.

Amici curiae share a compelling interest in mitigating the risks of wrongful conviction. Accordingly the undersigned submit this brief to urge the Court to employ a confrontation clause framework that meaningfully protects the accused from the use of unreliable informant evidence.

SUMMARY OF ARGUMENT

The right to confrontation is at the heart of the protections afforded to the accused by our criminal legal system. At issue here is the New York Court of Appeals' holding that a defendant, by introducing evidence of an

informant's participation in the crime at issue, "opens the door" to the introduction of that informant's statements even when that witness is unavailable for cross-examination. Such a rule cannot stand; it is fundamentally flawed and at odds with a century of this Court's Sixth Amendment jurisprudence. Left undisturbed, the New York rule will lead to additional wrongful convictions and create perverse incentives for prosecutors to leverage their control over the plea bargaining process to gain an unfair—and unconstitutional—advantage.

Although widely used throughout the criminal legal system, informant testimony is often unreliable because informants are offered substantial benefits, such as sentencing reductions, in exchange for their cooperation. The mere prospect of these benefits incentivizes informants to provide false testimony, as demonstrated by dozens of wrongful convictions. Thus, informant testimony must be carefully scrutinized through the constitutionally-mandated mechanism for seeking the truth: cross-examination.

This Court should hold in favor of Mr. Hemphill.

ARGUMENT

I. Fraught with Reliability Problems, Informant Testimony Pervades the Criminal Legal System and Is a Leading Cause of Wrongful Conviction.

False informant testimony was a factor in nearly one in five of the 375 DNA-based exonerations achieved by the Project, Network, and affiliated organizations. *See* Innocence Project, *Informing Injustice: The Disturbing*

Use of Jailhouse Informants, https://innocenceproject.org/informing-injustice/ (last visited June 26, 2021) [hereinafter *Informing Injustice*]. Similarly, over 200 of the 2,805 known wrongful convictions featured false or unreliable informant testimony. National Registry of Exonerations, *Exoneration Detail List*, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=JI (last visited June 26, 2021) [hereinafter *Detail List*]. In capital cases, 45.9% of wrongful convictions were based at least in part on unreliable informant testimony—by far, the leading cause. Northwestern U. Sch. of Law, Ctr. on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, 3 (2005) [hereinafter *The Snitch System*]. It is virtually certain that the incidence of wrongful conviction based on false informant testimony is even greater than these sources suggest, as the use of informant testimony is, and has been, so widespread throughout the criminal legal system—and, as noted *infra* Section III.A, only a fraction of those cases make it to trial, where those false statements are ever tested through cross-examination, and even fewer post-conviction. *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 744 (2016).

In exchange for their cooperation, informants are offered strong and wide-ranging benefits that incentivize false testimony. For imprisoned informants, incentives include sentence reductions, special prison or jail privileges, access to commissary, monetary payments, assistance to family members or third parties, supportive testimony at parole hearings, and reduced charges in

pending cases. *See Informing Injustice*, *supra*; Brandon L. Garrett, *Characteristics of Informant Testimony*, https://convictingtheinnocent.com/wp-content/uploads/2016/10/garrett_informants_appendix.pdf. Informants may also be offered witness protection or relief from deportation. Roth, *supra*, at 748. To people in compromising and vulnerable situations—like those facing incarceration or deportation of themselves or loved ones—incentives like these are acutely powerful and raise the specter of false testimony. *See, e.g.*, *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (finding that informants "who are rewarded by the government for their testimony are inherently untrustworthy.");[2] *see also* Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996) ("[Informants'] willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, [and] soliciting others to corroborate their lies with more lies."); R. Michael Cassidy, *Soft Words of Hope:* Giglio*, Accomplice Witnesses, and the Problem of*

2. *See also, e.g.*, *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) (finding that informants granted immunity are "[b]y definition . . . cut from untrustworthy cloth, and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom"). *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."); *United States v. Singleton*, 144 F.3d 1343, 1353–54 (10th Cir. 1998), *vacated, on reh'g en banc,* 165 F.3d 1297 (10th Cir. 1999); *United States v. Levenite*, 277 F.3d 454, 462 (4th Cir. 2002); *Horton v. Mayle*, 408 F.3d 570, 581 (9th Cir. 2005); *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005).

Implied Inducements, 98 Nw. U. L. Rev. 1129, 1140 (2004) ("Because an offer of leniency allows [an informant] to avoid the full penal consequences of his own misconduct, such a reward may provide not only a powerful incentive to cooperate, but also a powerful incentive to lie."). Particularly in multi-defendant cases, where convictions largely hinge on cooperation, prosecutors use informant testimony to pursue certain defendants over other defendants who do not cooperate. And depending on the value of testimony offered, the prosecutor will offer more lenient terms to cooperating defendants, leading to informants having "overwhelming incentives to lie" to "please" the prosecutor. *See* Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 Cardozo L. Rev. 875, 879 (2002).

In weaker cases—prosecutions more likely to result in wrongful conviction—the government is also heavily incentivized to use informant testimony, despite its unreliability, to secure convictions. Police and prosecutors "do not and cannot check the[] lies" told by informants because that information "may be all the government has." Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 108, 108 (2006); *see also* Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 Cardozo L. Rev. 829, 848 (2002) ("A prosecutor has a powerful incentive to accept a cooperator's account uncritically."). Prosecutors can also go one step further and actually shape informant testimony to their advantage. Gershman, *supra*, at 848.

This "disturbing marriage of convenience" between the government and informants leads to miscarriages of justice. Natapoff, *supra*, at 108. Take, for example, some of the cases where incentivized informant testimony has led to wrongful conviction:

- In 1977, Randall Dale Adams was sentenced to death for the murder of a police officer during a traffic stop. His conviction rested on informant testimony from the *actual* killer, who received immunity in exchange for his testimony. The killer eventually recanted, and Adams was exonerated after having spent spending thirteen years on death row.

- In 1996, Dan L. Bright was convicted of murder and sentenced to death. His conviction was based, in part, on the false testimony of an informant who was promised leniency in exchange for testifying. Bright was exonerated after the disclosure of a suppressed FBI report indicating that someone else had committed the crime. He was incarcerated for eight years.

- In 1983, Anthony Siliah Brown was convicted of murder and sentenced to death. The informant was the *actual* killer, who testified against Brown in exchange for leniency. Brown was exonerated by the killer's recantation at re-trial, but he was incarcerated for three years.

- In 1985, Verneal Jimerson was convicted of double murder in Chicago. His conviction rested on the testimony of a purported accomplice, who, in

exchange for her testimony, was *released from prison*, where she was serving fifty years for her supposed role in the crime. The same informant also falsely testified against two other alleged participants in the crime. Jimerson and the other participants were eventually exonerated after DNA testing of the biological evidence excluded him, and the real killers confessed. He was incarcerated for eleven years.

- In 1993, Steven Manning was convicted of murder and sentenced to death. His conviction rested primarily on the testimony of a jailhouse informant who, in exchange for his testimony, was released after having served only six years of a fourteen-year sentence. Manning was awarded a new trial in 1997 based on trial errors, and the charges against him were dropped in 2000. In total, Manning was incarcerated for ten years.

See The Snitch System, *supra*, at 3–4, 8, 10. These are just a few examples of the many cases where incentivized informant testimony led to wrongful convictions.

II. The Confrontation Right, Always Critical for the Accused, Is All the More Vital in the Face of Inherently Unreliable Informant Testimony.

A. The Supreme Court has consistently emphasized the importance of the confrontation right.

For over a century, this Court has been unambiguous in its interpretation of the Confrontation Clause: it "commands . . . that reliability be assessed in particular

manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004) (noting that the Court's decisions have remained faithful to the Framers' understanding that testimonial statements of witnesses absent from trial may be admitted only where the declarant is unavailable and the defendant has had a prior opportunity for cross-examination); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (depriving the accused of the right to cross-examination deprives him of a fair trial); *Kirby v. United States*, 174 U.S. 47, 55 (1899) (referring to the confrontation right as "[o]ne of the fundamental guaranties of life and liberty"); *Alford v. United States*, 282 U.S. 687, 692 (1931) (acknowledging the confrontation right as "one of the safeguards essential to a fair trial").

This Court has consistently held that the fundamental right to cross-examine opposing witnesses is not subject to any judicially-crafted exceptions, as the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54; *Giles v. California*, 554 U.S. 353, 375–76 (2008). It extends to evidence that is "obvious[ly] reliable," and is not supplanted even where there are other ways to test reliability. *See Bullcoming v. New Mexico*, 564 U.S. 647, 661 (2011) (alteration omitted); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009). In short, "fidelity to the Confrontation Clause" permits the admission of testimonial out-of-court statements *only* where the declarant is unavailable *and* where the defendant has had the prior opportunity to cross-examine. *Bullcoming*, 564 U.S. at 658 (citing *Crawford*, 541 U.S. at 59).

B. As this Court has long recognized, the right to confrontation is paramount when informant testimony is introduced against a defendant.

Because informant testimony is inherently unreliable, the right to cross-examination in this context is especially vital and cannot—under any circumstances—be stripped from defendants. Informant testimony is admitted only "under the assumption that the existing safeguards of the legal system will prevent unreliable testimony from leading to a conviction of an innocent defendant." Melanie B. Fessinger et al., *Informants v. Innocents: Informant Testimony and Its Contribution to Wrongful Convictions*, 48 Cap. U. L. Rev. 149, 159 (2020). Indeed, this Court has repeatedly emphasized the importance of cross-examination when such testimony is admitted.

For example, *Lee v. United States*, 343 U.S. 747 (1952), involved the use of a wired informant to whom the defendant made incriminating statements. *Id.* at 749. This Court recognized both the credibility issues associated with the use of informants, and the importance of cross-examination, writing:

> The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, 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. at 757 (emphasis added).

The Court took this topic up again in *Hoffa v. United States*, 385 U.S. 293 (1966), where it considered whether testimony offered by a secret informant, placed in the defendant's hotel room during his trial, violated the defendant's Fourth, Fifth and Sixth Amendment rights. *See id.* at 295–96. While the majority held that "the use of secret informers is not *per se* unconstitutional," *id.* at 311, Chief Justice Warren dissented, noting that "[t]his type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts." *Id.* at 293, 320 (Warren, C.J., dissenting). Chief Justice Warren argued that, because of the informant's incentive to provide false testimony, "no conviction should be allowed to stand when based heavily on his testimony." *Id.* He further described this testimony as "the quicksand upon which these convictions rest, because without [the informant], who was the principal government witness, there would probably have been no convictions here." *Id.* Notably, Chief Justice Warren made these observations long before dozens of DNA exonerations validated his point empirically and emphatically. And although the majority disagreed with Chief Justice Warren, it also emphasized the importance of cross-examination to test informant testimony:

> The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury. At the trial of this case, [the informant] was subjected to rigorous cross-examination, and the extent and nature of

> his dealings with federal and state authorities were insistently explored.

Id. at 311.

Dissenting in *Albright v. Oliver*, 510 U.S. 266 (1994), which affirmed the dismissal of a Section 1983 civil rights action, Justice Stevens highlighted the problems with an arrest predicated on informant testimony, noting that the "only evidence against petitioner came from a paid informant who established her *unreliability* on more than 50 occasions, when her false accusations led to aborted and dismissed prosecutions." *Id.* at 292 (Stevens, J., dissenting) (emphasis in original). Justice Stevens wrote this dissenting opinion just five years after the first DNA exoneration[3] in 1989 when only a handful of defendants had been exonerated by DNA evidence. *See* National Registry of Exonerations, *Exonerations By Year: DNA and Non-DNA*, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last updated May 25, 2021).

The Court also tied the admission of informant testimony to the right to cross-examine in *Kansas v. Ventris*, 556 U.S. 586 (2009). There, the Court held that a defendant's statement to the jailhouse informant, though elicited in violation of the Sixth Amendment, was admissible to impeach the defendant's inconsistent testimony at trial. *See id.* at 593–94. The Court rejected

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3. Rob Warden, *DNA Exoneration: Gary Dotson,* Center on Wrongful Convictions, https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html (last visited June 25, 2021).

the proposal of a broad rule against jailhouse informant testimony but acknowledged the need for confronting and cross-examining such witnesses: "Our legal system, however, is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses." *Id.* at 594 n.* (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967)). Justice Stevens emphasized that "[t]he likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored. Indeed, by deciding to acquit respondent of felony murder, the jury seems to have dismissed the informant's trial testimony as unreliable." *Id.* at 597 n.2 (Stevens, J., dissenting) (internal citation omitted). Notably, since *Ventris* was decided, 115 innocent people whose convictions rested on informant testimony have been exonerated. *See Detail List*, *supra*.

As these cases demonstrate, this Court has time and again recognized the inherent reliability risks of informant testimony. The crucible of cross-examination is our Constitutional safeguard; cross-examination ensures that the court's truth-seeking function is fulfilled. As such, restricting a defendant's right to cross-examine informant testimony profoundly undermines a defendant's bedrock constitutional right to confront witnesses.

C. States recognize the importance of the confrontation right in the informant context.

In response to growing concerns over wrongful convictions predicated on informant testimony, certain states have taken significant steps to make defendants' confrontation rights even *more* robust in the informant context. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 86–88 (2008). These states

now require disclosures and tracking of the benefits informants receive in exchange for testifying so that defendants will be well-equipped to expose informants' credibility problems through cross-examination. *See, e.g.*, 725 ILCS 5/115-21 (Illinois requiring disclosures); Fl. Cr. Rule 3.220(b)(1)(A)(i)(M) (Florida requiring disclosures); Innocence Project, *Policy Reform: Connecticut* https://innocenceproject.org/policy/connecticut/ (last visited June 26, 2021) (Connecticut requiring disclosures and tracking); Innocence Project, Policy Reform: Maryland, https://innocenceproject.org/policy/maryland/ (last visited June 26, 2021) (Maryland requiring disclosures and tracking; https://innocenceproject.org/policy/oklahoma/ (last visited June 26, 2021) (Oklahoma same); https://innocenceproject.org/policy/texas/ (last visited June 26, 2021) (Texas same); https://innocenceproject.org/policy/nebraska/ (last visited June 26, 2021) (Nebraska same). The implementation of these reforms across the country confirms the unique threat to the fair administration of justice posed by the introduction of informant testimony.

III. Limiting Defendants' Ability to Cross-examine Informants Provides Prosecutors Additional Means to Secure Unreliable Convictions.

A. The New York rule provides prosecutors additional leverage to pressure innocent defendants to plead guilty.

That innocent defendants can be compelled to plead guilty is not disputable. In fact, in 18% of all known DNA exonerations, the defendant pleaded guilty to a crime he did not commit. *See* The Innocence Project, *Guilty Plea Problem*, https://www.

guiltypleaproblem.org/ (last visited June 25, 2021). The New York rule will only exacerbate the guilty plea problem.

The reasons for this problem are myriad. One factor is that defendants who are risk averse determine that pleading guilty will subject them to a less severe sentence than what they would receive if they were to take their chances, go to trial, and get convicted. *See* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 Cardozo L. Rev. 2295, 2306 (2006) (asserting that "an innocent defendant might accept the offer in order to avoid the risk of a much harsher result if he is convicted at trial, and thereby plea bargaining could very well lead to the conviction of factually innocent defendants"). This risk aversion is directly related to another factor—the "trial penalty," which is represented by the significantly higher sentences defendants face if they are convicted after trial rather than accept a plea deal from the government. *See* Innocence Project, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline* (Aug. 7, 2018), https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/; *see also* Clark Neily, *The Trial Penalty*, Cato Institute: Cato at Liberty (Feb. 9, 2018), https://www.cato.org/blog/trial-penalty (identifying the trial penalty as "the array of penalties, paybacks, and repercussions that are inflicted upon criminal defendants who presume to insist upon exercising their Sixth Amendment right to a jury trial").

The reality is that the criminal legal system is plea-driven rather than trial-based, and the plea bargaining process is controlled by prosecutors. *See Missouri v. Frye*, 566 U.S. 134, 143–44 (2012). And in addition to the pressure of the "trial penalty," the New York rule gives prosecutors

leverage to pressure even innocent defendants into pleading guilty. Unlike trials, which are premised upon an adversarial process designed to uncover the truth, the plea bargaining process is decidedly *not* truth-seeking. *See id.* at 144 (noting the goal of plea bargaining is to "conserve valuable prosecutorial resources"). Prosecutors wield nearly absolute power over the plea bargaining process: pleas are offered on their terms and timeline—with very little scrutiny. *Id.* at 143. This unregulated system allows prosecutors almost singular control over outcomes of these cases, resulting in "unfairness to individual defendants, inaccurate results, coerced dispositions, and compromises based on inadequate information." Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 Law & Contemp. Problems 83, 87 (2017) (citing Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. Legal Stud. 43, 44 (1988)).

Moreover, prosecutors can control the specific facts admitted in an allocution. *See id.* at 88 ("[T]he 'primary factors in determining plea prices—expected sentences, probability of conviction, and cost of litigation—all are, and have been, subject to manipulation by the government.'"); *see also* Mary Cecilia Sweeney-Kwok, *An Argument Against the Arbitrary Acceptance of Guilty Pleas As Statements Against Interest*, 71 Fordham L. Rev. 215, 251 (2002) ("In return for the sentence discount, the declarant's part of the bargain is to allocute as specified by the prosecution and in a way that fits the prosecution's version of the facts."); Ellen Yaroshefsky, *Introduction to the Cooperating Witness Conundrum: Is Justice Obtainable?*, 23 Cardozo L. Rev. 747, 757 (2002) (citing remarks by Judge Gerald Lynch suggesting "prosecutors

are de facto administrative law judges because they decide who is guilty or not, to which cooperator one should attempt to obtain or force a guilty plea, and in effect to impose a sentence"). This command over the process is only heightened in the context of cooperating witnesses, where "the prosecutor often will dictate or prepare the allocution itself." Sweeney-Kwok, *supra*, at 251 (pointing out that a prosecutor arguably has considerable influence on the content of a plea allocution, which "is coached, if not written, by a prosecutor with an eye towards its use against another defendant").

Indeed, that is what happened in Mr. Hemphill's case: the prosecution relied on the informant's allocution to discredit Mr. Hemphill's defense that he did not commit this crime. However, the informant, who had originally admitted to possessing the murder weapon, allocated in his guilty plea to possession of a different weapon, unconnected to the crime Mr. Hemphill was accused of. By changing the terms of the informant's allocution, the prosecution manipulated the factual record to implicate Mr. Hemphill, rather than the informant, who Mr. Hemphill asserts actually committed the crime. In this context, Mr. Hemphill's right to confront the informant was critical to his ability to present a defense; squashing it cemented the prosecution's case and left Mr. Hemphill without a defense. As shown by Mr. Hemphill's case, the degree of control prosecutors hold over the plea bargaining process allows them to create unassailable factual records using unreliable informant testimony—testimony that they can then weaponize against other defendants.

The New York rule will only add to the prosecutors' already outsized ability to exercise immense leverage

in the plea bargaining process. Neutering the right to confront a critical prosecution witness (the informant) will be yet another way innocent people are compelled to plead guilty to crimes they did not commit.

B. The New York rule creates additional opportunities for prosecutorial misconduct by making witnesses unavailable.

Endorsing the New York rule portends an additional consequence should the accused choose to take his case to trial: it creates an incentive for prosecutors to cause witnesses who might undermine a defense to become unavailable and, thus, unconfrontable. *See* Sweeney-Kwok, *supra*, at 250 n.283 (noting that "a prosecutor who possesses a favorable hearsay statement from an accomplice who will make an unsavory or unpredictable witness at trial, . . . [is] give[n] . . . an incentive to keep the witness 'unavailable'" but still allows the previous statement to come in against the defendant). Prosecutors can affirmatively make a witness unavailable to testify by, for example, "threatening to prosecute them (or a loved one) for an unrelated wrong unless they leave the jurisdiction or invoke a privilege." Mark Spottswood, *Truth, Lies, and the Confrontation Clause*, 89 U. Colo. L. Rev. 565, 603–04 (2018) (citing *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), in which a prosecutor repeatedly threatened a previously willing defense witness to induce her to invoke her privilege against self-incrimination). "[O]nly the prosecution has the power to compel live witnesses," and ensuring a witness will be unavailable for in-person testimony by dangling immunity or other benefits is a weapon of "the prosecutor's alone." Sweeney-Kwok, *supra*, at 250 n.283.

The prosecutorial tactic of offering unconfronted testimony in lieu of producing an available witness is "[t]he prototypical harm that the Confrontation Clause is designed to prevent." Spottswood, *supra*, at 599. The appropriate cure "where witnesses are unavailable due to prosecutorial conduct [is that] courts should readily exclude their prior, unconfronted statements." *Id.* at 603–04 (noting that a prosecutor's affirmative act to make a witness unavailable indicates that "confrontation might provide important insights and that the prior statement is of little intrinsic reliability"). So "allowing the testimony of a witness who was made unavailable by prosecutorial misconduct would severely undercut the [Confrontation] Clause's utility." *Id.* at 596 (citing Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1035 (1998)). As such, absolving prosecutors from the requirement to have informants available for cross-examination will inevitably lead to more convictions based on insufficient, unreliable evidence.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to hold in favor of Mr. Hemphill that his confrontation clause rights were violated when the court below allowed the introduction of unconfronted informant testimony against him.

Respectfully submitted,

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