No. A-_____

# In the Supreme Court of the United States

JAMES MILTON DAILEY,

*Applicant*,

v.

STATE OF FLORIDA,

*Respondent*.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA**

Pursuant to 28 U.S.C. § 2101(d) and Rule 13.5 of the Rules of this Court, applicant James Milton Dailey respectfully requests a 60-day extension of time, to and including Monday, May 2, 2022, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Florida in this case.

The Florida Supreme Court denied a timely petition for rehearing on December 2, 2021. Unless extended, the time to file a petition for a writ of certiorari will expire on March 2, 2022. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a). Copies of the Florida Supreme Court's opinion and of the order denying rehearing are attached.

1. Applicant James Dailey was convicted of capital murder and sentenced to death. Florida Sup. Ct. slip op. 2-3. There is significant cause to doubt Dailey's guilt. Among other things, his conviction rested in substantial part on the testimony of

three jailhouse informants who received favorable treatment from the State after declaring that Dailey confessed to them that he committed the crime; principal among these informants was Paul Skalnik, who gave graphic testimony recounting Dailey's supposed description of the murder. It has since been reported, however, that Skalnik was a serial liar and perpetual con man who made a career of testifying against fellow inmates in return for favors from the state.[1] Because of this and other deficiencies in the State's case, *amici* including the U.S. Conference of Catholic Bishops and Florida Conference of Catholic Bishops argued in support of a prior certiorari petition (No. 19-7309, *Dailey* v. *Florida*) that the evidence against Dailey was "shockingly sparse" (Br. 3) and "vanishingly thin" (Br. 5), concluding that "the evidence of Mr. Dailey's actual innocence is not only credible; it is overwhelming." Br. 7. Another *amicus* brief supporting that petition, this one filed by Current or Former Prosecutors and Attorneys General, likewise concluded that there is a "substantial likelihood that an innocent man could soon be executed for a crime that he did not commit." Br. 17.

In the years following the conviction, substantial additional evidence has come to light undermining the case for Dailey's guilt. This petition involves a portion of that newly discovered evidence. In particular, Skalnik sought to buttress his credibility by testifying at trial that he previously had been charged with "grand

[1] See, Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. Times Magazine (Dec. 4, 2019), https://www.nytimes.com/2019/12/04/magazine/jailhouse-informant.html. Recent press accounts report that Skalnik boasted he had "placed 34 individuals in prison, including four on death row." *Ibid.* In just a six-year period, he provided information to prosecutors in 37 cases, despite being dubbed a "con man extraordinaire" by police. *Ibid.*

theft," but "not murder, not rape, no physical violence in my life." Tr. 9:1158. This was false; in fact, the Pinellas County State Attorney's Office had charged Skalnik with lewd and lascivious assault on a child under age 14. R.2, 21, 30, 90, 2286. Dailey's counsel subsequently learned that the prosecutor at Dailey's trial had been actually aware of Skalnik's perjury at the time and nevertheless used Skalnik's misstatement to bolster the State's case against Dailey. Slip op. 6-7.

Accordingly, Dailey commenced this post-conviction challenge in state court, contending, among other things, that the State's failure to correct Skalnik's perjury violated Dailey's right to due process and fatally tainted his conviction, under the doctrine of *Giglio* v. *United States*, 405 U.S. 150 (1972). The trial court rejected the claim and the Florida Supreme Court affirmed. Insofar as is relevant here, that court opined that Dailey's current claim is simply a "repackaging" of a prior post-conviction challenge that had identified Skalnik's perjury but predated Dailey's discovery that the prosecutor had been aware that Skalnik lied on the witness stand; the court held it "irrelevant whether [the prosecutor] had actual knowledge that Skalnik's testimony was false." Slip op. 7-9. The court added that evidence that the State made knowing use of Skalnik's perjury is "immaterial under *Giglio*" because the jury already was aware that Skalnik had a criminal record and because two other inmates also testified that Dailey confessed to the murder. *Id*. at 10-11.

Justice Labarga dissented. Noting that "there was *no* forensic evidence linking Dailey to [the] murder" (slip op. 22), he explained that "Dailey's conviction and sentence of death exist under a cloud of unreliable inmate testimony." *Id*. at 24.

Justice Labarga added: "While finality in judicial proceedings is important to the function of the judicial branch, that interest can never overwhelm the imperative that the death penalty not be wrongly imposed. Since Florida reinstated the death penalty in 1972, thirty people have been exonerated from death row. * * * Thirty people would have eventually been put to death for murders they did not commit. This number of exonerations, the highest in the nation, affirms why it is so important to get this case right." *Id*. at 25.

2. Among other things, the petition for certiorari will argue that review is warranted because the Florida Supreme Court's application of *Giglio* is inconsistent with this Court's rulings and in conflict with the approach taken by other appellate courts.

The Florida court was wrong to hold that, because Skalnik's credibility had been diminished by the jury's knowledge of his criminal record, it is irrelevant that the State made *knowing* use of Skalnik's perjured testimony: The prosecution's "*deliberate* * * * presentation of known false evidence" is a near-insurmountable bar to the satisfaction of due process. *Giglio,* 405 U.S. at 153 (emphasis added). Accordingly, Dailey's current claim is distinct from, and considerably more powerful than, his prior one, which did not rest on the State's *actual knowledge* of Skalnik's perjury. Indeed, a prosecutor's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary standards of justice.'" *Giglio,* 405 U.S. at 153 (citation omitted). Consequently, the State's intentional use of perjured testimony generally *must* be a constitutionally material

fact. See also *United States* v. *Agurs,* 427 U.S. 97, 103 (1976) ("[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." (footnotes omitted)); *Napue v. Illinois,* 360 U.S. 264, 269 (1969) ("[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.").

Moreover, the decision below is in clear tension with the holdings of federal courts of appeals that a state's knowing use of false or misleading evidence bears on the determination whether that evidence had a material impact on the jury. See, *e.g.*, *Long* v. *Hooks,* 972 F.3d 442, 466 (4th Cir. 2020) (en banc) (where there was a pattern of police suppression of material evidence, the detectives' behavior "demonstrate[d] a pattern of deceitfulness and suppression that not only signifies that state actors conducted themselves in a corrupt manner, but also that they believed the withheld evidence was material enough to hide"); *Guzman* v. *Secretary, Department of Corrections*, 663 F.3d 1336, 1350 (11th Cir. 2011) (where detective testified falsely that witness received nothing in return for testimony, "[t]he fact that the lead detective * * * twice denied the existence of the payment is at least a tacit admission that it was perceived to have relevance to a reasonable fact finder viewing the credibility of this witness"); *Silva* v. *Brown,* 416 F.3d 980, 988 (9th Cir. 2005) (where prosecution agreed to a plea deal with co-defendant conditioned not only on the co-defendant's promise to testify against the defendant at trial but also

on his agreement to forego a psychiatric examination prior to testifying, "the very fact that the prosecution had sought to keep evidence of the co-defendant's mental capacity away from the jury might have diminished the State's own credibility as a presenter of evidence").

3. Applicant requests this extension of time to file the petition for a writ of certiorari because undersigned counsel were not responsible for the preparation of applicant's briefs in the Florida state courts. They accordingly seek additional time to review and familiarize themselves with the record and with the complex issues presented here.

In addition, counsel primarily responsible for preparing the petition also have responsibility for a number of other matters in this and other courts with proximate due dates, including *Railcar Management LLC* v. *Cedar AI, Inc.*, No.: 2:21-cv-00437-TSZ (W.D. Wash.) (motion to dismiss due Feb. 14, 2022); *American Trucking Ass'ns* v. *Alviti*, No. 1:18-cv-00378-WES-PAS (D.R.I.) (depositions scheduled for week of Feb. 21, 2022); *Community Housing Improvement Program* v. *City of New York*, No. 20-3366 (2d Cir.) (oral argument Feb. 16, 2022); and *Kennedy* v. *Bremerton School Dist.*, No. 21-418 (*amicus* brief in support of respondent likely to be due the week of Feb, 28, 2022). Accordingly, an extension of time is warranted.

Counsel for respondent has informed us that the State has no objection to an extension of up to thirty days.

For the foregoing reasons, the application for a 60-day extension of time, to and including May 2, 2022, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

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