No.

In the Supreme Court of the United States

JAMES MILTON DAILEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

LAURA FERNANDEZ
127 Wall Street
New Haven, Connecticut 06511

JOSHUA DUBIN
201 S. Biscayne Blvd
Suite 1210
Miami, Florida 33131

SCOTT A. EDELMAN
STEPHEN P. MORGAN
Milbank LLP
55 Hudson Yards
New York, NY 10001

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
(202) 263-3000
crothfeld@mayerbrown.com

MICHAEL B. KIMBERLY
PAUL W. HUGHES
McDermott Will & Emery LLP
500 N. Capital Street, NW
Washington, DC 20001

Additional names on inside cover

JULISSA R. FONTAN
Capital Collateral Regional Counsel Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637

SETH MILLER
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, Florida 32301-2651

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511

***** CAPITAL CASE *****

QUESTIONS PRESENTED

Petitioner James Milton Dailey was convicted of capital murder and sentenced to death. He has since discovered that the State made knowing use of perjured testimony by one of the principal witnesses against him. But the Florida Supreme Court refused to set aside the conviction, holding that the fact that the prosecution's use of perjury was knowing and intentional has no bearing on whether the resulting conviction should be reversed.

The questions presented are:

Whether the State's knowing use of perjury is relevant to determining whether the perjured testimony was material to the verdict.

Whether perjured testimony that the State knowingly used must be deemed material to the verdict so long as there is any reasonable likelihood that the false testimony "could" have affected the judgment of the jury.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: August 7, 1987

Direct Appeal:
Florida Supreme Court
Dailey v. *State*, 594 So. 2d 254 (Fla. 1991) (reversed death sentence)
Judgment Entered: November 14, 1991

Resentencing Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: January 21, 1994

Second Direct Appeal:
Florida Supreme Court
Dailey v. *State*, 659 So. 2d 246 (Fla. 1995)
Judgment Entered: May 25, 1995

Supreme Court of the United States
Dailey v. *Florida*, 516 U.S. 1095 (1996)
Judgment Entered: January 22, 1996

First Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: July 14, 2005

Florida Supreme Court
Dailey v. *State*, 965 So. 2d 38 (Fla. 2007)
Judgment Entered: May 31, 2007

United States District Court for the Middle District of Florida
Dailey v. *Secretary, Florida Department of Corrections*, No. 8:07-cv-01897 (M.D. Fla. Sept. 30, 2008)
Judgment Entered: September 30, 2008

United States District Court for the Middle District of Florida
Dailey v. *Secretary, Florida Department of Corrections*, No. 8:07-cv-01897 (M.D. Fla. Apr. 1, 2011), as amended Mar. 29, 2012
Judgment Entered: April 1, 2011

United States Court of Appeals for the Eleventh Circuit
Dailey v. *Secretary, Florida Department of Corrections*, No. 12-12222-P (11th Cir. July 19, 2012)
Judgment Entered: July 19, 2012

Supreme Court of the United States
Dailey v. *Crews*, 569 U.S. 961 (2013)
Judgment Entered: April 29, 2013

Second Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: April 12, 2017

Florida Supreme Court
Dailey v. *State*, 247 So. 3d 390 (Fla. 2018)
Judgment Entered: June 26, 2018

Supreme Court of the United States
Dailey v. *Florida*, 139 S. Ct. 947 (2019)
Judgment Entered: January 22, 2019

Third Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: March 20, 2019

Florida Supreme Court
Dailey v. *State*, 279 So. 3d 1208 (Fla. 2019), rhrg denied, SC18-557, 2019 WL 5152446 (Fla. Oct. 14, 2019)
Judgment Entered: October 3, 2019

Supreme Court of the United States
Dailey v. *Florida*, 141 S. Ct. 689, No. 19-7309
Judgment entered: November 2, 2020

First Successive Motion After Death Warrant Signed:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084

Judgment Entered: October 16, 2019

Florida Supreme Court
Dailey v. *State*, 283 So. 3d 782 (Fla. 2019)
Judgment Entered: November 12, 2019

United States District Court for the Middle District of Florida
Dailey v. *Secretary, Florida Department of Corrections*, No. 8:19-cv-02956 (M.D. Fla. Dec. 5, 2019)
Judgment Entered: December 5, 2019

Dailey v. *Secretary, Florida Department of Corrections*, No. 8:07-cv-01897 (M.D. Fla. Dec. 10, 2019)
Judgment Entered: December 10, 2019

United States Court of Appeals for the Eleventh Circuit
Dailey v. *Secretary, Florida Department of Corrections*, No. 19-15147 (11th Cir.) (filed Dec. 27, 2019)
Judgment Entered: February 5, 2020

In re: James M. Dailey, No. 19-15145 (11th Cir.) (filed Dec. 30, 2019)
Judgment Entered: January 30, 2020

Second Successive Motion After Death Warrant Signed:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Filed: December 27, 2019

Judgment Entered: May 29, 2020

Third Successive Motion After Death Warrant Signed:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Filed: July 31, 2020
Judgment Entered: September 21, 2020

Florida Supreme Court
Dailey v. *State*, 329 So. 3d 1280 (Fla. 2021), rhrg denied, SC20-934, SC20-1529, 2021 WL 5709839 (Fla. Dec. 2, 2021)
Judgment Entered: September 23, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

James Milton Dailey respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court (App., *infra*, 1a-19a) is reported at 329 So. 3d 1280. The decision of the Florida Circuit Court (App., *infra*, 20a-39a) is not reported.

JURISDICTION

The Florida Supreme Court entered judgment on September 23, 2021, and denied a timely petition for rehearing on December 2, 2021. On March 18, 2022, Justice Thomas extended the time to file a petition for a writ of certiorari to April 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

STATEMENT

In the years since petitioner James Milton Dailey was convicted of capital murder and sentenced to death, substantial additional evidence has come to light that raises grave doubts about the integrity of his trial—and that establishes his innocence. This petition involves some of that newly discovered evidence: It has now been established that the State made knowing use of perjured testimony offered against Dailey at trial by a key prosecution witness.

But the Florida Supreme Court held that it is legally "irrelevant whether [the prosecutor] had actual knowledge that [the prosecution witness's] testimony was false." App., *infra*, 7a. The court therefore held that the prosecution's knowing use of perjury has no bearing on the materiality of the perjured testimony.

That holding is wrong. As federal courts of appeals have correctly recognized, a prosecutor's knowing decision to make use of perjury *itself* tends to establish that the witness's lies were significant, and therefore strongly supports the conclusion that the perjury was material to the jury's decision. The decision below also got wrong—and contributes to a broader conflict in the lower courts on—the standard used to determine materiality in this context.

The proper treatment of the State's invocation of perjured testimony to obtain a conviction is a recurring issue that is significant in every factual context. And here, the context vastly compounds the importance of the issue: The State used the perjured testimony to obtain a capital conviction and a sentence of death. The error below is especially disturbing because there is strong reason to believe that the State's misconduct, if uncorrected, will produce a horrifying injustice: neutral third parties, including the U.S. and Florida Conferences of Catholic Bishops, have concluded that "the evidence of Mr. Dailey's actual innocence is not only credible; it is overwhelming." Br. for A*mici* Catholic Bishops at 7, No. 19-7309, *Dailey* v. *Florida* (U.S. Jan. 17, 2020) (Catholic Bishops' Br.). Further review therefore is warranted.

A. Factual background

1. Dailey and another man, Jack Pearcy, were prosecuted for the murder of fourteen-year-old Shelly

Boggio in 1985. Pearcy was tried first. The jury found him guilty and recommended a life sentence with the possibility of parole after 25 years. *Pearcy* v. *State*, 514 So. 2d 364 (Fla. 2d Dist. Ct. App. 1987).

At Dailey's trial, it was undisputed that the victim, who knew Pearcy, had been at Pearcy's house on the night of the murder, along with Pearcy, Dailey, Pearcy's girlfriend Gayle Bailey, and a friend of Pearcy, Dwaine "Oza" Shaw. Witnesses presented conflicting accounts of what happened there. Bailey claimed that Pearcy, Dailey, and Boggio left the house together, while she and Shaw remained at home. TR1 8:958, 971-72, 977, 983-84.* Shaw, in contrast, testified that Pearcy and Boggio—but *not* Dailey—gave him a ride to a nearby phone booth before continuing on without him. TR1 8:997, 999, 1004-05, 1007.† Both Bailey and Shaw testified that they saw Pearcy and Dailey enter the house together in the early hours of the morning (TR1 8:958-60, 982-83); at a post-conviction proceeding, however, Shaw would testify that

---

* "TR1" refers to the record on appeal from Dailey's first trial proceedings. "TR2" refers to the record on appeal from Dailey's resentencing. "R2" refers to the record on appeal in *Dailey* v. *State*, 279 So. 3d 1208 (Fla. 2019). "PC ROA" refers to the record on appeal from the denial of Dailey's initial state postconviction motion. "R4" refers to the record on appeal in this proceeding.

† Telephone records corroborated Shaw's account, confirming that he made a call from the phone booth at the time in question. R2 419, 436, 10290, 11712; PC ROA 3:358 (testimony of Betty Mingus about receiving a call to her number); PC ROA Supp Vol. 1:100 (state's closing argument, acknowledging that call was placed locally at 1:15 a.m. eastern time and lasted through 1:41 a.m.).

Pearcy had first returned home alone, without Boggio, before heading out again with Dailey. R2 421.‡

The next day, police found Boggio's body in the water near Indian Rocks Beach. The medical examiner concluded that she had been stabbed and strangled before ultimately drowning sometime between 1:30 a.m. and 3:30 a.m. TR1 7:850, 870. There were no eyewitnesses to Boggio's killing, and no physical or forensic evidence placed Dailey with her at the time or place of her death; the prosecutor conceded as much in closing argument. TR1 10:1267-68 (noting that there was no "physical evidence," "no fingerprints," and "no hair or fibers"). The prosecutor would later remark that "[i]t was a circumstantial case * * * [s]o speculation is all we have as to what happened." Jamal Thalji, *Pinellas girl, 14, lived a short, hard life. Her killer is set to die*, TAMPA BAY TIMES (Sept. 27, 2019).

The linchpin of the government's case against Dailey therefore was the testimony of three jailhouse informants—James Leitner, Pablo DeJesus, and Paul Skalnik—who claimed that Dailey had confessed to them that he committed the murder; each informant garnered substantial benefits from the State in exchange for his testimony. Skalnik offered a particularly inflammatory account, testifying that Dailey had told him that "[t]he young girl kept staring at [me],

---

‡ The Florida Supreme Court's account of the facts recounts Shaw's testimony that "'he saw Pearcy and Dailey, but not Boggio, entering the house together.'" App., *infra*, 2a (citation omitted). That account omits Shaw's subsequent statement that Pearcy had earlier returned *alone*, without Boggio, before leaving again, this time with Dailey. Shaw gave the same account to police shortly after discovery of the crime. See page 6, *infra*.

screaming and would not die." TR1 9:1116. He repeated some variant of this statement at least three times during the prosecutor's direct examination (TR1 9:1116, 1117) and twice more during cross-examination, TR1 9:1153.

Skalnik's testimony was so compelling that, during closing argument, the prosecutor referred to it half a dozen times. TR1 10:1255, 10:1257, 10:1265, 10:1281, 10:1285. She specifically invoked his testimony that the victim "wouldn't die, she kept screaming, she wouldn't die, they drowned her," as evidence of premeditation. TR1 10:1257. And she explicitly embraced Skalnik's imagery to drive the point home: "The child wouldn't die so he drowned her * * *. Stared at him and she wouldn't die. So, he killed her." TR1 10:1285. Apart from Skalnik's riveting account, however, none of the jailhouse informants was able to provide additional information about the manner, motive, or circumstances of the killing.

When testifying at trial, Skalnik presented himself as a former police officer turned petty thief. TR1 9:1117-18, 1155-56. He claimed that he had previously been charged with "grand theft . . . not murder, not rape, no physical violence in my life." App., *infra*, 7a. In closing argument, the prosecutor implicitly adverted to this testimony as well, presenting the informants as credible witnesses in part by arguing that there is a "hierarchy over in that jail" where "some crimes are worse than others" and implying that Skalnik, as someone who assertedly had not engaged in sex offenses or violent crimes, was at the top of that hierarchy. TR1 10:702.

After this presentation, the jury convicted Dailey and recommended death; following an appeal and remand, he was sentenced to death. TR2 2:247-253 (resentencing order). Dailey's subsequent attempts to obtain state and federal postconviction relief have been unsuccessful. See App., *infra*, 3a-5a.

2. Since Dailey's conviction, substantial evidence has come to light—including much that had been withheld by the State—that calls his guilt into serious question. This evidence indicates that it was Pearcy who murdered Boggio—and that Pearcy acted alone. A partial list of this evidence includes the following:

a. Pearcy himself has admitted to being solely responsible for Boggio's death or otherwise has affirmed Dailey's innocence at least four times. R2 9599-9600, R2 12099, R2 12119, R2 12121.

b. In Dailey's initial state postconviction proceeding, Dailey presented evidence from Oza Shaw that Pearcy and Boggio left Pearcy's home together, without Dailey, during the time window in which Boggio died; and that Pearcy returned home without Boggio later that evening. Because Shaw had not previously testified that Pearcy returned home alone after having been out with Boggio, the State suggested on cross-examination that Shaw's account was a recantation that was not worthy of belief, a position accepted by the Florida courts. But in Dailey's second postconviction petition, filed in 2017, he presented a report from the Indian Rocks Beach police showing that Shaw had given the same account just after the crime in a tape-recorded interview with law-enforcement personnel. R2 92-95.

c. Dailey also discovered that the testimony of the jailhouse witnesses was procured under very peculiar

circumstances: They first came forward 13 months after Dailey's detention, when lead detective John Halliday—just a week after Pearcy's jury declined to recommend the death penalty in his case—pulled each of the inmates from Dailey's jail pod into a small room and showed them newspaper articles recounting details of the crime. None of the 15 inmates Halliday interviewed relayed any incriminating statements from Dailey in their interviews. The three who ultimately came forward did so only *after* Halliday's jailhouse visit, and all claimed that Dailey made his incriminating statements sometime *after* that visit. See R2 12181, R2 12188-94, R2 12206-08, R2 12210-22.

3. Dailey also learned that informant Skalnik—who has since been reported to have been a serial liar and perpetual grifter who made a career of testifying against fellow inmates in return for favors from the state, including in *four* capital cases[§]—committed perjury when he testified that his criminal activity had been limited to theft, "not rape, no physical violence in my life." That was not true. In fact, Skalnik had been "arrested in 1982 on a charge of lewd and lascivious assault on a child under fourteen." App., *infra*, 5a. The State dismissed that charge against Skalnik, not because the charge was unsupported by the evidence, but because Skalnik cooperated with Pinellas County prosecutors in other cases. R2 2236 ("Your Honor, upon the acceptance of the plea by the Court,

---

[§] 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://tinyurl.com/wc8d3a8. Skalnik boasted that 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*.

the State will no info the current investigation concerning the lewd and lascivious counts, or similar type counts against the Defendant that are under investigation."); R2 2290 ("no information" filed by State 11 days later, on March 21, 1983).

In 2017, after uncovering Skalnik's sexual assault charge and subsequent dismissal, Dailey brought a motion for postconviction relief, arguing that the State's failure to correct Skalnik's false testimony was a violation of *Giglio* v. *United States*, 405 U.S. 150 (1972), which held that the government's failure to disclose exculpatory evidence that had been known to any state official—including impeachment evidence—is inconsistent with the requirements of due process. See also *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). But the Florida Supreme Court denied the motion for relief, holding that the impeachment evidence of Skalnik's sex crime was immaterial: "Skalnik's credibility was already compromised because the jury was aware that he had committed multiple crimes." *Dailey* v. *State*, 279 So. 3d 1208, 1217 (Fla. 2019), cert. denied, 141 S. Ct. 689 (2020). Accordingly, the court concluded that evidence of Skalnik's sexual assault charge would not "have affected the jury's verdict." *Ibid.*

B. Proceedings below

This petition addresses *additional* exculpatory material that has been uncovered by Dailey.

At Dailey's trial, prosecutor Robert Heyman had questioned Detective Halliday about the jailhouse informants' testimony. By chance, a set of notes taken during the Dailey trial was disclosed in another, unrelated capital case in which Skalnik had testified. Those notes, undated and unsigned, tracked Heyman's questioning of Halliday at Dailey's trial—and they had the words "sexual assault" repeatedly scratched out, presumably indicating that Heyman had been aware of Skalnik's sexual assault charge and made a conscious choice not to address it before the jury. R4 104. During an ABC News interview on January 14, 2020, Heyman identified the notes as his own. R4 202. It therefore is apparent that the prosecution had been aware *during Dailey's trial* of Skalnik's perjury regarding his own history of sexual assault on a minor and had chosen not to correct or disavow it.

Accordingly, Dailey commenced this postconviction 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*. The trial court rejected the claim (App., *infra*, 34a-38a) and the Florida Supreme Court affirmed. *Id.*, 1a-16a.

Insofar as is relevant here, the court below opined that Dailey's current claim is "merely a repackaging of the claim in Dailey's 2017 successive motion that *Giglio* was violated based on Skalnik's false testimony about his criminal history at Dailey's trial." App., *infra*, 6a. The court added that it was "irrelevant whether Heyman had actual knowledge that Skalnik's testimony was false because that knowledge

would have been imputed to Heyman even if he did not have actual knowledge." *Id.* at 7a. Because "[b]oth *Giglio* claims allege[d] that the same testimony is false" and the Florida Supreme Court believed that Heyman's notes had no bearing on that claim (*ibid.*), the court concluded that Dailey's claim was "untimely and procedurally barred" as a matter of state law on the ground that it added nothing material to the prior motion for relief based on the fact of Skalnik's perjury. *Id*. at 6a.

The court added that, even if the new claim were not procedurally barred, it should be rejected on the merits. The court noted its prior ruling that Skalnik's perjury was not material to the jury's verdict 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. App., *infra*, 7a-8a. Here, the court continued, prosecutor Heyman's knowledge of the perjury "ha[s] no impact on the materiality of Skalnik's testimony." *Id*. at 8a. Thus, the court concluded, evidence of the State's knowing use of perjury "would not weaken the case against Dailey so as to give rise to a reasonable doubt as to his culpability." *Id*. at 9a.

Justice Labarga dissented. Noting that "there was *no* forensic evidence linking Dailey to [the] murder" (App., *infra*, 16a), he explained that "Dailey's conviction and sentence of death exist under a cloud of unreliable inmate testimony." *Id*. at 17a. 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 18a-19a.

REASONS FOR GRANTING THE PETITION

Decades after the fact, Dailey has discovered that the State made knowing use of perjured testimony from the key prosecution witness to obtain his conviction and sentence of death. In the decision below, the Florida Supreme Court held that the State's actual knowledge of the perjury is legally irrelevant and has no bearing on the standard used to assess the materiality of the false testimony. Both elements of this holding conflict with the decisions of federal courts of appeals or state courts of last resort, and both are wrong.

And those legal errors, significant in their own right, should not obscure the manifest injustice of the conviction and sentence here. The State's case against Dailey is strikingly weak, resting in substantial part on the graphic testimony of a jailhouse informant—the very witness whose perjured testimony the State embraced at trial and who has since been revealed to be an enthusiastic fabulist. There is every reason to believe that, viewed under the proper materiality standard, Dailey's conviction and sentence should be set aside. Yet absent this Court's intervention, as a number of distinguished former prosecutors wrote in support of a prior petition for certiorari, there is a "substantial likelihood that an innocent man could

soon be executed for a crime that he did not commit." Br. for *Amici* Prosecutors at 17, No. 19-7309, *Dailey* v. *Florida* (U.S. Jan. 17, 2020). The Court should grant review and reverse.

I. This Court has jurisdiction over the case.

As a preliminary matter, this Court has jurisdiction to hear the case, notwithstanding the Florida Supreme Court's invocation of state law in denying Dailey's claim. That court held the claim procedurally barred under Florida Rule of Criminal Procedure 3.851(e)(2) ("[a] claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits[.]"). App., *infra*, 6a-8a. Such a ruling constitutes an adequate and independent state ground for decision "[o]nly if the state ground is truly independent of the federal issue and is otherwise adequate." Stephen M. Shapiro, Kenneth S. Geller et al., SUPREME COURT PRACTICE 3-82 (11th ed. 2019). The Court has long applied a presumption against independence where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983).

That presumption applies in this case: The Florida Supreme Court's ruling that Dailey's claim is barred under Florida law cannot be separated from its analysis of *Giglio* materiality, which involves a federal constitutional question. The Florida court concluded that the instant *Giglio* claim failed to allege a new ground for relief because it was "merely a repackaging of the claim in Dailey's 2017 successive motion

that *Giglio* was violated." App., *infra*, 6a. But that conclusion rested on a mistaken understanding of federal law. The prior claim was based on the fact of Skalnik's perjury. The new one, in contrast, rests on the prosecutor's *knowing use* of perjured testimony. The procedural holding below therefore expressly rested on the judgment that, under *Giglio*, it is "irrelevant whether [the prosecutor] had actual knowledge" of perjury. *Id.* at 7a.

The validity of that conclusion—that a prosecutor's actual knowledge of perjury is irrelevant for *Giglio* purposes—is a matter of federal law. And "when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and * * * jurisdiction is not precluded." *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985). That is the situation here: The Florida Supreme Court could not have decided that the present *Giglio* claim "fails to allege new or different grounds for relief" (Fla. R. Crim. P. 3.851(e)(2)), without first deciding that a prosecutor's actual knowledge has no bearing on a *Giglio* claim.

The Court has applied this jurisdictional rule repeatedly. See, *e.g.*, *Ake*, 470 U.S. at 74-75 (where "the State ha[d] made application of the procedural bar depend on an antecedent ruling on federal law," "the federal-law holding is integral to the state court's disposition of the matter, and [a] ruling on the issue is in no respect advisory"); *Int'l Longshoremen's Ass'n, AFL-CIO* v. *Davis*, 476 U.S. 380, 388 (1986) ("sufficiency of the state procedural ground" depended on the state's resolution of an "antecedent federal question").

As in those cases, the Florida Supreme Court's ruling on state procedure depended on an antecedent ruling on federal law. Underscoring this point, that court's alternative analysis of the merits of Dailey's *Giglio* claim rests on the same essential proposition as its procedural ruling: Dailey "cannot meet the *Giglio* materiality prong" because the prosecutor's knowledge of Skalnik's perjury "ha[s] no impact on the materiality of Skalnik's testimony." App., *infra*, 8a. Because the court's procedural holding depended on its understanding of the *Giglio* materiality standard—an understanding that, as we show below, was wrong—"the federal-law holding [was] integral to the [Florida Supreme Court's] disposition of the matter." *Ake*, 470 U.S. at 75. Consequently, the decision below does not rest on an independent and adequate state ground barring jurisdiction.

II. That the State made knowing use of perjured testimony is material to resolution of a *Giglio* claim.

A. The Florida court was wrong to hold that the State's knowing use of perjury was not relevant to the materiality inquiry.

It is settled that the state's use of perjured testimony or suppression of exculpatory evidence requires reversal of a conviction if the evidence was "material" to the jury's determination of guilt or punishment. See, *e.g.*, *Wearry* v. *Cain*, 577 U.S. 385, 392 (2016) (per curiam); *Strickler* v. *Green*, 527 U.S. 263, 281-82 (1999); *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); *United States* v. *Agurs*, 427 U.S. 97, 112-13 (1976). Here, 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 to the materiality analysis that the State also made *knowing* use of Skalnik's perjured testimony. In fact, as other courts have recognized, that the prosecutor chose to hide and exploit a witness's perjury is highly relevant to the determination of materiality.

The prosecution's knowledge compounds the simple fact of the perjury and is independently relevant for two reasons. It shows that, in the state's *own* assessment, the prosecution obtained a significant advantage from the perjury. And it raises doubts about the integrity of the *entirety* of the state's case. The court below erred as a matter of federal constitutional law in holding to the contrary.

First, the government has a duty both to disclose material evidence favorable to the defense and to correct perjured testimony. See, *e.g., Agurs,* 427 U.S. at 103. Logically, that a prosecutor *intentionally* fails to perform this duty almost certainly reflects a judgment that disclosure would materially injure the government's case—"an admission, so to speak, of prejudice which might, particularly in close cases, tip the scales." *United States* v. *Gerard*, 491 F.2d 1300, 1302 (9th Cir. 1974). After all, it is "'doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial.'" *United States* v. *Mitchell*, 365 F.3d 215, 255 (3d Cir. 2004) (quoting *United States* v. *Jackson*, 780 F.2d 1305, 1311 n. 4 (7th Cir. 1986)); see, *e.g.*, *Gilday* v. *Callahan*, 59 F.3d 257, 269 (1st Cir. 1995) ("[W]e think it at least reasonably likely that the suppression of this evidence could have affected the jurors' judgment. Presumably, the government agrees with this

assessment; for what other reason would the prosecutor have gone to such lengths to keep the information from them?").

Courts routinely acknowledge this common-sense reality—and, consequently, understand that knowing use of perjury or related prosecutorial misconduct must be taken into account by a court in assessing materiality under *Giglio*: knowing suppression of evidence demonstrates that prosecutors "believed the withheld evidence was material enough to hide." *Long* v. *Hooks,* 972 F.3d 442, 466 (4th Cir. 2020) (en banc). Or where (as here) the state hid impeachment evidence, that conduct "is at least a tacit admission that it was perceived to have relevance to a reasonable fact finder viewing the credibility of this witness." *Guzman* v. *Secretary, Dep't of Corrections*, 663 F.3d 1336, 1350 (11th Cir. 2011); cf. *Kyles* v. *Whitley*, 514 U.S. 419, 444 (1995) (importance of suppressed evidence "is best understood by taking the word of the prosecutor").

Second, a prosecutor's recourse to perjury or similar tactics likely reflects the state's belief that its case is weak *overall.* Given the clear impropriety of using perjury, as well as the risks associated with that misconduct, prosecutorial bad faith supports an inference that prosecutors "resorted to improper tactics because they were justifiably fearful that without such tactics the defendants might be acquitted." *United States* v. *Boyd*, 55 F.3d 239, 241-42 (7th Cir. 1995).

By the same token, knowing use of perjury raises a reasonable suspicion that other elements of the state's case also are misleading: an effort "to keep evidence * * * away from the jury might * * * diminish[] the State's own credibility as a presenter of

evidence." *Silva* v. *Brown,* 416 F.3d 980, 988 (9th Cir. 2005); see *United States* v. *Flores-Rivera*, 787 F.3d 1, 18-19 (1st Cir. 2015) (noting value to the defense of evidence that calls into question the testimony of a witness and of the prosecutor). This, too, is common sense, and mirrors a broader understanding that misleading litigation behavior in one area may well carry over into other parts of the case: "[A] person may mistakenly testify wrongly and still be believable, but if a person testifies falsely, willfully, and materially on one matter, then his oath or word is not worth anything and he is likely to be lying in other respects." *Enying Li* v. *Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013) (internal quotations omitted); accord *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949) ("[T]he testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next."); *Siewe v. Gonzales*, 480 F.3d 160, 170 (2d Cir. 2007) (emphasizing that a single instance of false testimon*y* may infect the credibility of a petitioner); *Du Bose* v. *Lefevre*, 619 F.2d 973, 978 (2d Cir. 1980) (jury is entitled to discredit a witness's entire testimony based upon impeachment evidence). That insight is fully applicable to prosecutors, and is properly taken into account by courts making materiality determinations under *Giglio*.

Both of these considerations are present in this case. Hiding Skalnik's sex-crime charge strongly suggests the State's understanding that truthful testimony on the point both would have made it impossible to present Skalnik as being at the top of the jail hierarchy and—given that crime's parallel to the allegations at trial—would have more broadly undermined Skalnik's credibility. It also raises suspicions about the possibility that other instances of prosecutorial

misconduct infected the trial, which should lead to more careful scrutiny of dubious conduct by the State's attorneys (such as the recruitment of jailhouse informants in circumstances that seem calculated to produce questionable testimony). This is particularly true where the State dismissed the sex-offense charge against Skalnik over the course of his cooperation in several cases, not for lack of evidence (indeed, there were eyewitnesses to his crime). 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. The Florida court's disregard of these considerations was wrong.

B. The decision below conflicts with the holdings of federal courts of appeals that a prosecutor's actual knowledge of perjury bears on the *Giglio* materiality analysis.

As the discussion above illustrates, the decision below conflicts with the rulings of other courts in its determination that it is "irrelevant whether [the prosecutor] had actual knowledge" that the State's testimony was false." App., *infra*, 7a. In contrast, at least five federal courts of appeals have held that, even though actual knowledge of perjury is not necessary to establish a *Giglio* claim, that knowledge bears on the materiality analysis. Dailey's postconviction motion would not have been dismissed in any of these jurisdictions.

Third Circuit. In *United States* v. *Mitchell*, the Third Circuit held "that the existence of bad faith on the part of the prosecution is a factor for the court to consider in weighing the materiality of the withheld

evidence." 365 F.3d at 255. The court explained that, although a *Brady* or *Giglio* claim does not depend on the bad faith of the prosecution, bad faith is relevant to materiality because it suggests the prosecutor believed the suppressed evidence was important to the government's case. *Ibid*. Here, the prosecutor's decision to knowingly allow Skalnik's false testimony to stand, in conjunction with the emphasis the State placed on Skalnik's credibility in closing argument, suggests that the State believed Skalnik's sexual assault charge to be material to his credibility and, therefore, material to Dailey's conviction. Accordingly, a court applying the Third Circuit standard would not have dismissed Dailey's motion.

Fourth Circuit. Similarly, the Fourth Circuit held that 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." *Long,* 972 F.3d at 466.

Seventh Circuit. "[W]here the materiality of the evidence has not been conclusively determined, [the Seventh Circuit] will look to the bad faith of the government, if it exists, to assist [its] judgment." *United States* v. *Jackson*, 780 F.2d at 1311 n.4. The Seventh Circuit has held that it is "nothing more than plain common sense" that prosecutorial bad faith bears on materiality because a "prosecutor would [not] in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial." *Ibid*. Given that Skalnik was the key witness in a capital

murder trial and that the State touted his high position in the jail moral hierarchy during closing argument, the *im*materiality of Skalnik's perjury hardly had been "conclusively determined." The Seventh Circuit therefore also would have considered evidence of the prosecution's bad faith in ruling on Dailey's motion.

Ninth Circuit. The Ninth Circuit likewise has recognized that "a prosecutor's assessment of undisclosed evidence can support a finding of materiality by highlighting the importance of that evidence." *Silva* v. *Brown*, 416 F.3d at 990. Hence, that court also treats prosecutorial bad faith as relevant to the materiality analysis and would not have dismissed Dailey's motion out of hand, as did the Florida Supreme Court.

Eleventh Circuit. The Eleventh Circuit has reached the same conclusion: where a detective testified falsely that a 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." *Guzman*, 663 F.3d at 1350 (quoting *Guzman* v. *Secretary, Dep't of Corrections*, 698 F. Supp. 2d 1317, 1332 (M.D. Fla. 2010)).

Conversely, we are not aware of any other federal court of appeals or state court of last resort that has explicitly held, as did the Florida Supreme Court, that the prosecution's actual knowledge of perjury has no bearing on *Giglio* materiality. Because that court's position has been clearly rejected by federal courts of appeals, this Court should grant certiorari to ensure that criminal defendants receive the same constitutional protections in every jurisdiction.

III. The court below applied the incorrect standard for materiality.

The court below also erred for a second reason: in addition to wrongly disregarding the State's knowledge of perjury in assessing materiality, the Florida court applied the wrong standard in determining whether materiality had been established.

A. When knowing use of perjury is at issue, the error is material so long as confidence in the verdict is undermined.

This Court, and many lower courts, apply different tests of materiality depending upon the nature of the government's violation. When the state made knowing use of perjury, courts apply a broad standard of materiality articulated in *Agurs*, which directs that a court should find perjured testimony material "if there is any reasonable likelihood that the false testimony *could* have affected the judgment of the jury." 427 U.S. at 103 (emphasis added). See *Bagley*, 473 U.S. at 679 n.9 (opinion of Blackmun, J.); see also *Wearry* , 577 U.S. at 392 . In contrast, where the prosecution made inadvertent use of perjury or simply failed to disclose exculpatory or impeachment evidence, the standard articulated in *Bagley* places a heavier burden on the defendant, providing for a finding of materiality only if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding *would* have been different.'" *Kyles*, 514 U.S. at 433 (quoting *Bagle*y, 473 U.S. at 682) (emphasis added).**

** The Court in *Bagley* also "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes." *Kyles*, 514 U.S. at 433 (discussing *Bagley*, 473 U.S. at 682). Compare *Agurs*, 427 U.S. at 103-06.

These standards are meaningfully different. Under the *Agurs* standard applicable to knowing use of perjury, the rule may "be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *Bagley*, 473 U.S. at 680 (opinion of Blackmun, J.). Because it is sufficient to show that the new evidence would "undermine confidence" in the verdict, the defendant can prevail under this standard "even if * * * the undisclosed information may not have affected the jury's verdict." *Wearry,* 577 U.S. at 392 & n.6 (citation omitted). But under the stricter *Bagley* test, the defendant must establish a reasonable probability that, had the withheld evidence been disclosed, "the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.).

There is good reason for this distinction. As the Court has recognized, a prosecutor's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice'" (*Giglio,* 405 U.S. at 153 (citation omitted)) and is "fundamentally unfair." *Agurs,* 427 U.S. at 103; see *Banks* v. *Dretke*, 540 U.S. 668, 694 (2004); *Napue v. Illinois,* 360 U.S. 264, 269 (1959). Because "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 680 (opinion of Blackmun, J.) (quoting *Agurs*, 427 U.S. at 104)), courts should be especially reluctant to countenance a conviction obtained through the use of such evidence.

Courts repeatedly have recognized that the materiality standard governing cases involving knowing use of perjury imposes a lesser burden on the defendant and often determines the outcome: it is a standard that is "'strict' against the government" and "'a veritable hair trigger for setting aside the conviction.'" *United States* v. *Butler*, 955 F.3d 1052, 1058 (D.C. Cir. 2020) (citation omitted) (Srinivasan, C.J.). In such cases, "a petitioner is given the benefit of a friendly standard (hostile to the prosecution) to establish materiality," meaning that the application of this standard "will likely result in a finding of constitutional error." *Gilday*, 59 F.3d at 268. See, *e.g.*, *Rosencrantz* v. *Lafler*, 568 F.3d 577, 587 (6th Cir. 2009) (quoting *Gilday*, 59 F.3d at 268, and referring to "*Giglio*'s friendly-to-the-accused standard"); *Jackson* v. *Brown*, 513 F.3d 1057, 1076 n.12 (9th Cir. 2008); *State* v. *Komisarjevsky*, 258 A.3d 1166, 1241 (Conn.), cert. denied, 142 S. Ct. 617 (2021) ("[W]hen * * * a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant."); *People* v. *Coleman*, 701 N.E.2d 1063, 1077 (Ill. 1998) ("[T]his standard of materiality is the most lenient to the defendant."); *Wilson* v. *State*, 768 A.2d 675, 682 (Md. 2001) ("The standard for measuring the materiality of the undisclosed evidence is strictest if it 'demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury.'") (citation omitted).

Here, the court below erred by applying the more prosecution-friendly *Bagley* standard, which properly governs only when the case does *not* involve knowing use of perjury. Although acknowledging decisions that

apply the *Agurs* test, the Florida court's articulation of that standard at the time that it rejected Dailey's prior claim relating to Skalnik's perjury—brought before Dailey knew that the prosecutor was aware of the perjury—borrowed from *Bagley*, asking whether "'there is no reasonable possibility that [the] information * * * *would have affected the jury's verdict*.'" App., *infra*, 8a (quoting 279 So. 3d at 1217) (emphasis added). It then applied the identical standard in *this* proceeding, holding that "[t]here is *still* no reasonable possibility that [the] information * * * *would have affected the jury's verdict*." *Ibid*. (emphasis added). The discovery that the government countenanced Skalnik's perjury makes that approach wrong.

This distinction—between asking whether the government's misconduct "would have" affected the jury, as did the court below, and whether it "could have" affected the jury, which is what the court should have asked—is significant. "Would" is the past tense of "will" and is "[u]sed to express inevitability." *Will*, MERRIAM-WEBSTER DICTIONARY (2022). "Could," in contrast, is the past form of "can" and connotes much less certainty, "[e]xpressing objective possibility, opportunity, or absence of prohibitive conditions." *Could*, OXFORD ENGLISH DICTIONARY (3d ed. 2017). Thus, as applied in the materiality context, "[t]he 'could have' standard requires a new trial unless the prosecution persuades the court that the false testimony was 'harmless beyond a reasonable doubt.' *Giglio*'s materiality standard is 'more defense-friendly' than *Brady*'s." *Phillips* v. *United States*, 849 F.3d 988, 993 (11th Cir. 2017) (citations omitted). The court below got this wrong, and its error could well have left a wrongful death sentence undisturbed.

B. The lower courts are in conflict on the proper standard of materiality when the state made knowing use of perjury.

Review on this question is especially important because the Florida court is not alone in its misapplication of the materiality standard in cases involving knowing use of perjury; there is a division of authority and considerable confusion on the point among the lower courts, some of which have characterized as "an open question whether the *Agurs* standard remains clearly established precedent." *Walker* v. *Pennsylvania*, No. 11-0300, 2015 WL 4770664, at *20 n.7 (E.D. Pa. Aug. 12, 2015); see *In re. Investigation of W. Va. State Police Crime Lab'y*, 438 S.E.2d 501, 505 (W. Va. 1993) ("There is some divergence of view among the federal courts of appeals as to the test to be used in determining what impact false testimony will have on the ultimate question of whether a criminal conviction should be set aside.").

Many jurisdictions, including the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and D.C. Circuits, as well as numerous state courts of last resort, follow *Agurs* and place a lesser burden on the defendant to establish materiality in cases where a witness offered perjured testimony that the prosecution knew or should have known to be false. These jurisdictions hold that perjured testimony is material "if there is any reasonable likelihood that the false testimony *could have affected the judgment of the jury*." *Gilday*, 59 F.3d at 267 (emphasis added); *Drake* v. *Portuondo*, 553 F.3d 230, 240-41 (2d Cir. 2009); *Haskell* v. *Superintendent Greene SCI*, 866 F.3d 139, 145-47 (3d Cir. 2017); *United States* v. *Ellis*, 121 F.3d 908, 927 (4th Cir. 1997); *Creel* v. *Johnson*, 162 F.3d 385, 391 (5th Cir. 1998); *Rosencrantz*, 568 F.3d at 587;

United States v. *Flores-Lagonas*, 993 F.3d 550, 562 (8th Cir. 2021); *United States* v. *LaPage*, 231 F.3d 488, 492 (9th Cir. 2000); *Smith* v. *Sec'y, Dep't of Corrections*, 572 F.3d 1327, 1333 (11th Cir. 2009); *United States* v. *Butler*, 955 F.3d at 1058; *Ex parte Womack*, 541 So. 2d 47, 59 (Ala. 1988); *In re Brown*, 952 P.2d 715, 723 n.7 (Cal. 1998); *Adams* v. *Comm'r of Correction*, 71 A.3d 512, 520 (Conn. 2013); *Sivak* v. *State*, 8 P.3d 636, 644 (Idaho 2000); *Coleman*, 701 N.E.2d at 1077; *State* v. *Brunette*, 501 A.2d 419, 423 (Me. 1985); *Commonwealth* v. *Waters*, 571 N.E.2d 399, 402 (Mass. 1991); *Wilson*, 768 A.2d at 682; *State* v. *Boppre*, 503 N.W.2d 526, 534-35 (Neb. 1993); *Jimenez* v. *State*, 918 P.2d 687, 694 (Nev. 1996); *State* v. *Call*, 508 S.E.2d 496, 511 (N.C. 1998); *Christopher J.* v. *Ames*, 828 S.E.2d 884, 895 (W. Va. 2019).

In contrast, the Seventh and Tenth Circuits, as well as state courts of last resort in Michigan and Wisconsin, apply the *Bagley* standard for materiality to all *Giglio* and *Brady* claims, including claims involving knowing use of perjury. These jurisdictions ask whether the perjured testimony "*would* have affected the jury's verdict," as did the Florida Supreme Court in this case. App., *infra*, 6a-8a (emphasis added). See *United States* v. *Boyd*, 55 F.3d at 245; *Douglas* v. *Workman*, 560 F.3d 1156, 1172-74 (10th Cir. 2009); *State* v. *Harris*, 680 N.W.2d 737, 746 (Wis. 2004); cf. *People* v. *Chenault*, 845 N.W.2d 731, 737 n.5 (Mich. 2014) ("*Bagley* retreated from the different materiality standards articulated in *Agurs*. * * * Thus, any reliance on the *Agurs* language as an articulation of existing Supreme Court precedent is undermined.").

The question which of these approaches is correct is not only recurring, but important: The burden

placed on a defendant challenging a conviction based on knowing use of false testimony is a question central to the just administration of the criminal law. Accordingly, resolution of this conflict warrants the Court's attention.

IV. Viewed under the proper standard, the State's knowing use of perjury in this case was material to the verdict and sentence.

Finally, and not least, the legal errors committed below determined the outcome: When analyzed in the manner directed by this Court's precedent, it is manifest that there is a reasonable likelihood that the suppressed evidence "could have affected the judgment of the jury." *Wearry*, 577 U.S. at 392 (citations and internal quotation marks omitted).

1. The State's case against Dailey was notably weak. The only evidence that Dailey could have been at the scene when the crime was committed was offered by Bailey, Pearcy's girlfriend, and was directly contradicted by Shaw's account that Pearcy and Boggio left Pearcy's house *without* Dailey. There is no direct evidence that Dailey was involved in Boggio's killing: The State offered no physical evidence tying him to the crime; no eyewitness testimony; no motive; and, as Justice Labarga emphasized in his dissent, "*no* forensic evidence linking Dailey to Boggio's murder." App., *infra*, 16a. As the trial prosecutor has acknowledged, "[i]t was a circumstantial case, it's not like there was an upstanding citizen eyewitness to the case * * * [s]o speculation is all we have as to what happened." See page 4, *supra*.

That left the case against Dailey resting substantially on "a cloud of unreliable inmate testimony" (App., *infra*, 16a (Labarga, J., dissenting)), including

graphic and provocative testimony that Dailey confessed to the crime. Such evidence, utterly uncorroborated by the "substantial independent evidence" that typically is offered to support inmate testimony (*ibid.* (quoting *Lightbourne* v. *State*, 841 So. 2d 431, 443 (Fla. 2003) (Pariente, J., concurring)), is an alarmingly weak reed on which to sustain a capital conviction. The testimony of jailhouse informants is notoriously unreliable.†† And here, the testimony—that Dailey floridly confessed to three inmates more than a year after his incarceration, but just after Detective Halliday made known throughout the jail that he was looking for evidence to support a capital charge against Dailey—is little short of preposterous. The most inflammatory of this evidence was provided by Skalnik, who has been revealed to be a perjurer and unrestrained prevaricator.

As noted at the outset, neutral third parties who have closely reviewed the record agree that the State's case is insubstantial. The Catholic Bishops labeled the evidence against Dailey "shockingly sparse" (Catholic Bishops Br. at 3) and "vanishingly thin" (*id.*

---

†† See*, e.g.*, Pamela Colloff, *supra* n.§; Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2004), https://tinyurl.com/yd7peept (finding the jailhouse informant testimony was used in 45.9% of documented wrongful death row convictions); Florida Innocence Commission, *Final Report to the Supreme Court of Florida* 49 (June 25, 2012), https://tinyurl.com/mw8ybtjz ("[f]abricated testimony [from jailhouse informants] [was] a leading cause of wrongful convictions in capital cases. * * * [S]tudies have shown that informant perjury was a factor in nearly 50% of wrongful murder convictions."); see also *State* v. *Arroyo*, 973 A.2d 1254, 1260-61 (Conn. 2009) (requiring a special credibility jury instruction when informant testimony is used).

at 5), before concluding that the evidence of his "actual innocence is not only credible; it is overwhelming." *Id.* at 3, 5, 7. In another *amicus* brief supporting that earlier certiorari petition, current and former prosecutors who have defended the death penalty in other cases likewise concluded that, absent review by this Court, there is a "substantial likelihood that an innocent man could soon be executed for a crime that he did not commit." Br. of *Amici* Prosecutors at 17 .

2. Against this background, the evidence that the State made knowing use of perjury—and did so to hide evidence that Skalnik was himself accused of a heinous sex crime against a young girl—"is sufficient to 'undermine confidence' in the verdict." *Wearry*, 577 U.S. at 392 (citation omitted).

Indeed, *Wearry*, where the Court set aside a conviction in a case alleging *Brady* violations, bears striking similarities to the circumstances here. In that capital case, the Court summarily reversed after finding that the state postconviction court erred in its approach to determining materiality. There, as here, the prosecution relied on incarcerated informants who had every reason to lie. 577 U.S. at 392. In both cases, the prosecution suppressed evidence that undermined the credibility of its star witness. *Ibid*. In neither case did the State "present[] * * * physical evidence at trial" linking the defendant to the crime. *Id.* at 387. And in this case, as in *Wearry*, "[t]he State's trial evidence resembles a house of cards" that collapses when any of the State's questionable evidence is removed. *Id.* at 392. The Court should intervene here as it did in *Wearry*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

LAURA FERNANDEZ
127 Wall Street
New Haven, CT 06511

JOSHUA DUBIN
201 S. Biscayne Blvd
Suite 1210
Miami, FL 33131

SCOTT A. EDELMAN
STEPHEN P. MORGAN
Milbank LLP
55 Hudson Yards
New York, NY 10001

JULISSA R. FONTAN
Capital Collateral Regional Counsel Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637

SETH MILLER
Innocence Project of Florida, Inc.
1100 E Park Ave.
Tallahassee, FL 32301-2651

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, D.C. 20006
(202) 263-3000
crothfeld@mayerbrown.com

MICHAEL B. KIMBERLY
PAUL W. HUGHES
McDermott Will & Emery LLP
500 N. Capital Street, NW
Washington, DC 20001

EUGENE R. FIDELL
Yale Law School
*Supreme Court Clinic**
127 Wall Street
New Haven, CT 06511

Counsel for Petitioner

APRIL 2022

---

* The representation of a party by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.