No. 21-1411

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PETITIONER'S REPLY BRIEF

A criminal conviction that rests on perjured testimony must be set aside if that testimony was material to the jury's decision. In this case, the Florida Supreme Court held that the State's knowing and intentional use of perjury was irrelevant to the materiality determination. That holding was wrong, and determined the outcome of the case—meaning that the state court's error is responsible for preserving petitioner Dailey's death sentence.

In nevertheless opposing review, the State mischaracterizes the decision below and distorts the record. Because the nature of the evidence bears directly on the proper materiality analysis, the following discussion first corrects the State's erroneous account of the record—which on any fair review contains "overwhelming" "evidence of Mr. Dailey's actual innocence," Catholic Bishops' Br. 7—before turning to the constitutional errors committed below that warrant this Court's review.

A. The State's account of the facts mischaracterizes the evidence in ways that distort the legal question presented in the petition.

1. At the outset, as we noted in the petition, third-party review of the evidence establishes the profound weakness of the State's case. Pet. 2, 28-29. The Catholic Bishops, after a close review of the record, found the evidence against Dailey "shockingly sparse" (Catholic Bishops' Br. 3) and "vanishingly thin" (*id.* at 5), concluding that "the evidence of Mr. Dailey's actual innocence is not only credible; it is overwhelming." *Id.* at 7. Separately, current and former prosecutors who

have defended the death penalty 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." Prosecutors' Br. 17. That conclusion is confirmed by journalists' reviews of the case. See, *e.g.*, Pet. 6 & nn. 4, 6.

2. Although space constraints preclude complete review of the record here, the primary evidentiary points made by the State are wrong.

First, the centerpiece of the State's presentation is a contention that Dailey sexually pursued Shelly Boggio, followed by a graphic description of her brutal murder that places the knife in Dailey's hand. Opp. 1-3, 19-20. But the State fails to mention that this account rests entirely on the word of Jack Pearcy, whose description of the murder, as the Catholic Bishops explain, came in "a series of self-serving statements [he made] to the police in an attempt to shift the blame to Mr. Dailey." Catholic Bishops' Br. 3. Because Pearcy acknowledged being present when the victim was killed, the State's repeated observation that his statement "was 'consistent with the physical facts of the case'" (Opp. 2, 19) is wholly nonprobative of Dailey's guilt. Pearcy, who had been familiar with Boggio before the crime and whose dancing with the victim on the night of the murder upset his girlfriend Gayle Bailey (TR1 8:967-68), subsequently affirmed Dailey's innocence on at least four occasions. Pet. 6.

Second, the principal evidence cited by the State tying Dailey to the crime rests on the assertion that, after the group including the victim arrived at Pearcy's house, "[Oza] Shaw and Bailey stayed there for the rest of the night, but Dailey and Pearcy took Shelly back out." Opp. 1. This account is false. Bailey,

Pearcy's girlfriend, did state that Pearcy, Dailey, and the victim left the house together. Pet. 3. But Shaw gave a very different account. He indicated that, during the period the murder occurred, Pearcy and the victim left the house *without* Dailey; that Shaw himself, and not Dailey, left with Pearcy and the victim; that Pearcy deposited Shaw at a telephone booth, where he made a lengthy call before returning to the house alone; that Pearcy subsequently returned to the house *without* the victim; and that only afterwards did Pearcy and Dailey leave together, returning with wet pants. Pet. 3-4, 6. Shaw's account is confirmed by telephone records indicating that he made the call he described. *Id.* at 3 & n.2. Far from establishing Dailey's guilt, this evidence tends to confirm that Pearcy committed the crime—and that he did so alone.

Third, the State reports that, "[h]ours after the murder, [Dailey], Pearcy, Shaw, and Bailey fled to Miami." Opp. 2, 19 (Dailey "disappear[ed] from Florida altogether"). In fact, this evidence also supports Dailey's innocence. The trip to Miami was Pearcy's idea; Pearcy registered at a Miami hotel under an alias but Dailey registered under his own name; and Dailey subsequently lived and worked in Arizona and California (*i.e.*, "disappeared from Florida") under his own name. TR1 7:920, 8:979-80. These actions suggest that Pearcy, and not Dailey, had something to hide. After all, Shaw and Bailey also "fled to Miami" with Pearcy, yet the State does not suggest that *they* were involved in the murder.

Fourth, the State's case at trial in fact rested overwhelmingly on the testimony of three manifestly unreliable jailhouse informants, who claimed that Dai-

ley confessed to them that he committed a brutal murder, but did so only after a detective seeking incriminating evidence in return for favorable treatment visited the jail. See Pet. 4-5, 27-28. The Catholic Bishops thus report that "the evidence against Mr. Dailey consisted entirely of testimony given by three jailhouse informants who each sought, in exchange for their testimony, lenient treatment from the State in their own unrelated cases" (Catholic Bishops' Br. 4), while the *amici* Prosecutors explain that "the informants' testimony was quite simply the keystone to the prosecution case." Prosecutors' Br. 9. That being so, it is telling that the State's brief in opposition glosses over this testimony and wholly ignores the graphic account of the State's star—and since discredited—witness, Paul Skalnik, which was so important to the State's case that the prosecutor referred to it half a dozen times in closing argument. Pet. 5.[1]

B. The decision below does not rest on an independent and adequate state ground.

Against this background, the State begins its legal argument by contending that this Court lacks jurisdiction because the court below rested its decision on

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[1] The State does claim that the testimony of the other two informants was "corroborated" by "inculpatory notes written in petitioner's and Pearcy's handwriting" and that one of Pearcy's notes implicated Dailey as the killer. Opp. 19; see *id.* at 3. That is not so. In fact, Pearcy's notes encourage Dailey to provide favorable testimony at Pearcy's trial; in his responsive notes, "Dailey appeared eager to appease his co-defendant, whom prosecutors planned to put on the stand." 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. This exchange shows that Pearcy sought Dailey's assistance, not that Dailey committed—or sought to conceal the commission of—the crime.

a Florida procedural bar—a new-claim requirement—that purportedly constitutes an independent and adequate state ground for its ruling. Opp. 8-10. This contention is wrong.

The Florida Supreme Court held Dailey's current claim to be procedurally barred under state law because the court characterized "[t]his claim [as] merely a repackaging of the claim in Dailey's 2017 * * * motion that *Giglio* was violated based on Skalnik's false testimony." Pet. App. 6a. In that 2017 motion, Dailey sought relief under *Giglio* on the ground that Skalnik had committed perjury at trial. The Florida Supreme Court denied relief on that claim in 2019, holding that the perjury was not material because Skalnik's testimony had already been compromised. See Pet. 6. There was no discussion in that case of the State's intentional use of the perjury—and there could not have been because, at that time, Dailey had not yet learned of the prosecutor's actual awareness of Skalnik's perjury and the State's intentional suppression of that information.[2]

In the decision below, the state court opined that there was nothing new in the current claim because "[b]oth *Giglio* claims allege that the same testimony is false. * * * It is * * * irrelevant whether [prosecutor] 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." Pet. App. 7a. On the face of it, this is

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[2] The State is wrong when it asserts that the Florida Supreme Court assumed in its prior decision that the prosecutor had actual knowledge of Skalnik's perjury. Opp. 7. The court assumed that knowledge of perjury should be *imputed* to the state, which is what Dailey argued at the time.

a holding that the prosecutor's actual knowledge of witness perjury does not affect the strength of a *Giglio* claim—a point that is confirmed by the court's alternative holding that nothing in the *Giglio* materiality analysis changed between the prior and current cases. *Id*. at 7a-8a.

As we show in the petition (at 12-14), this necessarily is a holding 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 that perjured testimony. In reasoning that the claims were identical, the procedural holding below therefore expressly is based on the judgment that, under *Giglio*, it is "irrelevant whether [the prosecutor] had actual knowledge" of perjury. *Id.* at 7a. Accordingly, that holding "made application of the [state-law] procedural bar depend on an antecedent ruling on federal law." *Ake* v. *Oklahoma*, 470 U.S. 68, 74-75 (1985).

In arguing to the contrary, the State insists that the Florida court's procedural ruling had nothing to do with the meaning of *Giglio*. Instead, the State says, the Florida Supreme Court meant to hold that a prosecutor's actual knowledge of witness perjury is "irrelevant" only for state-law procedural purposes. Opp. 10. But that is nonsensical; the state court treated the prior and current challenges as identical *because* it regarded the prosecutor's knowledge of perjury as irrelevant to the strength of the *Giglio* challenge. Thus, the relevant portion of the decision addressed only *Giglio* and the federal-law standards for imputation of knowledge under *Giglio* and *Brady*; it nowhere suggested that a claim may not be "new and distinct" for state-law purposes even when resting on distinct federal constitutional claims. See Pet. App. 7a.

At a minimum, the state-law procedural ruling is "interwoven with the federal law, and * * * 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 suffices to give this Court jurisdiction.

C. The State's knowing use of perjury was relevant to the materiality inquiry.

The petition's central argument is that the Florida court's decision departed from the holdings of other courts, and was wrong, when it concluded that a prosecutor's knowledge of perjury does not support a finding of materiality under *Giglio*. Pet. 14-20. The State makes no attempt to defend that holding; instead, it denies that *was* the holding below. Opp. 11-12. This is a plain misreading of the Florida court's decision.

In so many words, the court declared it "irrelevant whether [prosecutor] 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." Pet. App. 7a. Although the court made that statement in the course of its procedural discussion, we show above that the court's statement reflects its understanding of *Giglio*'s proper application. And when the court turned to the merits, it rested entirely on its 2019 materiality decision—which predated Dailey's discovery of the prosecutor's awareness of the perjury—reaffirming that the prosecutor's notes evidencing that awareness "have no impact on the materiality of Skalnik's testimony." Pet. App. 8a. The court thus made no attempt to address the relevance of the prosecutor's knowing use of Skalnik's perjury, to analyze what that awareness

says about the State's own assessment of the materiality of the perjury, or to explain why that assessment has "no impact" on the materiality inquiry. On any fair reading of the decision, this reflects a holding that knowledge of perjury simply does not bear on materiality under *Giglio*. For the reasons explained in the petition—which the State does not contest—that holding is wrong and conflicts with the approach taken by other courts.[3]

For its part, although the State appears to recognize that knowledge of perjury may be material, it minimizes that consideration, declaring that "to the extent that factor matters, it is the least important of a reviewing court's considerations" and "will rarely, if ever, be enough to convince a reviewing court" to set aside a verdict. Opp. 19-20. But neither logic nor, so far as we are aware, any decision of any court stands for that proposition. To the contrary, courts uniformly have recognized that it is "nothing more than plain common sense" that prosecutorial bad faith demonstrates the state's *own* judgment that the evidence at stake is material. *Jackson*, 780 F.2d at 1311 n.4 . See

[3] The State notes that some of the decisions recognizing the materiality of prosecutorial bad faith involve the suppression of evidence under *Brady* rather than perjury under *Giglio*. Opp. 11-12. That distinction is irrelevant; *all* the decisions recognize that a state's bad faith bears on materiality because it reflects the prosecution's own judgment that the evidence at issue likely would have had an impact on the jury. Indeed, a finding of materiality in the *Giglio* cases follows *a fortiorari* from those involving *Brady*; as the State recognizes (Opp. 13), cases involving knowing use of perjury under *Giglio* use a more generous standard of materiality than do exculpatory-evidence cases under *Brady*.

Pet. 15-20 (citing cases). A court should grant that judgment substantial weight.[4]

D. The State's knowing use of perjury undermines confidence in the verdict.

1. Finally, there is every reason to believe that taking account of the State's intentional use of Skalnik's perjury, when viewed in the context of the State's "shockingly sparse" case (Catholic Bishops' Br. 3), should convince a court that the perjury "could have affected the judgment of the jury." *Wearry*, 577 U.S. at 392 (citations and internal quotation marks omitted).

Skalnik's graphic account of the murder of a teenage girl was the centerpiece of the State's case, so important that it was the focus of the prosecutor's closing argument. Consequently, the State's decision to hide Skalnik's perjury almost certainly reflected its recognition that the jury would have been affected by knowledge that Skalnik had *himself* committed a sexual assault on a young girl. That judgment should

[4] The State spends much space arguing that there is no conflict in the courts on the materiality standard that applies under *Giglio* and that, in assessing *Giglio* materiality, courts uniformly ask whether perjury "could" have affected the verdict. Opp. 13-18. The short answer to this contention appears in the Florida Supreme Court's decision below, which asked only whether the perjury "*would* have affected the jury's verdict." Pet. App. 8a (emphasis added). (That court's 2019 decision appeared to use "would" and "could" interchangeably. See 279 So. 3d at 1217.) Given the State's recognition that there is a meaningful and often determinative difference between these standards (Opp. 15-16), the court's invocation of a "would" standard confirms the error below—and, at a minimum, shows profound confusion about a crucial constitutional rule.

have outweighed the scraps of evidence that the court below found to support the verdict.

In its contrary argument (Opp. 18-19), the State relies on the following points to show that its case was sufficiently strong to survive consideration of its knowing use of perjury:

- since-recanted statements offered by Pearcy in a self-serving effort to evade his own responsibility for the crime;
- discredited and self-evidently outlandish testimony offered by jailhouse informants who stated that Dailey confessed the crime to them—but only after a detective visited the jail to offer them leniency in exchange for inculpatory evidence;
- testimony by Pearcy's girlfriend that Dailey left Pearcy's house with Pearcy and the victim, which is contradicted by the contemporaneous statement of another witness—supported by telephone records—that Pearcy and the victim left the house with that witness but *without* Dailey, and that Pearcy returned alone;
- and evidence that the day after the murder, all those at Pearcy's house, including two people who unquestionably had no involvement in the crime, "fled to Miami" *at Pearcy's suggestion*.

Given the weakness of this case, the State's evident recognition that Skalnik's perjury was important enough to hide "is sufficient to 'undermine confidence' in the verdict." *Wearry*, 577 U.S. at 392 (citation omitted). This Court should intervene in light of the "substantial likelihood that an innocent man could soon be

executed for a crime that he did not commit." Prosecutors' Br. 17.

2. To avoid this conclusion, the State offers as alternative bases to support the decision below the assertions that (a) Skalnik did not actually commit perjury and (b) the prosecutor was unaware of that perjury. Opp. 20-23. Both contentions are wrong.

As for the first, although the State asserts that Skalnik was not asked on the stand to list all of his crimes, he in fact stated unreservedly, when describing those crimes: "'not rape, no physical violence *in my life*.'" Opp. 21 (emphasis added). That was false and, in the context of a case involving the murder and alleged sexual assault of a teenage girl, materially so. As for the State's second point, even if it is assumed that Skalnik was not asked to list all the charges he had ever faced, the prosecutor knew that Skalnik lied when he said that he had never been charged with physical violence "in my life"—as is confirmed by the prosecutor's repeated scratching out of the term "sexual assault" from his trial notes. See Pet. 9. In any event, as the court below assumed that the prosecutor was aware of Skalnik's perjury (Pet. App. 7a), the State's counter-factual musings to the contrary are no reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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