No. 22-488

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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

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INTERESTS OF AMICI CURIAE[1]

The Innocence Project (the "Project") is a nonprofit organization dedicated primarily to providing pro bono legal and related investigative services to innocent people wrongfully convicted of crimes. Relying on research and analysis, 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 (the "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 seventy-one current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as in ten other countries. 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 reform

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1. The parties have been provided timely notice concerning 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.

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

To date, the work of the Project, the Network, and affiliated organizations has led to the exoneration of 375 wrongfully convicted individuals based on DNA evidence. False informant testimony, including jailhouse informant testimony, is among the leading contributing causes of these wrongful convictions, appearing in sixty-four of these cases. *See* Innocence Project, *DNA Exonerations in the United States*, https://innocenceproject.org/dna-exonerations-in-the-united-states/.

Amici curiae share a compelling interest in mitigating the risks of wrongful conviction. Accordingly, the undersigned submit this brief to urge the Court to hold that the court below erred in finding that the use of unreliable informant evidence was harmless error.

SUMMARY OF ARGUMENT

Though widely used throughout the criminal legal system, informant testimony is inherently unreliable and has frequently resulted in the wrongful conviction of innocent people. The risk of unreliable testimony—and wrongful conviction—is only heightened where the informant is also facing criminal charges, since this dynamic creates powerful incentives—such as dropped charges and reduced sentencing—for cooperation. *Infra* Section II. And the incentives do not apply just to informants—informant testimony is also a powerful tool for prosecutors. *Infra* Section III. Moreover, despite the inherent unreliability of

informant testimony, social science research and the phenomenon of wrongful convictions demonstrate that jurors overvalue such testimony. *Infra* Section IV. Thus, the widespread and deeply flawed practice of using informant testimony to obtain convictions jeopardizes the fairness and accuracy of the criminal legal system.

Here, the New York Court of Appeals erred by affirming Mr. Hemphill's conviction by deeming the Constitutional violation identified by this Court to be nothing more than harmless error in light of the informant testimony incriminating Mr. Hemphill. As this brief will show, informant testimony is simply not reliable enough to form the sole basis for a conviction—particularly not in light of the serious violation of Mr. Hemphill's Constitutional right to confrontation.

This Court should grant Mr. Hemphill's writ of certiorari.

ARGUMENT

I. False Informant Testimony Is Pervasive and Significantly Contributes to Wrongful Convictions

False informant testimony erodes the integrity of the criminal legal system. False informant testimony contributed to nearly one in five of the 375 DNA-based exonerations achieved by the Innocence Project, Innocence Network, and affiliated organizations. *See* Innocence Project, *Informing Injustice: The Disturbing Use of Jailhouse Informants*, https://innocenceproject.org/informing-injustice/ (last visited Jan. 4, 2023) [hereinafter *Informing Injustice*].

Over 200 of the 3,351 known wrongful convictions nationwide 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 Jan. 4, 2023). In fact, unreliable informant testimony is by far the leading cause of wrongful convictions in capital cases. 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*]. Of the 111 death row exonerations between the 1970s (when capital punishment resumed) and 2005, 45.9% involved testimony from an unreliable informant. *Id.* Twenty-one of these cases involved accomplices who received benefits in their sentencing. *See id.* at 3–12. And these numbers represent only the tip of the iceberg. It is a virtual certainty that the prevalence of wrongful convictions based on false informant testimony is even greater than these sources suggest. The use of informant testimony is so pervasive throughout the criminal legal system, but only a fraction of wrongful convictions is challenged post-conviction. *See* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 744 (2016).

There are numerous cases that have involved an informant who falsely implicated an innocent person in order to avoid prosecution themselves—the position of the informant in Mr. Hemphill's case. Evident from

these wrongful convictions is the power of informant testimony—even where the incentives to lie should be obvious to jurors. For example:

- 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 thirteen years on death row.

- 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 due to the killer's recantation at retrial, but Brown 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 them, and the real killers confessed. He was incarcerated for eleven years.

- In 1989, Joseph Burrows was sentenced to death after Gayle Potter, who murdered an elderly farmer in Illinois, implicated Burrows in the murder. Burrows was freed only after Potter recanted her false testimony. Potter implicated Burrows to cast suspicion away from herself.

- 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.

- 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.

See The Snitch System, *supra*, at 3–4, 8, 10. These exonerations represent merely a handful of the many cases where incentivized informant testimony resulted in wrongful convictions.

Federal and state courts have long recognized that the use of informant testimony contributes to wrongful convictions. *See, e.g.*, *Lee v. United States*,

343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."); *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993) ("Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison."); *State v. Patterson*, 886 A.2d 777, 789 (Conn. 2005) (noting that a "[jailhouse] informant who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused. Consequently, the testimony of such an informant, like that of an accomplice, is inevitably suspect.")

In *Hoffa v. United States*, 385 U.S. 293 (1966), Chief Justice Earl Warren used his dissent to "speak to a future age," in hopes that, in future cases, courts would more carefully scrutinize informant testimony in criminal cases. *See* Ruth Bader Ginsburg and Malvina Harlan, National Public Radio (May 2, 2002 12:00 AM ET), https://www.npr.org/templates/story/story.php?storyId=1142685 (quoting Justice Ruth Bader Ginsburg that "dissents speak to a future age"). Chief Justice Warren focused on the inherently problematic aspects of informant testimony and recognized a duty to scrutinize it, 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," concluding that "no conviction should be allowed to

stand when based heavily on his testimony." *Hoffa*, 385 U.S. at 320.

Like many other cases involving informant testimony, the conviction in *Hoffa* was attributed principally to one individual. Chief Justice Warren described the informant's 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.* Speaking about informant testimony more broadly, he explained, "one of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement." *Id.* at 315. Here, *amici* ask that the Court carefully scrutinize the unreliable informant testimony used to convict Mr. Hemphill.

II. Informants Are Heavily Incentivized to Give False Testimony

Informants receive a plethora of benefits in exchange for their testimony, such as 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*; *see also* Brandon L. Garrett, *Characteristics of Informant Testimony in DNA Exoneration Cases, Convicting the Innocent: Where Criminal Prosecutions Go Wrong Ch. 5*, https://convictingtheinnocent.projects.law.duke.edu/

wp-content/uploads/sites/7/2016/10/garrett_informants_appendix.pdf (last visited Jan. 4, 2023).

These incentives are especially powerful for people in compromising and vulnerable situations, such as coconspirators facing conviction for the same crime, individuals facing incarceration for a different crime, and individuals facing deportation themselves or the deportation of loved ones. Informant testimony can also include "scenarios in which family, friends, coworkers, or neighbors want to hurt the defendant or cast suspicion away from the real perpetrator." *See* Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 502 (2014). Similarly, the actual perpetrator of the crime can weaponize the government's offer to testify to implicate others and cast suspicion away from themselves, resulting in the conviction of an innocent individual. As the cases of Randall Dale Adams, Anthony Siliah Brown, Joseph Burrows, and others, *supra*, demonstrate, the risk of the actual perpetrator giving informant testimony that falsely implicates a codefendant, accomplice, or other third party is real, not theoretical. *See Commonwealth of N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001) ("Never has it been more true that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.").

Facing such serious consequences and offered benefits by the government, informants have an

incentive to lie. *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 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.").

Additionally, informants can be incentivized to provide false testimony for the government even when such incentives are not explicitly laid out for them and

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2. *See also, e.g.*, *Bernal-Obeso*, 989 F.2d at 333 (holding 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).

even if they do not intend to reap the benefits right away. For example, a 1990 California grand jury report detailed how this practice shapes the market for informant testimony. In one case, an informant testified about an alleged confession he heard on an in-custody bus trip. He testified at trial that he had asked for nothing and that the District Attorney would not discuss favorable treatment with him. Yet, the day after his testimony, he provided a draft letter to the Deputy District Attorney, requesting an early release. 1989-90 Los Angeles Grand Jury, *Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County* 77 (1990). After the defendant in that case was convicted, the District Attorney submitted a letter to the Department of Corrections to request the informant's immediate release. *Id.* The report concluded that "the more clever informant, realizing that his successful performance will be enhanced if it appears that he is not to benefit therefrom, will testify that he has not been promised anything and will then wait until after his testimony to make his request for favors, oftentimes successfully." *Id.* at 84; *see also, e.g.*, Daniele Selby, *This Man's Lies Sent 4 People to Death Row and Dozens to Prison—Here's What You Need to Know*, INNOCENCE PROJECT (Dec. 16, 2019), https://innocenceproject.org/jailhouse-informant-nytimes-paul-skalnik/ (To establish credibility before the judge and jury, some informants testify without a clear promise from the government, all while maintaining an expectation that they will be rewarded in the future.).

Exacerbating the reliability problems of explicitly or implicitly incentivized informant testimony is the

fact that these incentives are often not made clear to jurors. *See* Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 138 (2011) (noting that informants rarely admit that they are testifying for gain and that "[s]ome informants claimed they were testifying as public-minded citizens"). In his study of 250 DNA exonerations, Professor Brandon Garrett, Director of Duke Law School's Wilson Center for Science and Justice, found that each of the twenty-three informants who were co-defendants or accomplices shifted the blame for the enterprise onto the exoneree. *See id.* at 139. This demonstrates that not only are co-defendants or accomplices willing to provide untruthful testimony to obtain an incentive from the government, but also that unreliable testimony results in innocent individuals ultimately being wrongfully prosecuted and convicted.

III. Prosecutors Are Incentivized to Solicit and Use False Informant Testimony

In some cases—particularly high profile or weak ones—public pressure to close a case will foster prosecutorial reliance on informant testimony. For example, there may be significant public pressure on prosecutors to obtain a conviction when reports of the case may be quickly broadcast to the public. *See* Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1419, 1423–24 (2007) ("The public pressure on prosecutors has grown significantly in a world where news is 24/7, blogs are omnipresent, and commentators abound. . . . [I]t is unsurprising that

prosecutors feel it necessary to solve major crimes quickly and publicly."); *see also* William Lee Hon, *Prosecuting Under Pressure*, TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION, https://www.tdcaa.com/journal/prosecuting-under-pressure/ (last visited Jan. 4, 2023) ("Beyond the pressure from law enforcement and victims is the not-infrequent pressure that the prosecutor feels from the public to obtain a particular result."). Moreover, scarce resources encourage prosecutors to rely on otherwise suspect evidence to reduce their large caseloads by closing cases quickly. *See* Raeder, *supra*, at 1423–24 ("[Public] pressure is exacerbated by extremely large caseloads in urban jurisdictions, coupled with inevitable funding shortfalls. . . . [Informants] also take the pressure off of law enforcement to fully investigate cases, the vast majority of which will not result in trial. Yet this Faustian bargain imposes the terrible cost of making police and prosecutors lazy in both their investigation and prosecution of the case, which increases the potential for a wrongful conviction when the lying witnesses are believed, and the other evidence is weak.").

In weaker cases—prosecutions more likely to result in wrongful conviction—the government is heavily incentivized to use informant testimony, despite its unreliability, to secure convictions. When faced with conflicting or scant evidence, 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."); Gould, *supra*, at 502 (noting that in these types of cases "the state may not be inclined to rigorously vet it in the same way as it would for other types of evidence.").

Prosecutors can also go one step further and actually shape informant testimony to their advantage. As Professor Bennett Gershman at the Elisabeth Haub School of Law at Pace University explained, the prosecutor's ability to coach cooperating witnesses before trial leads to numerous issues with the elicited testimony. Gershman, *supra*, at 848. In particular, Professor Gershman noted that "[t]he cooperating witness is (1) easily manipulated by coercive and suggestive interviewing techniques; (2) readily capable of giving false and embellished testimony with the prosecutor's knowledge, acquiescence, indifference, or ignorance; (3) readily capable of creating false impressions by omissions or memory alterations that in the absence of any recordation or documentation eludes disclosure and impeachment; and (4) able to present his testimony to the jury in a truthful and convincing manner, which because of the nature of the cooperation process is difficult to impeach through cross-examination." *Id.*

The incentive to use unreliable informant testimony to obtain a conviction is compounded by the fact that prosecutors rarely face consequences for putting on false testimony. *See* Robert M. Bloom, *What Jurors Should Know About Informants: The*

Need for Expert Testimony, 2019 MICH. ST. L. REV. 345, 369 (2019) (citing Raeder, *supra*, at 1425 (noting that from the Chicago Tribune's analysis of 381 murder cases that were reversed for prosecutorial misconduct, none of the prosecutors was disbarred)).

These factors—namely, public pressure to obtain convictions in a criminal case combined with scant disincentives for the government to avoid untruthful or unreliable informant testimony—create circumstances ripe for wrongful convictions.

IV. Psychologists Have Found That Jurors Do Not Critically Evaluate Informant Testimony Despite Disclosure of Informant Incentives

Despite the demonstrated pitfalls of informant testimony, psychological research has shown that jurors tend to hold it in high regard and inadequately consider informants' incentives to lie. Jeffrey S. Neuschatz et al., *Secondary Confessions, Expert Testimony, and Unreliable Testimony*, 27 J. POLICE CRIM. PSYCH. 179, 185 (2012). Juries place significant weight on the testimony of accomplices even when they are aware that the accomplice has benefitted from providing the testimony for the government. Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137, 138 (2008). Quantitative research has shown that jurors' verdicts are uninfluenced by information regarding informants' incentives for testifying (i.e., no incentive vs. a five-year reduction in sentence) or their role in the case (i.e., jailhouse informant, accomplice witness or civilian). *Id.*; Christopher Robertson and D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 J.

CONST. L. 33, 76 (2018) (finding no "statistically significant effect of an incentives disclosure on the jury, even though the presence of incentives had a huge effect on the substance of the witness's testimony").

Often, this misevaluation is a result of jurors' failure to appreciate the significance of government incentives or coercion as well as a demonstrated tendency to find informant witnesses credible merely because they are offered by the prosecution. Kylie N. Key et al., *Beliefs about Secondary Confession Evidence: A Survey of Laypeople and Defence Attorneys*, 24 PSYCH. CRIME L. 1 (2018); Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 336 (2012) (finding that "jurors . . . [are] generally ineffective at evaluating the reliability of police informants because they do not appreciate the government incentives or coercion . . . nor do they appreciate the vulnerability of some informants in the face of police pressure"). Among the beliefs jurors hold about criminal trials, particularly damaging is the credibility witnesses enjoy merely by being introduced by the prosecution. *See* Jeffrey S. Neuschatz et al., *The Truth about Snitches: An Archival Analysis of Informant Testimony*, 28 PSYCH. L. 508, 510 (2021) [hereinafter *The Truth About Snitches*]; Bloom, *supra*, at 368 ("Often the jurors will automatically believe the prosecutor."). Despite widespread deception by informants, jurors rely on prosecutorial vouching when evaluating witnesses—holding tight to "the belief that prosecutors rigorously vet their witnesses and would not let a dishonest witness testify." *The Truth About Snitches*, *supra*, at 510.

The failure of jurors to disregard informants' motivations to provide inaccurate testimony combined with jurors' tendency to ascribe unwarranted credibility to witnesses proffered by the prosecution leads to wrongful convictions. Evidenced in many cases, jurors' tendency to credit the false testimony of an informant has led to the conviction of innocent individuals, including sentences of life in prison and even the death penalty. *See supra* Section I. Due to jurors' demonstrated reluctance to critically evaluate such testimony, innocent individuals face an uphill battle to discredit the informant testimony. Here, Mr. Hemphill was unable to overcome the effect of the unreliable informant testimony on the jury, ultimately leading to his wrongful conviction.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to hold in favor of Mr. Hemphill that the court below erred in finding that the introduction of unreliable informant testimony against him was harmless error.

Respectfully submitted,

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