IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE SKATZES	)	**Case No. 3:09-cv-00289**
	)	
Petitioner,	)	**Judge Timothy S. Black**
	)	
v.	)	**Magistrate Judge Michael R. Merz**
	)	
KEITH SMITH, WARDEN,	)	**Death Penalty Case**
	)	
Respondent	)	**Brief of *Amici Curiae***

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF OHIO
AND THE INNOCENCE NETWORK
IN SUPPORT OF
PETITIONER GEORGE SKATZES' TRAVERSE

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INTRODUCTION

In several cases arising from the Lucasville prison uprising in 1993 the State of Ohio has imposed the ultimate punishment, a sentence of death, on the basis of a kind of evidence universally considered unreliable: the testimony of prisoner informants uncorroborated by independent, objective evidence.

Petitioner George Skatzes was convicted of the murder of two other prisoners, Earl Elder and David Sommers, and sentenced to death. He was also convicted of the murder of Correctional Officer Robert Vallandingham, and for that offense Skatzes received a life sentence.

The convictions and sentences for the murder of Elder and Sommers depended entirely on testimony by prisoner informants. Some of these informants admittedly were accomplices in the crimes concerning which they testified. There was no independent, objective corroborating evidence concerning the murders for which Petitioner was sentenced to death.

After Petitioner Skatzes was convicted and sentenced in the trial court, new evidence was discovered that cast grave doubt on his guilt. On post-conviction review, newly discovered evidence that could not have been offered at trial supported alternative scenarios as to who killed Elder and Sommers. With respect to the Vallandingham murder, evidence was presented on post-conviction review that cast doubt on this conviction too.[1]

Prisoner informants were induced to testify by intimidation, or by charges dropped or not brought, protection while in prison, a letter to the Parole Board or other benefits. Such testimony

[1] Pertinent grounds for relief are set forth in the Petition for Writ of Habeas Corpus and addressed in Petitioner's Traverse. Regarding the Vallandingham murder, see Section II, *Schlup* claim, and Section III, First and Second Grounds for Relief. Regarding the Elder murder, see the Seventh, Eighth, Ninth, Tenth and Thirteenth Grounds for Relief. Regarding the Sommers murder, see the Third, Fourth, Fifth, Sixth, and Twelfth Grounds for Relief. Regarding the use of "snitch" testimony, see Introduction at 1-4, and paragraphs 327, 370, 384, 389, 392, 430, and 515 in the Third, Sixth, Seventh, Tenth and Eleventh Grounds for Relief.

is inherently unreliable and is a major cause of wrongful convictions.

The United States Supreme Court has repeatedly recognized that "death is different" and that heightened reliability is required in a death penalty case. The dependence of the State on the testimony of prisoner informants who stood to benefit from turning State's evidence deprived Petitioner of a fair trial.

The overriding objective of a fair trial pervades the habeas jurisprudence of the United States Supreme Court. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) citing *Mooney v. Holohan*, 294 U.S. 103 (1935). *Accord, United States v. Agurs,* 427 U.S. 97, 107 (1976). A fair trial is " a trial resulting in a verdict worthy of confidence." *United States v. Bagley*, 473 U.S. 667, 678 (1985), quoted in *Kyles v. Whitley*, 514 U.S. 415, 434 (1995). "[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). "When the government cuts a deal with a criminal in exchange for incriminating information, it implicates some of the most important values of our criminal system." Alexandra Natapoff, "Written Testimony for the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Crime, Terrorism and Homeland Security, and the Subcommittee on the Constitution, Civil Rights and Civil Liberties," Joint Oversight Hearing on Law Enforcement Confidential Informant Practices (July 19, 2007) at 7.

I. "Death Is Different" and Requires Heightened Reliability

The principle that "death is different" is well established. "[D]eath is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976), citing opinions by Justices Brennan and Stewart concurring in *Furman v. Georgia*, 408 U.S. 238 (1972).

[T]he penalty of death, in its finality, is qualitatively different from a sentence of

> imprisonment, however long. . . . . Because of that qualitative difference, there is a corresponding difference in the **need for reliability** in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305 (emphasis added). Justice Rehnquist dissented on other grounds but agreed that death is different:

> One of the principal reasons why death is different is because it is **irreversible**. . . . This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for specially careful review of the fairness of the trial, the accuracy of the factfinding process, and the fairness of the sentencing procedure where the death penalty is imposed. But none of those aspects of the death sentence is at issue here. . . .
>
> The second aspect of the death penalty which makes it "different" from other penalties is the fact that it is indeed an **ultimate penalty**, which **ends a human life** rather than simply requiring that a living human being be confined for a given period of time in a penal institution. . . .

Woodson, 428 U.S. at 323 (emphasis added).

In *Gardner v. Florida*, 430 U.S. 349, 357 (1977), Justice Stevens writing for a plurality named five members of the Court who in *Furman* or in *Gregg v. Georgia*, "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." "[I]t is different in both its **severity** and its **finality**." *Id.* (emphasis added). "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. Where confidential information that had been withheld from the defendant and his counsel was the basis for a death sentence, "the **interest in reliability** plainly outweighs the State's interest . . . ." *Id.* at 359 (emphasis added). In a concurring opinion, Justice White wrote: "A procedure for selecting people for the death penalty that permits consideration of secret information relevant to the character and record of the individual offender . . . fails to meet the **need for reliability** in the determination that death is the appropriate punishment." 430 U.S. at 364 (emphasis added).

In *Beck v. Alabama*, 447 U.S. 625 (1980), Justice Stevens, writing for a majority, quoted

his opinion in *Gardner v. Florida*, 430 U.S. 349, 357-358, and added:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. [Footnote, omitted, quotes *Lockett v. Ohio*, 438 U.S. 586 [1978].] The same reasoning must apply to rules that diminish the **reliability of the guilt determination**. . . .

447 U.S. at 637-638 (emphasis added).

In *Solem v. Helm*, 463 U.S. 277, 294 (1983), Justice Powell quoted Justice Stewart concurring in *Furman*, 408 U.S. 238, 306: "the penalty of death differs from all other forms of criminal punishment, not in degree but in kind." 463 U.S. at 289, 294. In a dissenting opinion, referring to *Rummel v. Estelle*, 445 U.S. 263 (1980), Chief Justice Burger wrote:

> The *Rummel* Court emphasized, as has every opinion in capital cases in the past decade, that it was possible to draw a "bright line" between "the punishment of death and the various other permutations and commutations of punishment short of that ultimate sanction". . . .

463 U.S. at 308.

While the facts and issues considered by the Supreme Court may differ from one case to another, the principle is not in dispute that death is different, and that in capital cases reliability is "of vital importance to the defendant and to the community." *Gardner v. Florida*, 430 U.S. at 357-58; *Beck v. Alabama*, 447 U.S. at 637.

II. Prisoner Informant Testimony Is Unreliable Without Independent, Objective Corroborating Evidence

A. Historically, Prisoner Informant Testimony Has Been Increasingly Recognized as Presumptively Unreliable.

Testimony by accomplices and other prisoner informants, especially informants who receive benefits in exchange for their testimony, is presumptively unreliable. "The fact that accomplice testimony is presumptively unreliable has never been disputed." Christine J. Saverda,

"Accomplices in Federal Court: A Case for Increasing Evidentiary Standards," *Yale Law Journal*, v. 100, no. 3 (Dec. 1990), 787 (hereafter, "Saverda").

The proposition that prisoner informant testimony is unreliable evolved in the courts of Great Britain and the United States during several centuries, and has been progressively strengthened.[2] Learned treatises, the United States Supreme Court, federal courts of appeal,[3] state courts throughout the country,[4] and the Ohio legislature,[5] have recognized the unreliability of testimony by prisoner informants.

Corpus Juris Secundum, which describes itself in its sub-title as "a contemporary statement of American law as derived from reported cases and legislation," cites cases from Illinois, Louisiana, Mississippi, North Carolina, and the State of Washington in support of the

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[2]*See* George C. Harris, "Testimony for Sale: The Law and Ethics of Snitches and Experts," 28 *Pepp. L. Rev.* 1, 13 (2000) (hereafter "Harris"): "Current tolerance for compensation to witnesses cooperating with the government in criminal cases has its roots in the ancient doctrine of approvement and the subsequent practice of allowing a witness to turn 'king's evidence' or 'state's evidence.'" Professor Harris discusses the evolution of the rules of legal ethics and criminal statutes, current practice and case law, and describes what began as a process controlled by the discretion of the courts but has become largely within the discretion of the prosecutor. *Id.* at 4, 16.

[3]There are a number of relevant decisions by federal courts of appeal. The Fifth Circuit Court of Appeals has stated: "It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . . ." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987). According to the Fourth Circuit, compensated informant testimony "may be approved only rarely and under the highest scrutiny." *United States v. Levenite*, 277 F.3d 454, 462 (4th Cir. 2002). The Ninth Circuit observes: "Never has it been more true than it is now 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." *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001), quoted more fully in the report attached to the ABA resolution of Feb. 14, 2005 (*see below* at 8 n.7).

[4]For a comprehensive review of federal and state case law as of the year 2000, *see* Harris, at 19-32.

[5]Ohio Revised Code § 2923.03(D).

generalization that

> the uncorroborated testimony of an accomplice should be treated with great caution, regarded with skepticism, and viewed with suspicion. Testimony of this sort should be scrutinized and considered with care.

23 C.J.S. Criminal Law § 1010. Similarly, American Jurisprudence 2d states that consideration of accomplice testimony "goes to the credibility of the evidence" and that such testimony must be closely scrutinized, viewed with suspicion, and accepted with caution. 29A *Am. Jur. 2d* § 1407 (2008).

Professor Wigmore, in his monumental *Evidence in Trials at Common Law*, devoted almost thirty pages to the general unreliability of accomplice testimony. Beginning with the statement that prosecutions by the British Crown from the time of Henry VIII chiefly depended on accomplice testimony, Wigmore detailed the never-ending effort of government authorities to persuade courts to admit, and to persuade juries to rely upon, the testimony of accomplices. But by the end of the 1700s--the time of the American Revolution and the adoption of the United States Constitution--it had become the accepted general practice "to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated." 7 Wigmore, *Evidence* § 2056 (Chadbourne rev. 1978) at 405. Courts acquired the habit of instructing juries to be cautious in crediting accomplice testimony. *Id.* at 408.

The unreliability of accomplice testimony has repeatedly been recognized by the Supreme Court of the United States.[6] In *Crawford v. United States*, 212 U.S. 183, 204 (1909),

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[6] *Hoffa v. United States,* 385 U.S. 293 (1966), is not controlling. With regard to the Fifth Amendment due process claim, *Hoffa* is distinguishable from *Skatzes* in the following respects:

- *Hoffa* was not a death penalty case;
- Unlike the testimony regarding the Elder and Sommers murders, in *Hoffa* there was some independent, objective corroborating evidence in the form of contemporaneously

the Supreme Court declared that accomplice testimony

> ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.

In *Holmgren v. United States*, 217 U.S. 509, 524 (1910), the high court stated that it is "undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them." Justice Jackson stated in *On Lee v. United States*, 343 U.S. 747, 757 (1952), that "the use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." And again in *Cool v. United States*, 409 U.S. 100, 103 (1972), the Supreme Court determined:

> Accomplice instructions have long been in use and have been repeatedly approved. . . . In most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity.

Very recently, the United States Supreme Court once again made clear its concern with the unreliability of informant testimony in its extraordinary ruling in *In re Troy Anthony Davis*, 557 U.S. --, 130 S.Ct. 1 (2009). In *Davis*, the Court remanded the conviction of the petitioner for an evidentiary hearing in United States District Court. "The District Court should receive testimony and make findings of fact as to whether **evidence that could not have been obtained at the time of trial** clearly establishes petitioner's innocence." 130 S.Ct. at 1 (emphasis added).

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recorded telephone calls (*Hoffa*, 385 U.S. at 299 n.4, and 319, Warren, J., *dissenting*);

- The veracity of the single government informant was tested by rigorous cross-examination for an entire week (*Hoffa*, 385 U.S. at 311 and 312 n.12);
- The trial judge's cautionary instruction about informant testimony was far more specific and comprehensive than the instruction in *Skatzes* (*Hoffa*, 385 U.S. at 312 and 312 n. 14);
- The *Skatzes* jury did not hear the presentation of the new post-conviction evidence and there was no opportunity for it to be cross-examined in the jury's presence.

Justice Stevens concurred on behalf of himself and Justices Ginsberg and Breyer, inasmuch as

> seven of the State's key witnesses have recanted their trial testimony; several individuals have implicated the State's principal witness as the shooter; and "*no* court," state or federal, "has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable would satisfy the threshold showing for a truly persuasive demonstration of actual innocence." 565 F.3d 810, 827 (C.A.11 2009) (Barkett, J., dissenting) (internal quotation marks omitted). **The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing.** . . .

Id. (italics in original, bold added).

Skatzes' convictions rest on informant testimony of a kind very widely condemned in recent years. A resolution of the American Bar Association, adopted by the House of Delegates, February 14, 2005, urged "federal, state, local, and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that **no prosecution should occur based solely upon uncorroborated jailhouse informant testimony**." (Emphasis added.)[7]

A study examining error rates in all capital cases from 1973 to 1995 found that 43 percent of the capital cases in which defendants were later found to be innocent involved jailhouse informants. James S. Liebman, Jeffrey Fagan and Valerie West, "A Broken System: Error Rates in Capital Cases (1973-1995)," cited in Brandon L. Garrett, "Judging Innocence," *Columbia Law Review*, v. 108, no. 1 (Jan. 2008), 91-93.

A survey of the law on the unreliability of prisoner informants, *Jailhouse Snitch Testimony: A Policy Review*, was published in 2007 by the Justice Project, headquartered in Washington, DC, with a comprehensive bibliography.

[7]The report in support of this resolution, including references to pertinent studies, cases and law reviews, may be found at <http://www.abanet.org/leadership/2005/midyear/ daily/108B.doc> and is hereafter referred to as "ABA Report 108B."

The Justice Project, and the California Commission on the Fair Administration of Justice, both refer to a report by the Northwestern University School of Law Center on Wrongful Convictions. After a review of the cases of 111 persons released from the nation's death rows after they were exonerated, from 1973 through 2004, the Center on Wrongful Convictions found that "snitch cases account for 45.9 percent of those. That makes snitches the leading cause of wrongful convictions in U.S. capital cases . . . ." Center on Wrongful Convictions, Northwestern University School of Law, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (2005), at 3; cited in Justice Project, *Jailhouse Snitch Testimony*, at 1, 20; California Commission on the Fair Administration of Justice, "Report and Recommendations Regarding Informant Testimony" (n.d. [2006]), at 1; and Alexandra Natapoff, "Beyond Unreliable: How Snitches Contribute to Wrongful Convictions," 37 *Golden Gate U. L. Rev. 107* at 107 (2006), hereafter, "Natapoff (2006)".

In 2003 the Ohio Death Row Research Group of the Center for Law and Justice, University of Cincinnati College of Law, published "Death Row in Ohio, 2003: The Case for a Study Commission," *University of Cincinnati Law Review*, v. 72, no. 1 (Fall 2003), 223-247. Using the same methodology as that used by the Illinois Commission on Capital Punishment appointed by Governor George Ryan, "Report of the [Illinois] Governor's Commission on Capital Punishment" (April 2002) (hereafter, "Illinois Commission"), "Death Row in Ohio" articulated "compelling reasons to be concerned" about convictions based on the testimony of in-custody informants and accomplices because of the risk of falsification of testimony in exchange for a reduced or suspended sentence. "Death Row in Ohio" at 239-240. Of 173 men on Ohio's Death Row at the time of the study (before the Supreme Court ruled on Petitioner's case), seventy-five of these cases "rely in some part on the testimony of in-custody informants,

eyewitnesses, and accomplices" and in forty-three of these cases defendants maintain their innocence. *Id.* at 243. "[T]he Ohio Case Study illustrates that the death penalty in Ohio contains a likelihood of executing the innocent, a high rate of reversible error, and an arbitrariness in the application of the death penalty." *Id.* at 244.

A joint hearing on "Law Enforcement Confidential Informant Practices," particularly in drug enforcement and capital cases, was held before two sub-committees of the Committee on the Judiciary of the United States House of Representatives on July 19, 2007. The introductory statement says, "we are discussing those who seek to avoid punishment for their own crimes . . . and then provide false information that implicates innocent people." And, "Perhaps most disturbing is the effect the false testimony has in death sentences." United States House of Representatives, Joint Hearing before the Subcommittee on Crime, Terrorism and Homeland Security, and the Subcommittee on the Constitution, Civil Rights and Civil Liberties of the Committee on the Judiciary, "Law Enforcement Confidential Informant Practices" (July 19, 2007), Serial No. 110-112, <http: //judiciary.house.gov> at 2. Two of the witnesses referred to a study showing that 45.9 percent of documented wrongful capital convictions have been from false informant testimony. (Statement by Rep. Sheila Jackson Lee, *id.* at 192, and *id.*, "Written Testimony" by Alexandra Natapoff at 4 citing Northwestern Law School's Center on Wrongful Convictions (2004).)

The American Law Institute, made up of judges, lawyers from leading law firms, and law school professors, in 2009 withdrew from the Model Penal Code the capital sentencing provisions that have been adopted by many states including Ohio, "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." A report in support of this resolution specifically stated:

> Professor Samuel Gross of Michigan has studied wrongful convictions in both capital and non-capital cases, and he has made a convincing case that erroneous convictions occur disproportionately in capital cases because of special circumstances [including] . . . greater incentives for the real killers and others to offer perjured testimony [and] greater use of coercive or manipulative interrogation techniques . . . .

"Report to the ALI Concerning Capital Punishment," prepared at the request of ALI Director Lance Liebman by Professors Carol S. Steiker & Jordan M. Steiker (Nov. 2008), at 38, Annex B to "Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty" (April 15, 2009).[8]

B. The Nature of Accomplice Testimony Makes It Inherently Unreliable.

Accomplices and other prisoner informants have strong incentives to lie. Under the special circumstances of the prison environment, any promise of protection or the smallest material comfort, any implied promise that engenders hope, can constitute coercion. Welsh S. White, "Regulating Prison Informers Under the Due Process Clause," 1991 *Sup.Ct.Rev.* 103, 120, 122-23 (1991) (hereafter "White"). "In the prison context, it may fairly be said that the possible coercive impact of the promise of a benefit will be 'too great to ignore and too difficult to assess'." (*Id.* at 122.) Prison informers' motive for presenting false testimony is simple: they hope to receive some benefit from the government. (*Id*. at 130.) The government practice of offering rewards to prison informers in exchange for their testimony precipitates unreliable prison informer testimony. Whenever the government provides rewards for prison informer testimony, there is a real inducement to perjury. (*Id.* at 138.)

An accomplice has been defined as a person who is or could have been indicted for the

[8]*See also*, Natapoff (2006), at 109: "Professor Samuel Gross's study on exonerations likewise reports that nearly fifty percent of wrongful murder convictions involved perjury by someone such as a 'jailhouse snitch or another witness who stood to gain from the false testimony.'"

same crime, arising out of the same events, as the defendant. Saverda, at 786.[9] The test for whether a witness is an accomplice is whether the witness could have been convicted of the offense. 29A *Am. Jur. 2d* § 1408 (2008).

An accomplice has compelling reasons to testify on his own behalf. He will often have pleaded guilty, or have agreed to plead guilty, to the offense or a related offense. It is in his interest not only to implicate others but to minimize his own role and exaggerate the roles of his co-conspirators. He may have escaped indictment on the charges by telling a story that exonerates himself and shifts the blame to the accused. Saverda, at 786.

Lenient treatment may be a grant of immunity or non-prosecution agreement resulting in no charges being brought, dismissal of pending charges, acceptance of a plea to reduced charges, and agreement that statements made will not be used against the potential cooperator. Harris, at 16-17. Typically the prosecutor attempts to convince the potential cooperator that he faces certain conviction and only by cooperation can his sentence be mitigated. For such a defendant or target, facing a lengthy prison sentence or even death, lenient treatment will likely be a more valued form of compensation than money. The controlling principle is that the prosecutor will only give something in order to get something. Unless the potential cooperator will provide testimony that will support the conviction of an accomplice or another suspect, there will be no deal. Harris, at 17, 50. Modern prosecutors have virtually unlimited discretion to offer immunity or lenient treatment to a defendant or target in exchange for testimony. Harris, at 13, 16. "Whether the cooperator has given 'truthful' testimony will be determined by the prosecutor," Harris, at 17, that is, consistent with the prosecution's theory of the case.

[9]Saverda, at 792 n.47 quotes a similar definition of accomplice in the California Penal Code § 1111 (West 1985).

The option to offer such compensation is available only to the prosecution and not to the defense. Harris, at 49.

> [T]he prosecution and the defense are often competing for the truthful testimony of witnesses whose primary concern is their own exposure to prosecution. In the case of an alleged accomplice or co-conspirator, the potential witness' own interest in liberty or even life will often be at odds with that of the defendant. There will be a natural tendency to shift blame even without the promise of lenient treatment. Natural sympathies or even fears will seldom compete successfully with the government's enormous coercive power over witnesses who are defendants or potential defendants.

Harris, at 51. Further, Harris observes,

> Dependence on accomplice testimony and use of cooperation agreements are most likely to occur, moreover, in just those cases where the extrinsic evidence is not sufficient, or only marginally sufficient to convict any suspected accomplice. The same lack of evidence will make it difficult or impossible for the prosecutor to determine with any assurance which suspected accomplice or accomplices are telling the truth (or the closest approximation of the truth), and for the prosecutor to make the correct determination of their relative culpability. Particularly in the case of violent or high-profile crimes, these determinations will often be made under pressure to resolve the case by convicting **someone**.

Harris at 53-54 (footnotes omitted, emphasis added).

Accomplice testimony is often the most damaging evidence against a defendant because the cooperator has first-hand knowledge of the pattern of criminal activity. Consequently, a cooperator can manipulate the details of the events without arousing much, if any, suspicion and still be believable to a jury. Ellen Yaroshefsky, "Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment," 68 *Fordham L. Rev.* 917, 921 (1999), (hereafter "Yaroshefsky"), citing Saverda at 787. Because the prosecutor can provide the motive to lie, the prosecutor has a power that the defendant does not have. Saverda at 787 n.7.

Clever witnesses have powerful motives to lie and are able to testify so that their stories seem plausible. White, at 131. "In many cases involving uncorroborated accomplice testimony, the accomplice realizes that only she can account for the veracity of her statements. Armed with

the knowledge that digressions from the truth probably will not be discovered, and that if discovered are unlikely to result in prosecution, the accomplice is free to lie without worry." Saverda at 788.

Yaroshefsky recounts a typical scenario: The agent asks the cooperator, "Who was present at the meeting?" The cooperator mentions some names but does not include Jones. "Was anyone else there?" The cooperator says no. "Are you telling me that Jones was not there?" At that juncture, the cooperator knows what the agent wants to hear. The agent might say, "Let's take a break." After the break, when the client is asked again, he knows that Jones was there. Yaroshefsky, *id.* at 959.

Memory is fallible and subject to suggestive questioning. "A prosecutor, through the use of questions and suggestions has the ability to influence a witness to remember facts and fill gaps that may be inaccurate, but which the witness may come to believe is the truth." Bennett L. Gershman, "Witness Coaching by Prosecutors," 23 *Cardozo L. Rev.* 829, 839 (2002) (hereafter, "Gershman").

> [P]rosecutors have the ability, consciously or unconsciously, to strengthen the case by questions and suggestions that cause the witness to fill gaps in memory, eliminate ambiguities or contradictions, sharpen language, create emphasis, and alter demeanor. Some witnesses, moreover, are vulnerable to prosecutorial suggestions, or receptive to prosecutorial cues. . . .

Id. at 834. Furthermore, cooperators appreciate that their value depends on giving the prosecutor what he wants to hear. *Id.* at 849.

Drawing on many interviews with Assistant United States Attorneys, Yaroshefsky reports:

> You have to try to understand their predicament and what they think you mean by wanting them to cooperate. Telling them that you just want the truth is meaningless. What is the truth? Truth is very different when you have lived your life as part of an

> organization that commits crimes and lived life through deceit. Truth equals what I know or what I can be caught at. . . .
>
> * * *
>
> Many of them come in believing This Is What They Want To Hear Time rather than This Is What Happened Time. . . . The stakes are very high for them and they will do what they have to to get their letter [saying they provided substantial assistance to the prosecution].

Yaroshefsky, at 954-55.

If it is true that prison informers often testify falsely in order to gain rewards offered by the government, then the government practice of offering rewards for informers' testimony certainly contributes to the testimony's unreliability, Professor White concludes. White, at 136-137. "In view of most prisoners' overwhelming desire to reduce their prison time, rewards that involve the dismissal of charges or the substantial reduction of prison time should generally be considered 'exorbitant.'" *Id.* at 139.

C. Cross-Examination and a Cautionary Jury Instruction Do Not Provide Legally Sufficient Corroboration.

The incentives for perjury and slanted testimony inherent in compensating witnesses are universally acknowledged, but existing safeguards are inadequate because the sources of distortion remain largely hidden from the trier of fact. Harris at 4, 45, 46, 74.

> Cross-examination and cautionary jury instructions do not adequately correct for the distortions created by the government's power to compensate cooperating witnesses because they cannot effectively penetrate the process by which the government selects, prepares, and evaluates those witnesses. Under current rules, the processes by which prosecutors or law enforcement officers make decisions about what targets are most culpable and whose testimony is most useful, prepare cooperating witnesses for trial, and dole out immunity and plea bargains accordingly, are largely undiscoverable. Even that which is discoverable often remains resistant to realistic portrayal at trial.

Harris, at 53 (footnotes omitted). Because the safeguards relied on to correct the distortion of evidence presented to the trier of fact are inadequate, crucial decisions regarding culpability and truthfulness are often made by prosecutors rather than jurors. Harris, at 57.

1. Cross-Examination Is Insufficient.

Cross-examination by effective defense counsel may bring out the cooperator's incentives to lie, but cross-examination cannot penetrate the process by which the prosecutor selects and prepares its witnesses and develops its theory of culpability. Harris, at 54-55.

There is a grave danger the jury will under-estimate the unreliability of prisoner informant testimony. The jury will find it difficult to assess the credibility of a typical prisoner informer. A prison informer who testifies in numerous cases

> has few scruples about perjuring himself, and knows how to make his story appear convincing even if it is false. In these circumstances, **even cross-examination that effectively brings out the informer's incentives for obtaining the particular incriminating statements is unlikely to reveal to the jury the high probability that the informer's testimony is false**.

White, 136 (emphasis added).

> [O]ne of the cardinal precepts of cross-examination is to avoid asking questions of which the examiner does not know the answer. Thus, lacking a factual basis to believe that a witness's memory has been manipulated, that an "I don't remember" is false or misleading, or that a failure to mention an incriminating fact is the product of improper coaching, it is unlikely that a cross-examiner would focus on the discrepancy, or be able to prepare an effective impeaching strategy about something of which he is ignorant.

Gershman, at 854-855 (footnotes omitted).[10]

[10]Justice Marshall, dissenting in *United States v. Bagley*, 473 U.S. 667 (1985), developed the argument that what the defense does not know, because the prosecution does not provide it in discovery, could reshape defense strategy. "There is no constitutional duty to disclose evidence unless nondisclosure would have a certain impact on the trial--the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on prosecutors the burden to identify and disclose evidence pursuant to a pretrial standard that virtually defies definition." *Id.* at 700. "The prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful." *Id.* at 701. "The Court's standard also encourages the prosecutor to assume the role of the jury, and to decide whether certain evidence will make a difference." *Id.* at 702. "It is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence." *Id.* at 698. "No prosecutor can know prior to trial whether such evidence *will* be of consequence at trial; the mere fact that it might be, however, suffices to mandate disclosure." *Id.* at 703 (italics in

Particularly when accomplices are the only witnesses to the crime, it is nearly impossible for defense counsel to penetrate their stories on cross-examination. Natapoff (2006), at 117, 123.

2. A Cautionary Jury Instruction Is Insufficient.

Ohio Revised Code § 2923.03(D) requires a trial court when it charges the jury concerning complicity to state substantially the following:

> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution. . . ."

Although at Petitioner's trial Judge Mitchell gave the instruction mandated by ORC § 2923.03(D), the jury had no way of knowing "evidence that could not have been obtained at the time of trial." *In re Davis*, 130 S.Ct. at 1.

According to the Justice Project, a cautionary jury instruction, like that given in the Skatzes case, should not be considered a sufficient safeguard against informant perjury. *Jailhouse Snitch Testimony*, at 5.

Testimony by an accomplice poses a unique danger: since he alone knows about the pattern of criminal events and can manipulate the details, there is an "increased probability that a jury will, unquestioningly and with little scrutiny, accept his story as true because of its inherent 'believability.'" Saverda, at 787. The cooperating witness "is capable of lying convincingly, and typically is believed by the jury." Gershman at 847, quoted in the ABA Report 108B at n.7.

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original). "Without doubt, defense counsel develops his trial strategy based on the available evidence. A missing piece of information may well preclude the attorney from pursuing a strategy that potentially would be effective. His client might consequently be convicted even though nondisclosed information might have offered an additional or alternative defense, if not pure exculpation." *Id.* at 707. "Unless the same information already was known to counsel before trial, the failure to disclose evidence of that kind simply cannot be harmless because reasonably competent counsel might have utilized it to yield a different outcome." *Id*.

Many wrongful convictions represent instances where an innocent defendant refused to plead guilty and goes to trial, but is nonetheless convicted because the jury accepts a snitch's testimony as credible and true.

> [I]nformants may have an air of "inside knowledge" about the crime that may sway the jury, an air that is not easily dispelled by cautionary instructions. Indeed, the prevalence of wrongful convictions based on snitch testimony demonstrates that juries often believe informants.

Natapoff (2006), at 113 (footnotes omitted).

Jurors often assume that the prosecution has made the correct choices as to relative culpability and truthfulness and has charged those who ought to be charged. Harris, at 56.

D. Only Independent, Objective Evidence Can Provide Adequate Corroboration.

Corroborative evidence must be evidence from an independent source. Corroborating evidence must relate to some act or fact which is an element of the crime. There must be some evidence fairly tending to connect the defendant with the commission of the crime, so that the conviction does not rest entirely upon the evidence of accomplices. 29A *Am. Jur. 2d* § 1409.[11] Objective evidence, such as writings or documents, do not constitute corroborative evidence where the only evidence of a relationship between the document and the defendant is the testimony of the accomplice who identifies or authenticates the document. 29A *Am. Jur. 2d* § 1410.

Because prisoner informant testimony, induced by offering rewards, is highly unreliable, Professor White concluded, such testimony **should be excluded unless the government**

[11] As a rule of sufficiency, corroboration must consist of substantial, independent evidence that tends to establish the trustworthiness of the statement. If the corroborating evidence supports the essential facts to establish only one element of the offense, the government has to prove other elements of the offense entirely by independent evidence. *Opper v. United States*, 348 U.S. 84, 93-94 (1954), cited in Saverda, at 800.

presents affirmative evidence to establish that the informer's testimony is trustworthy. (White, at 140, emphasis added.) The affirmative evidence should be limited to evidence that actually relates to the informant's **trustworthiness** or provides **indisputable verification** of his testimony. (*Id.* at 142, emphasis added.)

According to Yaroshefsky, virtually all former Assistant U.S. Attorneys emphasized corroboration as the key factor in assuring cooperator truthfulness. When asked to recount situations where they learned that cooperators had lied, approximately half of those interviewed recounted instances that raise questions as to the nature of what constitutes corroboration and the extent to which it can be secured. Yaroshefsky, at 932. They looked to documentary evidence, tapes, wiretaps, surveillance, but still found many open areas where cooperators could shade or embellish the truth. "There is often ambiguity to tape recorded conversations. . . . The problem comes in because the 'filler' to fully tell the story of what happened comes from the cooperator's mouth and you just do not have corroboration for it." Yaroshefsky, at 935.

Full disclosure of information concerning the prisoner informant and his prior record and a pre-trial hearing does not ensure reliability.[12] A study of professionals whose job requires them to make truth-determination judgments, found that police investigators, polygraph examiners,

[12] A few state legislatures, some courts, and some advocates recommend a pre-trial hearing to assess the trustworthiness of accomplices and/or in-custody witnesses. For a summary of the statute passed by the Illinois legislature placing the burden on the government to prove the reliability of informant testimony, Ill. Comp. Stat., ch. 725, § 5/115-21(c) (2003), see Natapoff (2006), at 114. For discussion of state appellate court decisions in *Dodd v. Oklahoma* and factors to be considered if a pretrial reliability hearing were mandated, *see* Harris, at 29-31, 64. Harris proposes that all *ex parte* substantive discussions with cooperating witnesses regarding the cooperator's anticipated testimony be recorded, transcribed, and discoverable. Harris, at 61-62. The Illinois Commission on Capital Punishment concluded that even with such safeguards as disclosure of the background of in-custody informants, disclosure of benefits conferred, a pre-trial credibility hearing to assess the reliability of the testimony, and a special curative instruction, "the potential for testimony of questionable reliability remains high, and imposing the death penalty in such cases appears ill-advised." Illinois Commission, at 159.

trial judges, and psychiatrists, had an accuracy rate between 55.8 percent and 57.6 percent, and U.S. Secret Service agents, who scored the highest, were accurate only 64 percent of the time. Saul M. Kassin, "Human Judges of Truth, Deception and Credibility: Confident But Erroneous," 23 *Cardozo L. Rev.* 809, 811 (2002), quoted in ABA Report 108B at 6 n. 14. Four Assistant U.S. Attorneys expressed to Yaroshefsky the belief that many prosecutors unwittingly obtain false information. Yaroshefsky, at 953, quoted in ABA Report 108B at 6 n. 14.

According to Saverda, writing in 1990, many states have enacted statutes mandating corroboration of an accomplice's testimony to sustain a conviction. Saverda, at 790-91 (footnotes omitted, one of which refers to Wigmore § 2057 at 417 (1978), and another that lists accomplice corroboration statutes in sixteen states and territories). Saverda quotes provisions from Cal. Penal Code § 1111 (West 1985), and N.Y. Crim. Proc. Law § 60.22 (McKinney 1981), at 792 n.47, in support of the statement that such a rule would prevent a defendant from being convicted solely upon testimony provided by an accomplice. "[T]he prosecution must offer other extrinsic evidence to establish the defendant's guilt." Saverda, at 798 n.96. She warns:

> False accomplice testimony may still occur even though corroboration is presented: that is, corroborative evidence may be presented by the prosecutor to establish the defendant's connection to the crime, but there *still* may not be sufficient evidence to substantiate the accomplice testimony, since often only the accomplice and the defendant know what occurred behind the scenes.

Saverda, at 799.

The 2005 report in support of the American Bar Association resolution 108B states at 6: "The inherent skepticism of the testimony of accomplices has led many jurisdictions to require corroboration. A significant number mandate this requirement by statute." One footnote quotes *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 200l): "In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice." Another footnote says that eighteen

states require corroboration of an accomplice's testimony and cites statutes in Alaska, Arkansas, California, Georgia, Nevada, New York, Oklahoma, and Oregon. ABA Report 108B at 6 and notes 15, 16.

The Illinois Governor's Commission on Capital Punishment recommended enactment of a statute that despite other safeguards, **would not permit the death penalty to be imposed in cases where the uncorroborated evidence of the defendants' guilt was based on in-custody informants, accomplices and single eyewitnesses.** Although there could be cases in which in-custody informant testimony was reliable and truthful and was the only testimony available, it might be used to convict a defendant, but **"no defendant should face the ultimate penalty a state can impose if the conviction is based solely on the testimony of an in-custody informant."** Illinois Commission, at 158-159 (emphasis added).

Furthermore, the ABA Report quotes *Bland v. State*, 263 A.2d 286, 288 (Del. 1970):

> In those states which require corroboration, the usual rule is that corroborative evidence is not sufficient if it merely shows the commission of the offense or the circumstances thereof, and does not connect the defendant therewith. It is likewise the usual rule in such states that **testimony of one accomplice is not sufficient corroboration of the testimony of another accomplice; corroboration from an independent source is not dispensed with, regardless of the number of accomplices.**

ABA Report 108B at 7 n. 18 (emphasis added). Similarly, a recommendation by the Ontario Ministry of the Attorney General after a wrongful murder conviction states, **"One in-custody informer does not provide confirmation for another."** ABA Report 108B at 4 n. 11 (emphasis added), quoting Steven Skurka, "A Canadian Perspective on the Role of Cooperators and Informants," 23 *Cardoza L. Rev.* 759, 762 (2002).**"[T]estimony of another snitch must not be considered adequate corroboration."** *Jailhouse Snitch Testimony*, at 5, citing California Commission on the Fair Administration of Justice, "Report and Recommendations Regarding

Informant Testimony," (Nov. 20, 2006) (emphasis added).

The State of Ohio itself has recently affirmed similar principles by enacting legislation designed to prevent wrongful convictions by ensuring the most reliable evidence is available. In April 2010, the governor signed 128th Session Ohio Senate Bill 77 (SB. 77) into law. The bill was proffered by the Ohio Innocence Project as a means to address three of the most common reasons for wrongful convictions. SB 77 expands inmate access to DNA testing and creates stronger protocols to ensure evidence is properly preserved, encourages that interrogations of violent crime suspects be recorded, and establishes procedures for unbiased eyewitness identifications.

III. In Petitioner's Case, the State Courts Relied on Unreliable Prisoner Informant Testimony

At the heart of this case is unreliable testimony by prisoner informants, or "snitches," uncorroborated by independent, objective evidence. (Habeas Petition [hereafter "Pet."] at p. 1, and ¶¶ 370, 430.) There were no contemporaneous records--no tapes, no Critical Incident Communications--that could be used to identify who actually killed any of the victims. Sergeant Howard Hudson, who led the investigation of the Lucasville disturbance, told Petitioner's jury that there "was no physical evidence . . . linking any suspect to any weapon or any suspect to any victim." (*State v. Skatzes,* Montgomery County Court of Common Pleas, Nos. 94-CR-2890 and 94-CR-2891, Transcript, hereafter "Tr." at 1913; Petition, hereafter "Pet." at p. 1, ¶ 409.)

Consequently, the State sought inmate witnesses who would cooperate with the prosecution. According to the Director and Assistant Director of the Ohio Department of Rehabilitation and Correction, the prosecution staff

> targeted a few gang leaders and convinced them to accept plea bargains. Thirteen months into the investigation, a primary riot provocateur agreed to talk about Officer

> Vallandingham's death. He later received a sentence of 7 to 25 years after pleading guilty to conspiracy to commit murder. His testimony led to death sentences for riot leaders Carlos Sanders, Jason Robb, George Skatzes, and James Were. After that, fellow gang members began to seek deals of their own.

Reginald A. Wilkinson and Thomas J. Stickrath, "After the Storm: Anatomy of a Riot's Aftermath," *Corrections Management Quarterly* (1997), 16-24, at 21; *see* Pet. at pp. 2-3.

A. The Prisoner Informant Testimony in Petitioner's Case Was Demonstrably Unreliable.

The evidence concerning the murders of prisoners Elder and Sommers (the murders for which Petitioner was sentenced to death) illustrates the peril of relying solely on informant testimony. The only independent, objective evidence pertaining to these two homocides was forensic evidence provided by the doctors who performed the autopsies. This forensic evidence **contradicts** the testimony by prisoner witnesses in Petitioner's trial.

While performing the autopsy on the body of Earl Elder, the forensic pathologist found a piece of glass in one of the lethal wounds; and he testified that the fatal wounds were made with a large edge like a knife. Years after the trial, Eric Girdy confessed that he had killed Earl Elder with a knife made from a piece of broken glass. The coroner's findings and testimony provide objective, independent evidence corroborating Girdy and tending to exonerate Petitioner. (Pet. at ¶¶ 86-96, 100, 398-399, 425, 432-434.)

The forensic pathologist who performed the autopsy on the body of David Sommers testified at Petitioner's trial that Sommers died from a single massive blow to the head. At the later trial of Aaron Jefferson, the forensic pathologist opined that the person who struck the lethal blow was standing right in front of Sommers, or maybe a little to the left, and that the fatal blow was the terminal event. (Pet. at ¶¶ 202-205.) The forensic evidence disproved the testimony by prisoner informants concerning the sequence of events that led to the conclusion that Petitioner

inflicted the blow that killed David Sommers. (Pet. at ¶¶ 206-209, 215, 348, 353, 536-537.)

B. The Prisoner Informants Who Testified Against Petitioner Received Benefits in Return for Their Cooperation.

The principal prisoner informants who testified against Petitioner were Anthony Lavelle, David Lomache, Roger Snodgrass, Timothy Williams, Stacey Gordon, and Robert Brookover. Every one of these witnesses against Petitioner appears to have been induced to testify by a plea bargain, charges dropped or not brought, transfer to another prison, a letter to the Parole Board, or other benefits. The only witnesses (other than forensic experts) who testified for the State concerning the charges for which Petitioner was sentenced to death were inmates who were themselves charged or who could have been charged with crimes during the riot, and all of those witnesses--Roger Snodgrass, Timothy Williams, Stacey Gordon, and Robert Brookover--have since been paroled.[13]

1. Anthony Lavelle. Anthony Lavelle is the prisoner identified by Wilkinson and Stickrath who received a concurrent sentence of 7 to 25 years after pleading guilty to conspiracy to commit murder. (Tr. at 4052, 4160-61.) In a sidebar at Petitioner's trial, Prosecutor Hogan explained to the Court, "the state told [Anthony Lavelle] you are either going to be my witness, or I'm going to come back and try to kill you" and Lavelle "made his decision to testify based on that." (Pet. at 3; Tr. at 4047.) Lavelle stated that he testified against Petitioner because he did not

[13]The Ohio Parole Board Guidelines Manual, First Edition (March 1, 1998), authorized early parole as a reward for cooperation with the prosecution. Under "Decisions Outside the Guidelines," grounds for "Decisions Below the Guidelines" include, at 85:

> *7. Substantial cooperation:*
> . . . The offender has provided substantial cooperation to the government [e.g., in the prosecution of other cases; in averting a riot] which has been otherwise unrewarded [Give specifics].

(Elipsis, square brackets and other punctuation are as in original.)

want to end up on death row or spend his life in prison. (Pet. at 3, ¶ 284; Tr. at 4054-55; *see also*, Tr. at 5751, Prosecutor Hogan paraphrasing Lavelle, "I'll tell you why I'm here; I was on my way to death row.")[14] Obtaining testimony by intimidation is inconsistent with the rudimentary demands of justice. *Mooney v. Holohan*, 294 U.S. at 112.

Anthony Lavelle was the principal witness against Petitioner regarding the death of Officer Vallandingham. (Pet. at ¶ 274.) The prosecution relied on Lavelle to supply information not heard on the contemporaneously recorded "Tunnel Tape 61" when riot leaders allegedly voted to kill a guard on the morning of April 15, 1993. (Pet. at ¶ 127.) But no final decision was made to kill a guard at that meeting. (Pet. at ¶¶ 139, 308.) The Supreme Court of Ohio relied on testimony by Lavelle to the effect that Petitioner voted to kill a guard. (Pet. at ¶ 65 quoting *State v. Skatzes* (2004), 104 Ohio St.3d 195, 197; *see also*, 104 Ohio St.3d at 214-215 for reliance on testimony by Lavelle.)

Lavelle changed his story between the time when he was interviewed by Trooper Shepard of the Ohio State Highway Patrol shortly before taking a plea bargain, and his testimony at Petitioner's trial. Lavelle told Trooper Shepard that he was present when Officer Vallandingham was being killed in L-6. But at Petitioner's trial, Lavelle testified that after the morning meeting, he went back to L-1 where he remained until after Officer Vallandingham had been killed, and he was surprised when he learned that an officer had been killed. (Pet. at ¶ 308 citing Tr. at

[14]Petitioner Skatzes was offered a deal if he would cooperate, and threatened with prosecution for three capital murders if he did not. (Tr. at 2215-18; Tr. at 6021-A in Vol. XXXI; Tr. at 6022.) Sergeant Hudson confirmed that one of the State's goals was to see if Mr. Skatzes would become a witness for the prosecution of Carlos Sanders (also known as Hasan) and other conspirators specifically including Jason Robb and Anthony Lavelle, and Petitioner was told that, if he did not cooperate, he would be facing charges for the deaths of Earl Elder, Officer Vallandingham and David Sommers. (Tr. at 2217-18.)

3865.)

On post-conviction review, testimony in related trials and affidavits from prisoners, many of them African-American with no ulterior reason to defend a white man, asserted that it was Anthony Lavelle and men whom he recruited, who actually killed Officer Vallandingham. (Pet. at ¶¶ 181-195, 288-294.) Their accounts are consistent with statements made by Lavelle in the Shepard interview.

Lavelle is an unreliable witness. According to testimony by Antoine Odom, filed in support of Petitioner's post-conviction petition, when Lavelle entered into his plea agreement with the prosecution in June 1994 Lavelle told Odom "he was gonna cop out cause the prosecutor was sweating him, trying to hit him with a murder charge. . . . [H]e was gonna get a deal for his self. . . . He said he was gonna tell them what they wanted to hear." (*State v. Robb*, Tr. at 4854, filed in *Skatzes* Post-Conviction Exhibit 13.)

2. David Lomache. Prisoner informant David Lomache admitted that he was deliberately untruthful and withheld information in his early statements to the Ohio State Highway Patrol. He said he felt threatened by inmates and staff, and thought he might remain in the same housing unit. (Tr. at 2767-71, 2854.) Lomache testified that he told the trooper who was interviewing him, "I'll help you if you help me" and that the tape ended at that point but discussion continued. (Tr. at 2849-52.) He wrote a letter to Prosecutor Hogan in which he said, "You want me to crawl, I'll crawl. Anything. . . ." (Tr. at 2876.) Lomache became a witness against Petitioner.

Lomache and Lavelle were the only two witnesses who testified at Petitioner's trial about a meeting on April 14, 1993 at which, according to the Supreme Court of Ohio, "inmate gang leaders, including Skatzes, voted to kill a guard." (Pet. at ¶¶ 65-66, citing 104 Ohio St.3d at 197 and 223.) There is no tunnel tape or other independent corroborating evidence that any such

meeting took place.

3. Miles Hogan. Miles Hogan was not one of the principal witnesses against Petitioner but the Supreme Court of Ohio relied solely upon Hogan's testimony that on the night of April 14, 1993, Petitioner said he would kill a guard. That was the night when Petitioner reached a tentative agreement with the State's negotiator to the effect that two guards would be released the next morning. Furthermore, when Miles Hogan was previously interviewed by the Ohio State Highway Patrol, inmate Hogan did not attribute those words to Petitioner but merely said that Petitioner was standing there while a conversation took place between other inmates whose names he confused. (Pet. at ¶¶ 67-70.) *See Kyles*, 514 U.S. at 443, where a witness adjusted his story to be more precise and incriminating, a "substantial implication" arises that the prosecutor had coached him.

Concerning an incident involving another prisoner, inmate Hogan admitted while on the witness stand, "I was lying" and "He caught me lying." (Tr. at 2917-18.)

There also was a *quid pro quo* for Miles Hogan's testimony. "My number one concern was my safety, that overrode everything." (Tr. at 3007.) Inmate Miles Hogan was promised protection and a letter in his file from the prosecutor. (Tr. at 2984.)

Miles Hogan was an unreliable prisoner informant and his testimony was unsupported by any independent, objective corroborating evidence.

4. Roger Snodgrass. Inmate Roger Snodgrass was one of the witnesses concerning the murder of Officer Vallandingham and one of two witnesses against Petitioner for the murder of inmates Earl Elder and David Sommers. (Pet. at ¶¶ 388, 409, 544-546.) The Supreme Court of Ohio explicitly relied upon testimony by Snodgrass to convict Petitioner for the kidnapping and death of inmate Elder. (104 Ohio St.3d at 222-223.) Snodgrass was the only witness who

testified concerning Petitioner's prior calculation and design to kill Earl Elder. (Pet. at ¶¶ 103-104 citing 104 Ohio St.3d at 222, and Pet. at ¶ 108 citing 104 Ohio St.3d at 196, 222.)

Snodgrass was the only witness who testified about an alleged pact between the Aryan Brotherhood and Muslims that if whites were to be killed they were to be killed by their own kind. Snodgrass had no personal knowledge of any such agreement, nor was he sure from whom he heard such a reason for killing Earl Elder. The Supreme Court of Ohio based its finding on Snodgrass' testimony without corroborating evidence of any kind. (Pet. at ¶¶ 110-113 citing 104 Ohio St.3d at 211.)

Similarly, the Supreme Court of Ohio found that Snodgrass believed he would be killed if he disobeyed an order to kill Earl Elder, and bylaws of the Aryan Brotherhood were admitted in support of that claim. Snodgrass testified that he never saw the bylaws until after the Lucasville disturbance. There was no corroborating evidence as to the existence of the bylaws at the time of Elder's death, nor that Petitioner had any knowledge of such bylaws prior to his trial. (Pet. at ¶¶ 114-116 citing 104 Ohio St.3d at 221-222; Pet. at ¶¶ 546-552.)

Snodgrass admitted that he took part in the murders of inmates Elder and Sommers and that he tried to kill inmate Newell. (Pet. at ¶ 85 n.6.) Two other participants in the Sommers murder, Jesse "Dewey" Bocook, and Aaron "A.J." Jefferson, have declared in post-conviction affidavits that Petitioner was not present and that it was Snodgrass who dealt the single massive blow that killed David Sommers. (Pet. at ¶¶ 228, 329-331, 338-340, 370-371, 373.)

James Hunt and Emanuel "Buddy" Newell were later incarcerated with Snodgrass. Each of them says that he engaged in conversations with Snodgrass, that Snodgrass bragged about having killed inmates during the Lucasville disturbance and said Petitioner had nothing to do with the murders for which he was convicted, and that Snodgrass lied when he testified against

Skatzes declaring "It was his life or mine."[15] (Pet. at ¶¶ 85, 377-378, 442-445.)

Snodgrass testified that he was charged with kidnapping two correctional officers and aggravated murder of prisoner Earl Elder. (Tr. at 4593-95.) Snodgrass admitted participation in the killing of David Sommers but he was never charged with any offense in connection with Sommers' death. (Tr. at 4595, 4656.) He could have been but was not charged with other offenses during the Lucasville disturbance. (Tr. at 4458, 4488-90, 4633.) Snodgrass took a plea bargain. He pled guilty to involuntary manslaughter of Elder and was sentenced to five to twenty-five years running consecutively to the five to twenty-five years he was already serving. (Tr. at 4513; *see* Pet. at ¶ 85 n.6.)

Snodgrass testified that at the time he entered his plea he had to make a statement implicating a couple of other people, in part because he needed some security measures taken in order to keep himself alive until he got out of prison. He was placed in protective custody. (Tr. at 4515, 4517-18.) In return for his testimony, Snodgrass was promised that he would not be charged with any other crimes arising out of the SOCF riot unless he admitted to killing Officer Vallandingham. (Tr. at 4517-18.) Snodgrass was told that a letter would be placed in his file explaining to the Parole Board that he had testified and cooperated. (Tr. at 4520.)

Snodgrass was paroled in 2006, was convicted of another offense, returned to prison for a stated term, then paroled again.

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[15] The record reflects Snodgrass' willingness to lie:

- When Snodgrass went with Jefferson to L-6 to kill Buddy Newell, Snodgrass told Newell they were there to take Newell out to the yard. "I said I ain't going to kill you, [but] my intention was to kill him." (Tr. at 4488.)
- Snodgrass testified that he would have lied under oath. (Tr. at 4505.)
- James Hunt declared that Snodgrass said he would say whatever prosecutors wanted him to say because he had a deal worked out with them. (Affidavit of James Hunt, Post-Conviction Exhibit 11.)

5. Timothy Williams. Timothy Williams and Roger Snodgrass were the only witnesses who implicated Petitioner in the Elder murder. The Supreme Court of Ohio found that Timothy Williams corroborated most of Snodgrass' testimony. (104 Ohio St.3d at 222; Pet. at ¶¶ 386, 388, 409.) However, Eric Girdy was later found guilty of killing Earl Elder and Girdy implicated Williams in that attack.[16] (See Pet. at ¶¶ 91-95, 100.)

Williams repeatedly lied about what he said he knew. (Pet. at ¶¶ 95, 391.) Initially, Tim Williams said he didn't see any crimes committed. During his testimony against George Skatzes, Williams admitted that he lied when interviewed by his investigator, and later when interviewed by troopers from the Ohio State Highway Patrol. (*Skatzes*, Tr. at 3218-23, 3230-33, 3264-65, 3273-74; *Robb*, Tr. at 1482, filed in *Skatzes* Post-Conviction Exhibit 13.)[17]

Tim Williams was implicated by other inmates as having been on the scene of the murder of Bruce Harris, and the Ohio State Highway Patrol had information that Williams was on the Muslim death squad. (Tr. at 3225-26; Post-Conviction Exhibit 23.) Timothy Williams was a suspect in connection with assaults and/or murders of Vallandingham, Harris, Svette, Staiano, Farrell, Depina, Vitale, Elder, and Walker. (Post-Conviction Exhibit 23.) He testified in several of the Lucasville trials and was not prosecuted for any crimes in connection with the Lucasville disturbance; his safety was guaranteed and his cooperation was noted in a letter to the Parole

[16]Kenneth Law states in an affidavit that Tim Williams bragged about having killed Earl Elder and that Petitioner was not present when Elder was killed; and in interviews with the Ohio State Highway Patrol, Jack Spurlock identified Tim Williams as one of the men who attacked Elder. (*See* Pet. at ¶¶ 439-440.)

[17]The record reflects other instances in which Tim Williams said whatever suited his purposes. During the riot, after he was well aware of the plot to overthrow the leaders, Williams told other prisoners he did not know anything about it. (Tr. at 3086-87.) His testimony was inconsistent as to whether or not he had a weapon on the first day of the riot. (*Compare* Tr. at 3192-93 with Tr. at 3256 and Tr. at 3263-64.)

Board. (Pet. at ¶ 95.) He was released on parole in 1998.

6. Stacey Gordon. Stacey Gordon was the only witness who was present during an alleged conversation when it was decided by Robb, Sanders and Lavelle that David Sommers had to die because he knew too much. The Supreme Court of Ohio evidently relied on Gordon's testimony when it determined that "David Sommers, who controlled the phones and ran the inmates' tape player throughout the negotiations 'had to die because he knew too much.'" (104 Ohio St.3d at 198; Pet. at ¶¶ 240-244, 366, 515.) There was no evidence connecting Petitioner to any such plan. There was no corroborating evidence of any kind.

Inmate Stacey Gordon testified against Lucasville defendants Robb, Lamar, Scales, Law, Were and Skatzes. (Tr. at 4280-81.) Gordon was charged with one count of felonious assault on Officer Daniels, one count of Felonious assault on Officer Nagle, attempted murder and two counts of felonious assault on inmate Fryman, and admitted that he took part in the murder of inmate Bruce Harris. Gordon accepted a plea agreement in which he pleaded guilty to assault on Officers Daniels and Nagle, the charges concerning Fryman were dropped, and he was not charged with the murder of Bruce Harris. He was sentenced to 3-5 years on each assault against an officer, to run concurrently but consecutive to his prior 5-25 year sentence, thereby extending his sentence to 8-30 years. The prosecutor agreed to let the Parole Board know that Gordon had cooperated and testified. (Tr. at 4274-75, 4331, 4333.) Gordon was paroled in January 2007.

7. Robert Brookover. Robert Brookover admitted that he participated in the murder of David Sommers. (Tr. at 3720, 3758, 3764.) The Supreme Court of Ohio based its narrative of the Sommers murder on testimony by Robert Brookover. (104 Ohio St.3d at 198, 223-224; *see* Pet.

at ¶¶ 214-216.)[18] The Supreme Court also determined that Brookover was led to believe that he had a choice: kill someone or be killed. (104 Ohio St.3d at 223; *see* Pet. at ¶¶ 258-261.) There is no corroborating evidence. Snodgrass testified that he did not hear anyone tell Brookover to commit murder or he would be dead. (Tr. at 4478.) And Brookover himself testified, "There is no evidence whatsoever of what I've described to you people happened to me in the Lucasville riot." (Tr. at 3764.)

Brookover admitted that when interviewed by the Highway Patrol and Prosecutor Stead in January 1994, he had not been truthful but had given them false information about David Sommers and other matters until he was offered a plea agreement that would not require him to serve any additional time. (Pet. at ¶ 217.)

Brookover has a neurological condition such that "information that enters the nervous system cannot be integrated in a smooth, accurate manner, nor can it be stored in an accurate manner." (Pet. at ¶ 218 quoting the Arizona Supreme Court in *State of Arizona v. Robert Paul Brookover*, 124 Ariz. 38 (1979).) Judge Algenon Marbley of the United States District Court for the Southern District of Ohio, after reviewing the testimony provided by Robert Brookover during the trial of Jason Robb, found that "there was ample reason to question the truthfulness of Brookover's testimony." (Pet. at ¶ 219.)

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[18]Brookover and Snodgrass told different stories. *See Bland v. State [of Delaware]*, 263 A.2d 186, 288 (1970): "Comparison of the testimony of the two alleged accomplices shows that their stories differ in several important particulars. They disagree about the number of individuals involved; whether or not plans were discussed" and other matters of fact. Moreover, "it is of considerable importance that both of those accomplices had previously been permitted to enter pleas of guilty to lesser misdemeanors." Brookover and Snodgrass disagreed about the number of individuals involved, whether or not plans were discussed, and under what circumstances Petitioner allegedly struck Sommers. Both Brookover and Snodgrass took plea bargains to avoid indictment for the aggravated murder of Sommers.

Brookover was promised security and letters to the Parole Board detailing his cooperation. (Tr. at 3590-91.) He, too, was paroled.

IV. Conclusion

This case exemplifies the unreliability of prisoner informant testimony in return for benefits ranging from charges not brought to the granting of parole.

The State of Ohio should not be permitted to impose the ultimate penalty of death based solely on the unreliable testimony of accomplices and other prisoner informants unsupported by independent, objective corroborating evidence.

Petitioner George Skatzes was denied his right to due process and a fair trial, mandated by the Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Brief of *Amici Curiae* in Support of Petitioner George Skatzes' Traverse was filed electronically on January 14, 2011. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic case filing system.

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