No. 28195-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

v.

PAUL STATLER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Michael P. Price, Judge

AMICUS BRIEF OF THE INNOCENCE NETWORK

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I. INTRODUCTION

This case raises the likelihood of a wrongful conviction. At the heart of the case are two key facts. First, the appellant, Paul Statler ("Statler"), was convicted on the basis of statements made by an incentivized informant or "snitch." A snitch is one who "provides information about someone else's criminal conduct in exchange for some government-conferred benefit, usually lenience for his own crimes, but also for a flat fee, a percentage of the take in a drug deal, government services, preferential treatment or lenience for someone else." Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 652 (2004). As shown below, statements by snitches are inherently unreliable and lead to wrongful convictions. Second, newly discovered evidence directly contradicts the snitch testimony used to convict Statler. The Court has a responsibility to guard against a likely wrongful conviction and miscarriage of justice by granting Statler a new trial based on this newly discovered evidence.

II. IDENTITY AND INTEREST OF THE AMICUS

Amicus The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom newly discovered post-conviction evidence can

provide conclusive proof of innocence. The Innocence Network currently has 61 members, which represent hundreds of prisoners with innocence claims in all 50 states, the District of Columbia, and around the world. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from prior cases in which the system convicted innocent individuals, The Innocence Network promotes further study, advocating reform to improve the truth-seeking functions of the criminal justice system so as to prevent future wrongful convictions.

The Innocence Network has a direct interest in preventing wrongful convictions based on snitch testimony. It also advocates allowing the use of newly-discovered evidence to exonerate those who are wrongfully convicted.

In addition to protecting Statler against a wrongful conviction in this case, The Innocence Network seeks to present a broad perspective on the issues presented in the hope of minimizing the risk of wrongful convictions in the future. The Innocence Network's experience, along with that of its member/affiliate The Innocence Project, has demonstrated the unfortunate but substantial role that snitches play in wrongful convictions.

For example, Dennis Fritz ("Fritz") and Ron Williamson ("Williamson") served eleven years in prison for murder due to informant testimony. One snitch came forward the day before prosecutors would have had to drop charges against Fritz with the claim that Fritz had confessed to him while they shared a jail cell. *See* The Innocence Project, Profile of Dennis Fritz, http://www.innocenceproject.org/Content/Dennis_Fritz.php (last visited Nov. 11, 2010). Another informant claimed that she had heard Williamson allude to his role in the crime. *See* The Innocence Project, Profile of Ron Williamson, http://www.innocenceproject.org/Content/Ron_Williamson.php (last visited Nov. 11, 2010). Only after DNA testing exonerated Fritz and Williamson (and incriminated another government witness as the true perpetrator) were both men released.

Fritz and Williamson's case is just one example of numerous wrongful convictions based on snitch testimony. It highlights the degree to which false testimony from government informants can corrupt our system of justice, and the necessity of subjecting such testimony to scrutiny by allowing newly discovered evidence to shed light on its veracity.

III. STATEMENT OF THE CASE[1]

Paul Statler was convicted of one count of first-degree robbery, two counts of first-degree assault, and two counts of drive-by shooting on June 4, 2009. CP 259-71. The convictions all related to a robbery that took place on or about April 17, 2008 (the "April 17 Incident"). The April 17 Incident was one in a series of four robberies, including a subsequent robbery on April 21, 2008 (the "April 21 Incident").

At trial, the State relied on the testimony of Matthew Dunham ("Dunham"), who identified Statler and himself, among others, as co-perpetrators of the April 17 Incident. 4 RP 302, 388.

Prior to testifying, Dunham had negotiated a plea agreement with the State. 4 RP 335-36, 370. The State promised to recommend an "exceptional sentence" in exchange for Dunham's testimony and cooperation with law enforcement. Under his plea deal, Dunham, 17 years old at the time, would not go to the Department of Corrections (i.e., prison), but rather be treated as a juvenile. 4 RP 336-37. Further, according to his deal with the prosecution, Dunham would be placed in a juvenile detention facility until his 19th birthday, for a total detention

[1] The amicus relies substantially on the statement of the facts set forth in the Brief of Appellant, and intends to highlight only those facts salient to the issues discussed herein.

period of 18 months (as opposed to a possible 30- to 40-year maximum sentence). 4 RP 337, 370-71.

Dunham's testimony was the only trial evidence the State presented connecting Statler to the April 17 Incident. 4 RP 323, 324 (Detective William Francis testified that he had "no [additional] evidence other than Mr. Dunham."). Although four victims of the April 17 Incident testified at the trial, none identified Statler. 3 RP 46-136, 147-227; 4 RP 231-62.

After Statler was tried and convicted, his attorney discovered the following evidence:

- a letter written after the trial by Anthony Kongchunji ("Kongchunji"), who was Dunham's friend and one of his co-perpetrators for the April 17 Incident and the April 21 Incident (along with the other robberies in the series). The letter, written to Statler's father, stated that Dunham's statement was "all lies" and that Statler had *not* been involved in any of the robberies. Kongchungji admitted in the letter to being one of the perpetrators, and named Dunham, Larry Dunham (Dunham's brother) and Larry Smith (their friend) as co-perpetrators. CP 106; and

- Kongchungji's testimony at the subsequent trial for the April 21 Incident, where he again named the perpetrators for that robbery as "the same people I always go rob people with: Larry, Nick, Matt [Dunham]." CP 194. He also stated that he and Dunham had decided to "save [their] friends and [Dunham's] brother" by accusing Statler and his co-defendants of the other robberies (including the April 17 Incident). CP 174, 183-228. The jury acquitted Statler of the April 21 Incident. CP 172.

Statler and his co-defendants moved for a new trial regarding the April 17 Incident based on the newly discovered evidence. CP 85-90, 101-14, 171-229. The trial judge denied the motions. Statler now appeals the denial of his motion for a new trial.

IV. ARGUMENT

A. Statements by snitches are inherently unreliable

> In the 25 years I have been in this business, I have worked with hundreds of informants. I believe that exactly one of them was completely truthful, and there is no way to be 100% sure about him.

Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* 69 (2009) (quoting John Madinger, senior special IRS agent and former narcotics agent).

The dangers of using statements by snitches and cooperating witnesses to prosecute crimes are well-recognized. *See, e.g.*, *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) ("The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril."). Yet, rewarding criminals in exchange for information or testimony has become an important feature of the American criminal justice system. *See* Natapoff 2004, *supra*, at 645-46

("The use of criminal informants in the U.S. justice system has become a flourishing socio-legal institution unto itself.").

It is the deal between the government and a suspect that is the "central, defining characteristic" of informing. Natapoff 2009, *supra*, at 15. The most common reward for informants is leniency for crimes, which can include reduced charges or sentences for the informant (or for friends or family). *Id.* at 27. It is this promise of leniency (or other rewards) that provides informants with a powerful incentive to lie, thereby making testimony of these informants *inherently* unreliable and suspect. *See, e.g., United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."); *see also* The Honorable Stephen S. Trott (U.S. Court of Appeals for the Ninth Circuit), *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 . . . . A drug addict can sell out his mother to get a deal, and burglars, robbers, murderers and thieves are not far behind.").

This Court can and should take notice of the inherent unreliability of statements made by witnesses who receive rewards for their testimony. In this case, Dunham was undoubtedly an incentivized informant. Dunham knew that if he did not testify he faced the possible maximum sentence (up to 30 to 40 years) if sentenced as an adult for his own admitted participation in the April 17 Incident and other robberies. *See supra* pp. 4-5. Dunham was also motivated to "save" his brother and friend from prosecution for those incidents. *Id.* Thus, Dunham's statements inculpating Statler in the April 17 Incident are inherently unreliable.

B. Statements by snitches lead to wrongful convictions

> [C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.

Schlup v. Delo, 513 U.S. 298, 325 (1995).

Snitches play a prominent role in the wrongful conviction phenomenon. A comprehensive study in 2005 by the Center on Wrongful Convictions found that testimony provided by informants who have incentives to lie accounted for 45.9 percent of wrongful convictions in the cases studied, and was the leading cause for sentencing innocent people to death. Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2004-05),

http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf. Additionally, the Illinois Commission on Capital Punishment reported in 2002 that the testimony of many in-custody informants was not credible and led to wrongful convictions. *See* Natapoff 2009, *supra*, at 70. University of Michigan Law School Professor Samuel Gross's study on exonerations likewise reports that nearly 50 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." Samuel R. Gross, *et al*., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543-44 (2005).

Take the case of Anthony Graves, who spent 18 years on death row in Texas before being exonerated in 2010. *See generally* Pamela Colloff, *Innocence Lost*, Tex. Monthly, Oct. 2010, at 109, available at http://www.texasmonthly.com/2010-10-01/feature2.php. Graves, then aged 26, was convicted in 1992 of capital murder for the gruesome slaying of six members of a family in Texas. *Id.* The state's case against Graves was based primarily on the trial testimony of Robert Carter, the prosecution's "star witness." *See Graves v. Dretke*, 442 F.3d 334, 340 (5th Cir. 2006). Carter was another suspect who ultimately confessed to

the murders and negotiated a plea arrangement with the district attorney's office in exchange for his testimony. *Id.* at 337-38 (noting that in exchange for Carter testifying against Graves, the district attorney agreed to forego questioning Carter's wife about the crimes). Apart from Carter's trial testimony, there was "no physical evidence that tied Graves to the crime and no discernible motive — only the word of the crime's prime suspect." Colloff, *supra*, at 113; *see also Graves*, 422 F.3d at 344-45 ("Graves' conviction rests almost entirely on Carter's testimony and there is no direct evidence linking him with Carter or with the murder scene other than Carter's testimony.").

Yet, it was not until years later that Carter was found to have lied at trial. Following Graves's conviction, it came to light that the district attorney who prosecuted the case (and also negotiated Carter's plea deal) had suppressed two additional statements by Carter that exculpated Graves: (1) a statement that he (Carter) had committed the crimes alone, and (2) a statement that Carter's wife had actively participated in the murders. *See* Colloff, *supra*, at 310; *see also Graves*, 442 F.3d at 340, 344.

Graves spent the next 14 years of his life protesting his innocence and appealing his conviction. Finally, in 2006, the U.S. Court of Appeals for the Fifth Circuit granted his request for a writ of habeas corpus. *See*

Graves, 442 F.3d at 345 (finding prosecutorial misconduct in suppressing statements and remanding case with instructions to grant writ of habeas corpus unless retried within a reasonable time). Four years later, in 2010, and following a five-month investigation into the evidence to be presented at a new trial, the district attorney's office dropped all charges against Graves. *See* Brian Rogers & Cindy George, *Prisoner Ordered Free From Texas' Death Row*, Houston & Tex. News, Oct. 28, 2010, available at http://www.chron.com/disp/story.mpl/metropolitan/7266470.html (reporting on the district attorney's filing of a motion to dismiss charges against Graves because he was "an innocent man" and "there [was] nothing that connect[ed] [him] to this crime."). Graves went home a free man in October 2010.[2] *Id.*

In this case, newly discovered evidence squarely contradicts the State's evidence connecting Statler to the April 17 Incident (*i.e.*, Dunham's snitch testimony). Specifically, Kongchunji's letter to Statler's father stated that Statler was *not* one of the perpetrators. *See supra* p. 5. Further, at the trial regarding the April 21 Incident, Kongchunji's testimony directly implicated Dunham, Dunham's brother, and their friend — but *not* Statler

[2] Carter was executed in 2000. He reportedly stated in his last words, "It was me and me alone. Anthony Graves had nothing to do with it. I lied on him in court." *See* Colloff, *supra*, at 207.

— as the perpetrators of the April 21 Incident. Indeed, having heard Kongchunji's testimony, the jury acquitted Statler of those crimes. *Id.*

In light of the newly discovered evidence (which was not heard by the jury in this case), Statler faces the likelihood of a wrongful conviction based on unreliable informant testimony. A new trial is therefore needed in order to guard against yet another wrongful conviction and to prevent the miscarriage of justice illustrated by the cases of Fritz, Williamson and Graves.

C. A new trial is necessary and appropriate for Statler

> To both lay and professional observers, the most fundamental purpose of the appellate process in criminal cases is to guard against erroneous outcomes and, in particular, to guard against wrongful conviction of the innocent . . . . Indeed, over the past several decades the Supreme Court has increasingly emphasized that our elaborate system for appeals is intended to guard against wrongful conviction of the innocent.

Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 591 (2009) (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107 (2008)).

An empirical study recently published in the *Columbia Law Review* (2008) examined for the first time the handling of the criminal cases of the first

200 persons exonerated by postconviction DNA testing in the United States. *See* Garrett, *supra*, at 60-69. According to the study, in 18 percent of the cases reviewed, the prosecution's case relied on the testimony of an informant, jailhouse informant, or cooperating alleged co-perpetrator. *Id.* at 86. As later shown by DNA evidence, the testimony of these individuals was not truthful. Thus, nearly one-fifth of people later found to be factually innocent had been convicted at least in part due to the (false) testimony of an informant or co-perpetrator.

The Columbia study also examined how the legal system handled the exonerees' post-conviction and appellate proceedings. In the cases reviewed, courts did *not* effectively review the unreliable and false evidence that had supported the wrongful convictions. *Id.* at 60-61. Sixteen exonerees in the study had, like Statler, sought a new trial based on newly discovered evidence of their innocence. *Id.* at 111. *Not one* request was granted (prior to obtaining DNA testing proving their factual innocence). *Id.*

The Columbia study thus found that appellate and post-conviction proceedings "did not effectively ferret out innocence" and that the exonerees were consistently denied relief on innocence claims. *Id.* at 61, 116. The author concluded:

> Though as Justice Powell wrote, "a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated," the experiences of 200 innocent former convicts provides a body of examples in which our criminal system failed to address, much less remedy, the sources of wrongful convictions. These exonerees could not effectively litigate their factual innocence, likely due to a combination of unfavorable legal standards, unreceptive courts, faulty criminal investigation by law enforcement, inadequate representation at trial or afterwards, and a lack of resources for factual investigation that might have uncovered miscarriages.

Id. at 130-31 (internal citations omitted; emphasis added).

Because (1) Statler was convicted on the basis of Dunham's incentivized testimony, and because (2) newly discovered post-trial evidence directly contradicts such incentivized testimony, a new trial for Statler is both appropriate and necessary. A jury must have the opportunity to evaluate all of the evidence to determine Statler's factual innocence and to guard against his wrongful conviction.

V. CONCLUSION

For the reasons set forth above, amicus The Innocence Network urges this Court to grant Statler's request and remand for a new trial.

DATED this 11th day of November, 2010.

Respectfully submitted,

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