No.13-1226

IN THE
Supreme Court of the United States

JASUBHAI K. DESAI,

Petitioner,

v.

RAYMOND BOOKER, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER

TIMOTHY P. O'TOOLE
Counsel of Record
MICHAEL N. KHALIL
MILLER & CHEVALIER
CHARTERED
655 15th St. NW, Suite 900
Washington, D.C. 20005
(202) 626-5800
E-mail: totoole@milchev.com

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INTEREST OF THE AMICUS CURIAE

Amicus curiae the Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions.[1] The Innocence Network currently has 66 members, which represent hundreds of prisoners with innocence claims both nationally and worldwide. 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 the kind of unreliable hearsay testimony at issue in Dr. Desai's case. In addition to protecting Dr. Desai from wrongful conviction, the Innocence Network seeks to present a broad perspective on the issues presented in the hope

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. *Amicus curiae* provided at least ten days notice to Petitioner and Respondent of their intention to file this brief. Petitioner and Respondent have consented in writing to the filing of this brief, and those consents accompany this brief.

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 incentivized hearsay testimony has played in wrongful convictions. For example, Dennis Fritz ("Fritz") served eleven years in prison for murder due in part to such testimony. An informant 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, providing a two-hour taped interview describing the alleged confession. *See* The Innocence Project, Know the Cases: Dennis Fritz, http://www.innocenceproject.org/Content/Dennis_Fritz.php (last visited May 6, 2014). Only after DNA testing exonerated Fritz was he released, eleven years later. Dennis Fritz's case is just one example of numerous wrongful convictions based on the testimony of incentived witnesses. It highlights the degree to which false testimony from informants who are promised rewards by the government can corrupt our system of justice and the necessity of ensuring, as a matter of basic constitutional law, that before any such testimony is relied upon, it meets basic standards of reliability.

SUMMARY OF ARGUMENT

The Due Process Clause of the United States Constitution bars the admission of fundamentally unreliable evidence in criminal proceedings. In this case, the State of Michigan convicted the Petitioner solely on the basis of wholly unreliable hearsay testimony from an incentivized informant (who was himself a suspect in the case) as to an alleged confession by the

Petitioner's co-defendant. Leaving aside the well-documented reliability concerns raised by informant testimony in general, the circumstances surrounding the supposed confession (between two acquaintances between the cracks of men's room stalls, while both were likely under the influence of alcohol or drugs or both) make this hearsay testimony among the most unreliable to ever be considered in a criminal trial.

In a well-reasoned forty-page opinion, the district court granted Dr. Desai's petition for habeas relief, finding that the testimony in question was "patently unreliable" and that "its admission resulted in a fundamentally unfair trial."[2] Pet. App. 37. The district court's opinion paid particular attention to the fact that the defendant was never afforded the opportunity to challenge the key evidence underlying the state's case, (the alleged confession), with "the traditional reliability-testing tools available to a criminal defendant," which include the right to compulsory process and to confront and cross-examine witnesses. (*Id.* at 39 (citing *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012)). Nonetheless, the Sixth Circuit, in a terse eight-page opinion, reversed the district court, holding that due process has a "limited role to play" in assuring the reliability of evidence. Pet. App. 7. The Sixth Circuit, relying on *Perry*, dismissed the district court's reliability concerns, expressing skepticism that this

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[2] The district court's ruling was consistent with the state trial court, which ruled that the testimony as to the alleged confession "failed to yield a reliable evidentiary basis" for the conviction. E.D. Mich. DE 115-13 at PageID# 8078 (internal quotation marks omitted).

Court's Confrontation Clause precedents applied with "any force[] to due process challenges to the admission of evidence." *Id.* at 8.

The idea that a criminal defendant could be convicted solely on the basis of such patently unreliable evidence is entirely at odds with the protections guaranteed by the Due Process Clause. The Innocence Network submits this brief in support of Petitioner and urges the Supreme Court to grant certiorari in light of the importance of the questions presented to the proper functioning of our constitutional protections.

ARGUMENT

Amicus relies generally on the statement of the case contained in the district court's opinion and order. *See* Pet. App. 14-21. Amicus recounts here only those facts most pertinent to the arguments below. In brief, the conviction here arises from the November 1983 death of Anna Turetzky, whose body was found by police in her car, in a hotel parking lot in Woodhaven, Michigan. E.D. Mich. DE 72 at PageID# 6646.

Police investigators failed to take a number of steps to properly preserve the crime scene (*e.g.*, failing to take photographs of the crime scene, generate sketches, and preserve trace evidence), and failed to conduct timely interviews of potential witnesses. Pet. App. 15. "In essence, no significant evidence was preserved from the scene." *Id.* No arrests were made.

Ms. Turetzky was a business associate of the Petitioner, Dr. Desai. The two had been business partners in a number of walk-in clinics since 1976. *Id.* The clinics employed a number of staff over the years, including Steve Adams and Larry Gorski. Gorski had a

checkered past, and "[a]t one time, Gorski even attempted to steal cash from [Dr. Desai]." *Id.* at 16.

As the district court noted, Turetzky's son, John, became convinced that Dr. Desai had killed his mother, and went so far as to fire a gun at Dr. Desai in an attempt to coerce a confession from him. Dr. Desai denied having any connection to the murder, despite the threat. *Id.* At one point or another, police considered Adams, Gorski, and Dr. Desai as suspects in Ms. Turetzky's death. *Id.* However, after months of investigating, the prosecutor's office concluded there was not enough evidence to charge any of them. *Id.* The prosecutor's decision not to charge either Dr. Desai or Adams was heavily influenced by the fact that Adams passed a polygraph examination denying any involvement in the murder. *Id.*

When initially questioned by police, Gorski denied having any knowledge about Turetzky's murder. E.D. Mich. DE 68 at PageID# 6246, 6251. However, after learning that he was a suspect, Gorski's story changed; in Gorski's revised account, made years after his initial interview with police, Gorski alleged that Adams had confessed to him, implicating Dr. Desai in the process. E.D. Mich. DE 48 at PageID# 4990-92. According to Gorski's new story, Adams and Gorski met at a noisy bar. Pet. App. 16. The meeting was unplanned. Gorski, suspected that Adams may have been drinking and using cocaine at the time. *Id.* at 18. Gorski claimed that Adams, who suffered from a serious hearing loss and relied heavily on lip reading, asked Gorski to join him in the men's room, where, speaking through the tiny crack between the tall divider and wall, Adams allegedly confessed, unbidden and with-

out explanation, to strangling Turetzky to death with his hands and then a necktie. *Id.* According to Gorski's new story, Adams went on to claim that Dr. Desai was involved in planning the murder and paid him to kill Turetzky. *Id.*

Adams himself would deny Gorski's claims, and his denial was bolstered by a successful polygraph test. Pet. App. 16. Moreover, Adams rejected the government's offer to dismiss the charges against Adams if Adams would admit his role in Turetzky's murder and testify against Dr. Desai. *Id.* at 28-29; E.D. Mich. DE 42 at PageID# 4120-23. The government's offer was contingent upon Adams passing a polygraph examination testing the truth of his admissions. *Id.* at 4122. Adams said he could not take the deal because he did not kill Turetzky. *Id.* at 4122-23.

In September 2001, *eighteen years* after the murder, Dr. Desai and Adams were tried jointly for the murder of Ms. Turetzky (though with separate juries). Pet. App. 17. Because Adams invoked his Fifth Amendment right against self-incrimination, Dr. Desai was unable to counter Gorski's hearsay testimony about the alleged confession (which again, Adams had repeatedly denied). *Id.* at 17-18. Dr. Desai was convicted of first-degree murder. *Id.* at 18. Gorski's hearsay testimony about Adams's alleged confession was the only direct evidence provided against Dr. Desai.[3] *Id.* Adams's separate jury was unable to reach a

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[3] The prosecution first learned of Gorski's story in 1988, however, Dr. Desai was not charged with the crime until 1993, when, pursuant to the Michigan Supreme Court's decision in *People v. Poole*, 506 N.W.2d 505 (Mich. 1993), state law changed so as to allow this previously inadmissi-

verdict, and the prosecutor dismissed the murder charges against Adams in return for a guilty plea in an unrelated case, notwithstanding its theory that Adams brutally murdered Turetzky. Adams was sentenced to serve ten months in the county jail for the unrelated offense. *Id.*

A. Reliability is the Linchpin of Due Process

The Due Process Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const., amend. V. As the district court below noted, for at least the last forty years this Court's Due Process jurisprudence has "made it clear that the Due Process Clause bars admission of fundamentally unreliable evidence." Pet. App. 34-35 (citing, *e.g., California v. Green*, 399 U.S. 149, 164 n.15 (1970) ("'considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking.'"); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (stressing that reliability is the "linchpin" of due-process analysis)). The requirement that courts ensure the reliability of evidence has "ancient roots." *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (citing 5 Wigmore on Evidence § 1364 (3d ed. 1940), *see* John Lord O'Brian, *National Security and Individual Freedom* 62 (1955). Indeed, as the Court noted in *Greene*,

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ble hearsay as evidence pursuant to the penal interest exception.

> [c]ertain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

360 U.S. at 496.

While the Due Process Clause has always served as a back-stop in protecting against the admission of patently unreliable evidence, this Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), directed courts to consider the reliability of hearsay evidence through the lens of the Sixth Amendment's right of confrontation so that hearsay from a non-testifying declarant could be admitted only if the declarant was unavailable and the statement bore "adequate indicia of reliability." *Id.* at 66 (internal quotation marks omitted). Thus, under *Roberts*, the Due Process reliability analysis was subsumed by the "adequate indicia of reliability" analysis. However, following the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the Sixth Amendment's Confrontation Clause is no longer relevant to non-testimonial hearsay such as the alleged men's room confession at issue here. *Crawford* thus revital-

ized the importance of the Due Process's reliability analysis where non-testimonial hearsay is at issue. Put another way, for at least the last forty years, whether under the rubric of the Confrontation Clause or the Due Process Clause, this Court has consistently emphasized the importance of ensuring the reliability of hearsay evidence.

The Due Process protection against unreliable evidence is such a fundamental part of our legal system that this Court has not limited its application to criminal proceedings, but rather applied it any time that government action is implicated (though the protections are at their greatest in the criminal context). In fact, the Due Process right to bar unreliable hearsay evidence is particularly well illustrated by the jurisprudence that has developed following the Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Morrissey* involved a parole revocation proceeding, which, as the Court noted, "is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply," *id.* at 480. Nevertheless, even in that context there are "minimum requirements of due process," including protections against the use of unreliable hearsay evidence. *Id.* at 489.

Following *Morrissey*, courts have consistently held that Due Process precludes the admission of unreliable hearsay evidence, even in non-criminal proceedings. *See, e.g., United States v. Kelley*, 446 F.3d 688, 692 (7th Cir. 2006) (reading *Morrissey* and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) as permitting the admission of reliable hearsay at revocation hearings so long as hearsay bears substantial indicia of reliability or court

makes a good cause finding); *United States v. Johnson*, 710 F.3d 784, 789 (8th Cir. 2013) (concluding trial court must consider reliability of hearsay evidence); *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir. 2005) (finding hearsay admissible at revocation hearing only because court determined it was reliable and government had a good reason not to produce declarants); *Singletary v. Reilly*, 452 F.3d 868, 872 (D.C. Cir. 2006) ("'the use of unsubstantiated or unreliable hearsay would certainly eviscerate the safeguards guaranteed by *Morrissey* and *Gagnon*.'") (quoting *Crawford v. Jackson*, 323 F.3d 123, 128 (D.C. Cir. 2003)).

The great irony of this case is that Dr. Desai was convicted of murder at a criminal trial based on hearsay evidence that would clearly be excluded by the Due Process Clause from a parole proceeding. Amicus agrees with the district court that this result simply cannot be correct.

B. Gorski's Hearsay Testimony is the Very Definition of Unreliable Evidence

It is a basic rule of evidence that the value of any testimony depends upon its accuracy, which itself depends upon "the perception, memory, narration, and sincerity of the witness." 2 *McCormick on Evidence* § 245 (6th ed. 2006). Not surprisingly then, our legal system has developed a natural aversion to hearsay testimony, an aversion which Wigmore has referred to as "that most characteristic rule of the Anglo-American law of evidence—a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure." 5 Wigmore on Evidence § 1364, at 28

(Chadbourn rev. 1974). Indeed, hearsay has been historically derided as "'a tale of a tale," or 'a story out of another man's mouth.'" *See* 2 *McCormick on Evidence* § 244 (6th ed. 2006), quoting *Colledge's Trial*, 8 How.St.Tr. 549, 663 (1681), and *Gascoigne's Trial*, 7 How.St.Tr. 959, 1019 (1680).

Notwithstanding this presumption against hearsay, our legal system has acknowledged that not all hearsay is too unreliable to be admitted. Indeed, some types of hearsay (*e.g.*, dying declarations, excited utterances, routine business records) have, through trial and experience, been found to be sufficiently reliable that courts universally accept them as evidence. Conversely there are other kinds of hearsay that lie on the opposite side of the reliability spectrum; hearsay that, on its face, carries such obvious risks of falsehood or inaccuracy as to require a court to view it with extreme skepticism. The hearsay admitted against the Petitioner is of exactly this sort.

1. Statements by Incentivized Informants Are Inherently Unreliable

It is impossible to assess the reliability of Gorski's testimony without first acknowledging Gorski for what he was – an incentivized informant. As one federal agent cynically observed, "'[i]n 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).

Courts have consistently noted the problems associated with relying on incentivized testimony. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 701 (2004) ("This Court has long recognized the 'serious questions of credibility' informers pose.") (citation omitted); *On 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. 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. 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.").

It should come as no surprise then that testimony from incentivized witnesses has been found to be the leading cause of wrongful convictions in capital cases. *See* Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidle and Other Innocent Americans to Death Row* 3 (Winter 2004-05)[4] (the "Snitch System") (noting that in 45.9% of death row exonerations since 1970, the original conviction was based in whole or part on the testimony of witnesses with incentives to lie). A study by University of Michigan law school professor Samuel Gross reached a similar conclusion, finding that nearly 50% of wrongful murder convictions involved perjury by someone such

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[4] http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf (last visited May 7, 2014).

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).

The case of Perry Cobb provides an unfortunate parallel to this case. *See* Snitch System at 7. Perry Cobb and Darby Tillis were convicted and sentenced to death for murder and armed robbery. Their convictions were based on the testimony of Phyllis Santini, who portrayed herself as an unwitting accomplice in the crime. Evidence later uncovered strongly suggested that Santini and her boyfriend were the actual perpetrators of the crimes. Nevertheless, based in large part on Santini's self-serving testimony, Cobb and Tillis were convicted and sentenced to death. Four years later, the Illinois Supreme Court reversed the convictions based on judicial error, and Cobb and Tillis were exonerated in 1987 and received gubernatorial pardons in 2001. Just like Santini, the prosecution's star witness in this case, Gorski, had an incredibly powerful incentive to provide misleading testimony implicating someone else – the knowledge that he was himself a suspect.

Anthony Graves presents a similar case. Graves spent 18 years on death row in Texas before being exonerated in 2010. *See* Pamela Colloff, *Innocence Lost*, TexasMonthly (Oct. 1, 2010).[5] Graves was convicted in 1992 of murdering six members of a family in Texas. *Id.* The state's case against Graves was based primarily on the trial testimony of Robert Carter, an-

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[5] http://www.texasmonthly.com/story/innocence-lost (last visited May 7, 2014).

other suspect in the case, who ultimately confessed to the murders and negotiated a plea arrangement in exchange for his testimony. *See Graves v. Dretke*, 442 F.3d 334, 337-38, 340 (5th Cir. 2006). As in this case, there was no physical evidence that tied Graves to the crime, and Graves's conviction rested almost entirely on the testimony of Carter, the incentivized witness. *See id.* 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."). Years later Carter was found to have lied at trial, and it was revealed that the prosecutor had suppressed additional exculpatory evidence. Graves spent fourteen years protesting his innocence and appealing his conviction. The Fifth Circuit granted Graves's request for a writ of habeas corpus in 2006, *see id.* at 345, and in 2010, following a five-month investigation, the district attorney's office finally agreed to drop all charges against him. *See* Brian Rogers, *Texas Sets Man Free from Death Row*, Houston Chronicle (Oct. 27, 2010).[6]

Here, Gorski faced the most basic of all incentives – self-preservation. Just as with the cases of Cobb and Graves, Dr. Desai's conviction was based on the testimony of a witness who knew that suspicion would fall on him unless he could provide an alternative suspect. Gorski's initial statements to police about Turetzky's murder were devoid of any mention of involvement by Adams or Desai, and according to an expert in the

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[6] http://www.chron.com/news/houston-texas/article/Texas-sets-man-free-from-death-row-1619337.php (last visited May 7, 2014).

field, Gorski lied in a polygraph examination when questioned about his own involvement in Turetzky's murder. It was only after being informed that he himself was a suspect in her murder that Gorski came up with the allegations that would eventually result in Dr. Desai's conviction. Incentivized witness testimony provided by an active suspect to a crime is facially unreliable, and for this reason alone the admission of Gorski's hearsay testimony was inconsistent with Dr. Desai's Due Process right to a fair trial.

2. The Confessions of Co-Defendants Are Presumptively Unreliable

There is a second fundamental reliability problem with Gorski's hearsay testimony – namely the alleged confession that Gorski testified to is itself a patently unreliable form of hearsay.

As discussed above, there are overwhelming reasons to view Gorski's testimony that Adams actually confessed to him with incredulity. But, even assuming, *arguendo*, that Gorski's account is accurate, it must be remembered that the alleged confession implicating Dr. Desai was itself hearsay from a non-testifying declarant. Moreover, because it came from the mouth of a co-defendant it was what Justice Stewart referred to as an especially dangerous brand of hearsay "at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves . . . ." *Bruton v. United States*, 391 U.S. 123, 138 (1968). In a dissent in the same case, Justice White expounded on the reliability concerns, which were, in his view, quite independent of any Sixth

Amendment Confrontation Clause issues. As he put it, a co-defendant:

> is no more than an eyewitness, the accuracy of whose testimony about the defendant's conduct is open to more doubt than would be the defendant's own account of his actions. More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable.

Id. at 141-42 (internal citations omitted). Because a codefendant's admissions are intrinsically "unreliable," Justice White observed that such admissions "cannot enter into the determination of the defendant's guilt or innocence because they are unreliable." *Id.* at 142. The Court's holding in *Lee v. Illinois*, 476 U.S. 530 (1986) almost two decades after *Bruton*, voiced the same reliability concerns. "A codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 545. *See also Lilly v. Virginia*, 527 U.S. 116, 128 (1999) (collecting cases, and noting that "[i]n the years

since *Bruton* was decided . . . we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."). Here, assuming that Adams did actually shout a confession to Gorski in a noisy men's room, there is no reason to expect that his hearsay testimony as to Dr. Desai's purported role in that murder would be reliable.

Worse still, because Adams' alleged confession, in which he implicated Dr. Desai, was non-testimonial, Dr. Desai did not have a Sixth Amendment right to confront Adams as to the confession.[7] Because Adams invoked his Fifth Amendment right to refuse to testify in the joint trials, Dr. Desai could not confront Adams,

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[7] The prosecution argued that the normal reliability concerns associated with co-defendant confessions is alleviated where a confession occurs in a non-testimonial setting. Appellant's Br. at 67-68, No. 12-2050 (6th Cir. DE 37, Mar. 15, 2013). The argument misreads the case law on the point, which requires courts to consider whether a co-defendant has any incentives to falsely implicate a co-defendant when making a confession. Here, assuming that Adam really did confess to the crime and as Gorski contends, implicated Dr. Desai in doing so, the fact that the alleged confession took place in a bathroom at a bar as opposed to a police station does nothing to alleviate the reliability concerns that are present in all such confessions. The point of these cases is that there are many reasons (blame-shifting, diversion, and braggadocio to name a few) why the hearsay allegations in a confession should be viewed with special suspicion. Rendering one's allegations in a men's room does not make one somehow more reliable.

who had previously denied ever making any such statement to Gorski, and therefore could not show the jury all of the reasons that the purported men's room confession was unreliable. While the law may have changed regarding whether a defendant has a Sixth Amendment right to confrontation in non-testimonial settings after *Crawford*, what has not changed is the relationship between cross-examination and reliability of testimony. As Justice Black observed in *Pointer v. Texas*, 380 U.S. 400 (1965), "no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." *Id.* at 404 (citing 5 Wigmore on Evidence § 1367 (3d ed. 1940). Indeed, Justice Black went on to say that:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Id. at 405. Adams's confession, if it happened at all, is an example of what the Court has frequently observed is one of the most unreliable forms of hearsay. That Dr. Desai never even had the opportunity to expose that hearsay to cross-examination makes it all the more unreliable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY P. O'TOOLE
Counsel of Record
MICHAEL N. KHALIL
MILLER & CHEVALIER CHARTERED
655 15th St. NW, Suite 900
Washington, D.C. 20005
(202) 626-5800

Counsel for Amicus Curiae
the Innocence Network

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