

No. 19-7309

IN THE
Supreme Court of the United States

JAMES MILTON DAILEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

**MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF OF *AMICI CURIAE* UNITED STATES
CONFERENCE OF CATHOLIC BISHOPS
AND FLORIDA CONFERENCE OF CATHOLIC
BISHOPS, INC., IN SUPPORT OF PETITIONER
JAMES MILTON DAILEY**

OWEN PELL
Counsel of Record
VIRGINIA ROMANO
TAI H. PARK
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 819-8200
opell@whitecase.com

Counsel for Amici Curiae

January 17, 2020

294010



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE IN SUPPORT OF PETITIONER
JAMES MILTON DAILEY**

Pursuant to Supreme Court Rule 37.2(b), the United States Conference of Catholic Bishops (“USCCB”) and Florida Conference of Catholic Bishops, Inc. (“FCCB”) respectfully move for leave to file a brief as *Amici Curiae* in support of Petitioner James Milton Dailey. The parties received timely notice of the intent to file this *amicus* brief. Petitioner consented to the filing, but respondent has withheld consent.

The USCCB is a nonprofit corporation whose members are the active Catholic Bishops of the United States. The USCCB advocates and promotes the pastoral teaching of the Church on diverse issues, including the protection of human rights, and the sanctity and dignity of human life. It often files *amicus curiae* briefs in support of legal positions of importance to the Church. FCCB is a nonprofit corporation whose members are the active bishops of the State of Florida. Like the USCCB, FCCB is the agency through which the Catholic Bishops of Florida speak on matters of concern to the Church and to the three branches of the Florida state government. The FCCB proposes solutions to the challenges and questions confronting elected and appointed officials on diverse issues, including the protection of human rights, and the sanctity and dignity of human life.

Amici’s brief articulates the position of the Catholic Church on a question of utmost moral importance to our country. The death penalty implicates quintessentially moral questions. *See, e.g., Penry v. Lynaugh*, 492 U.S.

302, 319 (1989) (capital punishment must reflect a “reasoned *moral* response to the defendant’s background, character, and crime) (emphasis in original). Few, if any, institutions can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame and punishment than the religious community. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 606-07 (1988) (noting the role of religious organizations in addressing secular problems in society). The Catholic Church in particular has developed a rich tradition of reflection and scholarship about justice, mercy, responsibility, and restoration. This study has informed and been informed by the experience of countless millions of people over centuries.

Recognizing the value of this perspective to its considerations, this Court has previously consulted the views of the religious community, including of the USCCB, to study the evolving standards of decency that inform this Court’s judgment about what the Eighth Amendment prohibits. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing submission of the USCCB and other religious organizations as “additional evidence” of a broad “social and professional consensus” against the imposition of the death penalty for a particular class of persons). It should do so again here.

The deeply troubling facts of Mr. Dailey’s conviction and death sentence raise profound moral questions that strike at the heart of the USCCB’s and FCCB’s mission. *Amici* have an abiding commitment to advocate against the death penalty, including by securing meaningful merits review of actual innocence claims. Here, the central question raised by the petition is whether our society can

permit the execution of a person without requiring a new trial when he has come forward with persuasive evidence of actual innocence. This question requires evaluation of the moral perspective described in *amici's* brief.

For the foregoing reasons, the USCCB and FCCB believe that their brief will be of assistance to the Court in its consideration of the petition, and respectfully request that leave to file be granted.

Respectfully Submitted,

OWEN PELL

Counsel of Record

VIRGINIA ROMANO

TAI H. PARK

WHITE & CASE LLP

1221 Avenue of the Americas

New York, New York 10020

(212) 819-8200

opell@whitecase.com

Counsel for Amici Curiae

January 17, 2020

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	iii
THE INTEREST OF <i>AMICI CURIAE</i>	1
FACTUAL BACKGROUND.....	2
A. The Sparse Evidence at Trial	3
B. Exculpatory Evidence Discovered Post-Trial...	4
SUMMARY OF ARGUMENT.....	8
ARGUMENT.....	8
I. THE CATHOLIC CHURCH OPPOSES THE DEATH PENALTY.....	8
A. Background to the Catholic Church’s Opposition to the Death Penalty.....	9
B. The Execution of an Innocent Person is Morally Indefensible.....	14
II. THE MORAL POSITION OF THE CATHOLIC CHURCH IS CONSISTENT WITH THIS COURT’S PRONOUNCEMENTS AGAINST SENTENCING TO DEATH A PERSON WHO IS ACTUALLY INNOCENT.	15

Table of Contents

	<i>Page</i>
A. The Eighth Amendment Serves to Protect the “Dignity of Man”	16
B. The Execution of an Innocent Person is Unconstitutional	18
C. Mr. Dailey Has Made a Compelling Showing of Actual Innocence.....	20
CONCLUSION	24

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES:	
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	18
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	23
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	21, 22, 23
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	18, 19
<i>Dailey v. State</i> , 247 So. 3d 390 (Fla. 2018)	3
<i>Dailey v. State</i> , 279 So. 3d 1208 (Fla. 2019)	22
<i>Dailey v. State</i> , 965 So. 2d 38 (Fla. 2007)	3
<i>DA’s Office for the Third Judicial Dist. v.</i> <i>Osborne</i> , 557 U.S. 52 (2009)	19
<i>Enmund v. Florida.</i> , 458 U.S. 782 (1982)	18

Cited Authorities

	<i>Page</i>
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	17
<i>Glossip v. Gross</i> , 135 S. Ct. 2726 (2015).....	15
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).....	16
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993).....	15, 18, 19, 20, 23
<i>House v. Bell</i> , 547 U.S. 518 (2006).....	19
<i>In re Davis</i> , 557 U.S. 952 (2009).....	19
<i>Kennedy v. Louisiana</i> , 554 U.S. 407 (2008).....	17
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	17, 18
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995).....	23
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958).....	17

Cited Authorities

	<i>Page</i>
<i>United States v. Nixon</i> , 418 U.S. 683 (1974)	23
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. V	7
U.S. Const. amend. VIII.	8, 16, 17, 18
OTHER AUTHORITIES:	
BENEDICT XVI, AFRICAE MUNUS (Nov. 19, 2011), http://w2.vatican.va/content/benedict-xvi/en/apost_exhortations/documents/hf_ben-xvi_exh_20111119_africae-munus.html	11
BENEDICT XVI, GENERAL AUDIENCE (Nov. 30, 2011), http://w2.vatican.va/content/benedict-xvi/en/audiences/2011/documents/hf_ben-xvi_aud_20111130.html	11
CHURCHES SPEAK, ON: CAPITAL PUNISHMENT (J. Gordon Melton ed., 1989)	14
DEATH PENALTY INFORMATION CENTER, INNOCENCE DATABASE, https://deathpenaltyinfo.org/policy-issues/innocence-database	13

Cited Authorities

	<i>Page</i>
DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2019: YEAR END REPORT, https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report	16
<i>Exodus 23:7</i>	14
FRANCIS, ADDRESS TO THE DELEGATES OF THE INTERNATIONAL ASSOCIATION OF PENAL LAW (Oct. 23, 2014), https://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.html	12
FRANCIS, ADDRESS TO THE JOINT SESSION OF THE UNITED STATES CONGRESS (Sept. 24, 2015), https://www.washingtonpost.com/local/social-issues/transcript-pope-franciss-speech-to-congress/2015/09/24/6d7d7ac8-62bf-11e5-8e9e-dce8a2a2a679_story.html	12
FRANCIS, LETTER TO THE PRESIDENT OF THE INTERNATIONAL COMMISSION AGAINST THE DEATH PENALTY (Mar. 20, 2015), https://w2.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco_20150320_lettera-pena-morte.html	12, 13, 15

Cited Authorities

	<i>Page</i>
FRANCIS, RESCRIPTUM “EX AUDENTIA SS. MI” (Aug. 2, 2018) (CATECHISM OF THE CATHOLIC CHURCH), https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html	10
JOHN XXIII, PACEM IN TERRIS (Apr. 11, 1963), http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html	10
John Gramlich, <i>California is one of 11 states that have the death penalty but haven’t used it in more than a decade</i> , Pew Research Center (Mar. 14, 2019), https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/	16
JOHN PAUL II, EVANGELIUM VITAE (Mar. 25, 1995), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html	10
JOHN PAUL II, HOMILY AT THE PAPAL MASS IN ST. LOUIS (Jan. 27, 1999), https://w2.vatican.va/content/john-paul-ii/en/travels/1999/documents/hf_jp-ii_hom_27011999_stlouis.html	11, 15
National Catholic News Service, <i>Capital Punishment: Grave Doubts</i> , 1 ORIGINS 529 (1972).	13

Cited Authorities

	<i>Page</i>
ROMAN CATHOLIC CHURCH – U.S. CATHOLIC CONFERENCE, RESOLUTION AGAINST CAPITAL PUNISHMENT (1974)	13, 14
THOMAS AQUINAS, SUMMA THEOLOGIAE II-II	14
U.S. CONFERENCE OF CATHOLIC BISHOPS, A CULTURE OF LIFE & THE PENALTY OF DEATH (2005), http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/upload/penaltyofdeath.pdf	13
U.S. CONFERENCE OF CATHOLIC BISHOPS, BISHOPS’ STATEMENT ON CAPITAL PUNISHMENT IV (1980), http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/statement-on-capital-punishment.cfm	14

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PETITIONER JAMES MILTON DAILEY**

THE INTEREST OF *AMICI CURIAE*¹

The United States Conference of Catholic Bishops (“USCCB”) is a nonprofit corporation whose members are the active Catholic Bishops of the United States. It advocates and promotes the pastoral teaching of the Church on diverse issues, including the protection of human rights, and the sanctity and dignity of human life. The Florida Conference of Catholic Bishops (“FCCB”) is a nonprofit corporation whose members are the active Catholic Bishops of the State of Florida. The FCCB is the agency through which the Catholic Bishops of Florida speak on matters of concern to the Church, its people, society, and to the three branches of government. The FCCB proposes solutions to the challenges and questions confronting elected and appointed officials on diverse issues, including the protection of human rights, and the sanctity and dignity of human life. The USCCB and FCCB have an abiding commitment to advocate against the death penalty, including by securing meaningful merits review of actual innocence claims. The deeply troubling facts of the Petitioner’s conviction and death sentence imposed in Florida, notwithstanding persuasive evidence of actual

1. *Amici curiae* affirm that no counsel for a party authored this brief in whole or in part. No person or party, other than *amici* or their counsel, made a monetary contribution for the preparation or submission of this brief. The parties received timely notice of the intent to file this *amicus* brief. Petitioner consented to the filing, but respondent has withheld consent. *Amici* have filed the attached motion for leave.

innocence, raise profound moral questions that strike at the heart of the USCCB's and FCCB's missions.

FACTUAL BACKGROUND

Petitioner James Milton Dailey was imprisoned over 30 years ago for a murder he has steadfastly denied committing. Indeed, it is undisputed that another man, Jack Percy, killed the victim and was duly convicted of the offense. In the State's subsequent prosecution of Mr. Dailey for complicity in the murder, it adduced no physical, forensic, or eyewitness evidence implicating him. Rather, Mr. Dailey was convicted on the basis of testimony of three jailhouse informants, who each had every incentive to lie.

At various times since his conviction, Mr. Dailey has come forward with exculpatory evidence, including a sworn affidavit by Percy wholly exonerating Mr. Dailey. Viewed together, and in combination with the meager and suspect evidence that was presented against him at trial, the post-conviction evidence establishes the very real prospect that Mr. Dailey is innocent. Yet, the Florida Office of the Attorney General, the state lower courts, and the Supreme Court of Florida have set aside such evidence. On September 25, 2019, the Governor of Florida signed Mr. Dailey's death warrant, and the Florida Supreme Court on October 3, 2019 affirmed the conviction and death sentence. The execution was ordered to take place on November 7, 2019. On October 23, 2019, the United States District Court for the Middle District of Florida granted a stay of the execution until December 30, 2019.

Each day of his 30-plus years of imprisonment, Mr. Dailey has faced the agonizing dread of execution. He now petitions this Court as a final effort to restore justice.

A. The Sparse Evidence at Trial

Mr. Dailey was found guilty of complicity in the murder of a 14-year old girl by a jury in Florida state court on June 27, 1987, and was sentenced to death on August 7 of that year.

The evidence against Mr. Dailey was shockingly sparse. He was only arrested in connection with the murder because his co-defendant Jack Percy made a series of self-serving statements to the police in an attempt to shift the blame to Mr. Dailey. R2 9314-15; 9316-19; 9341; 9624.² The State does not contest that Percy was himself guilty of the murder.

In fact, the State won a conviction of Percy after a jury trial, and its evidence against that defendant was overwhelming. At his trial, the prosecutor expressly argued to the jury that it was Percy, who had a motive to take the victim to the location where she was later killed, and that Mr. Dailey would have had no such motive. R2 10298, 11582. While the State easily obtained Percy's conviction, it was unable to convince the jury to impose the death penalty against him. Mr. Dailey's trial – and most of the “evidence”-gathering against him – took place after Percy's conviction and sentencing.

2. Factual citations refer to the following: “TR1” shall refer to the record on appeal from Mr. Dailey's first trial proceedings (with the volume and page numbers following in parenthesis); “TR2” shall refer to the record on appeal from Mr. Dailey's second trial proceedings; “PC ROA” shall refer to the first post-conviction record on appeal, *Dailey v. State*, 965 So. 2d 38 (Fla. 2007); “R1” shall refer to the second post-conviction record on appeal, *Dailey v. State*, 247 So. 3d 390 (Fla. 2018), and “R2” shall refer to the record submitted as part of Mr. Dailey's Petition.

What then, was the evidence against Mr. Dailey? Although he had been with Percy and others on the day of the murder, there was no eyewitness placing Mr. Dailey at or anywhere near the crime scene. Nor was there any physical or forensic evidence to tie Mr. Dailey to the murder. TR1 10:1267-68 (prosecutor conceding that there was no “physical evidence,” “no fingerprints,” and “no hair or fibers”). To the contrary, the forensic evidence, such as it was, pointed *away* from Mr. Dailey.³ Instead, the evidence against Mr. Dailey consisted entirely of testimony given by three jailhouse informants who each sought, in exchange for their testimony, lenient treatment from the State in their own unrelated cases.

Two of the three informants, James Leitner and Pablo DeJesus, both testified that Mr. Dailey had spoken to them in the Pinellas County Jail law library and confessed to the crime. TR1 10:1265, 1281, 1285. They both received plea deals from the State in exchange for their testimony. TR1 8:1014; 9:1082. The third informant, Paul Skalnik, testified that Mr. Dailey confessed his guilt to him in lurid detail through the bars of his cell as Skalnik walked past on his way to recreation. TR1 9:1115; R2 8208. He, too, received a plea deal in exchange for this testimony. PC ROA 4:455-56, 6:866-67.

B. Exculpatory Evidence Discovered Post-Trial

After the trial and conviction, Mr. Dailey obtained new counsel whose investigation uncovered substantial

3. The sole piece of physical evidence adduced at Mr. Dailey’s trial was a hair that had been found in the victim’s hand. A forensic examination showed it to be incompatible with Mr. Dailey’s hair. R2 99-100.

exculpatory evidence. If the evidence against Mr. Dailey at trial was vanishingly thin, it evaporated in the face of this new evidence. To the extent the jury may have been persuaded by the level of details the informants claimed Mr. Dailey shared with each of them, the new evidence demonstrated that such details almost certainly came from media reports and not Mr. Dailey.

Mr. Dailey's post-conviction counsel learned that, a week after Percy's trial ended with a jury recommending a sentence of life imprisonment rather than death, police officers attempted to buttress their case against Mr. Dailey. They arrived at the jail where he was being held and interviewed over 15 inmates to learn what Mr. Dailey may have said to them about the offense. R2 12094-96; R2 12106-09. Using highly suggestive procedures, the officers showed them newspaper clippings of Mr. Dailey's case. R2 12094-96; R2 12106-09. Facts about the murder were also aired extensively in the news, both in television and in print, such that the inmates at the county jail had ready access to significant details about the case from the press, including crime scene photos. R2 12076-78.

Post-conviction evidence also specifically discredited the jailhouse informants' testimony and their reliability as witnesses. For example, a defense witness, Travis Smith, testified that he observed Leitner and DeJesus "collaborate a story together as to what they were going to say when they talked to the State Attorney," and that they "fabricat[ed] their story" to get a reduced sentence in their respective cases. R2 12093. The testimony of informant Skalnik was even further undermined as the new evidence included: (i) information from Richard Watts, who had previously represented Skalnik, that

Skalnik received an undisclosed plea deal from the State in exchange for his testimony against Mr. Dailey (despite Skalnik's testimony to the contrary) TR 9:1108, 1157; (ii) internal memos from Pinellas County Jail deputies indicating that Skalnik made false allegations against correctional officers while Skalnik was in the jail; (iii) a criminal complaint that had charged Skalnik with a sexual offense against a child (which contradicted his sworn testimony minimizing his criminal history, as well as the State's argument to the jury that Skalnik and the other two informants may be thieves and drug dealers but they were not, like Mr. Dailey, offenders who victimized children). TR 9:1158; 10:1283, R2 21, 30, 90, 2286. Mr. Dailey also presented evidence that Skalnik was a serial police informant who had been convicted numerous times of crimes of dishonesty. PC ROA 4: 434-441; 2:211-213. Finally, the same prosecutor who tried Mr. Dailey's case testified in post-conviction proceedings that she would never again rely on Skalnik as a witness because she could not in good faith place him on the stand with the expectation that he would render truthful testimony. PC ROA 3:397-98. Taken together, this evidence powerfully undermined the key informant testimony – and, indeed, the totality of the case – against Mr. Dailey.

Mr. Dailey also put forward evidence showing he was not even present at the crime scene, contradicting the State's narrative that he was with Percy all evening, including when Percy killed the victim. According to contemporaneous police reports, Oza Shaw – who was with Percy and Mr. Dailey on the evening of the murder – told the police that Percy and the victim gave Shaw a ride to a telephone that evening – without Mr. Dailey – where they dropped him off. R2 93-94; 417-18. Shaw further stated

that he later returned to Percy's apartment, where he fell asleep, and that he was awakened in the early morning hours when Percy returned without the victim. R2 420-21. Shaw saw Percy go into Mr. Dailey's room alone and emerge with Mr. Dailey. *Id.*

Finally, and consistent with all of the above, the newly discovered evidence included a sworn statement by Jack Percy himself, fully exonerating Mr. Dailey. R2 63-64; 12153-59. Percy signed an affidavit, dated April 20, 2017, in which he admitted that "James Dailey was not present" when the victim was killed, and that "I alone am responsible" for her death. R2 63-64.⁴ This affidavit was fully consistent with Percy's prior statements to an inmate in whom Percy confided during their long imprisonment together, and years after Percy's conviction. That inmate, Juan Banda, stated that sometime between 1992 and 1996, and again in 2007, Percy told him that Mr. Dailey was innocent. R2 12118-122. Similarly, Travis Smith stated that Percy told him that he, Percy, had committed the crime alone. R2 12099. The statements of Banda and Smith, made spontaneously and over the course of over 20 years, show that Percy's affidavit did not contain a recently fabricated version of events in exchange for a benefit. Rather, it contained the truth.

In sum, the evidence of Mr. Dailey's actual innocence is not only credible; it is overwhelming.

4. At a hearing, Percy subsequently claimed parts of the affidavit were untrue but refused to explain which portion was inaccurate, as he invoked his Fifth Amendment privilege. R2 12139-41. When pressed to explain this new position, Percy conceded that he spoke to his mother and other relatives who reminded him his "parole just got denied for seven years and think about what I was doing. That's what they advised me." R2 12146-47.

SUMMARY OF ARGUMENT

The Catholic Church opposes the death penalty for it represents a violation of human dignity. It is fundamentally incompatible with the principle that human life is sacred and that redemption is always possible. The moral harm is all the more grievous, and utterly intolerable, when this irrevocable punishment is imposed upon an innocent person. The Court's Eighth Amendment jurisprudence is likewise premised on a special regard for human dignity. This Court has prohibited imposition of the death penalty except for the most egregious offenders committing the most egregious offenses. A defendant who presents compelling evidence of actual innocence falls well outside the category of those eligible for death. Thus, credible claims of actual innocence must be resolved on the merits and cannot be dismissed on any procedural grounds.

Here, Mr. Dailey has submitted more than credible evidence of actual innocence. The razor thin evidence of guilt premised entirely on the self-serving testimony of jailhouse informants has been thoroughly undermined by post-conviction evidence, including a sworn affidavit from Percy fully exonerating Mr. Dailey. The only just and legal solution is to require a remand for a new trial on the merits.

ARGUMENT

I. THE CATHOLIC CHURCH OPPOSES THE DEATH PENALTY.

The Bishops of the United States have long abhorred the practice of state-sanctioned executions of human

beings. Representing a final, irrevocable termination of a gift from God – human life – the Bishops view the death penalty as a grave violation of human dignity. It represents a judgment by fallible human beings that a person is beyond redemption. That is a judgment the Catholic Church rejects. The moral wrong is all the more egregious when the life of an innocent person is taken in the name of justice. It is the view of the Catholic Church that no social interest in procedural efficiency can ever justify the execution of a person who has a credible claim of innocence, no matter when, where, or how that claim arises.

A. Background to the Catholic Church's Opposition to the Death Penalty

The death penalty is incompatible with the principle that human life is sacred and that redemption is always possible. On May 11, 2018, Pope Francis pronounced:

Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.

Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have been developed, which ensure

the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption.

Consequently, the Church teaches, in the light of the Gospel, that “the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person,” and she works with determination for its abolition worldwide.⁵

This definitive statement flows from the Catholic Church’s longstanding tradition of defending the rights of the human person. “[T]hose rights . . . derive directly from [a human being’s] dignity as a human person, and . . . are therefore universal, inviolable and inalienable.”⁶ As Pope St. John Paul II wrote, “[n]ot even a murderer loses his personal dignity, and God himself pledges to guarantee this.”⁷ In his 1999 visit to the United States, in St. Louis, Missouri, he said that “[a] sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone

5. FRANCIS, RESCRIPTUM “EX AUDENTIA SS. MI” (Aug. 2, 2018) (CATECHISM OF THE CATHOLIC CHURCH, pt. 3, ch. 2, art. 5 ¶ 2267), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html>.

6. JOHN XXIII, PACEM IN TERRIS ¶ 145 (Apr. 11, 1963), http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html.

7. JOHN PAUL II, EVANGELIUM VITAE ¶ 9 (Mar. 25, 1995), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html.

who has done great evil.”⁸ Referring to circumstances in the United States, he added that “[m]odern society has the means of protecting itself, without definitively denying criminals the chance to reform. I renew the appeal . . . for a consensus to end the death penalty, which is both cruel and unnecessary.”⁹

Pope Benedict XVI continued this teaching, as he called for “the attention of society’s leaders to the need to make every effort to eliminate the death penalty.”¹⁰ Pope Benedict also praised the Community of Sant’Egidio – a Catholic lay ecclesial movement dedicated to prayer, friendship with the poor, and service towards peace – for their efforts to end the death penalty, saying:

I express my hope that your deliberations will encourage the political and legislative initiatives being promoted in a growing number of countries to eliminate the death penalty and to continue the substantive progress made in conforming penal law both to the human dignity of prisoners and the effective maintenance of public order.¹¹

8. JOHN PAUL II, HOMILY AT THE PAPAL MASS IN ST. LOUIS (Jan. 27, 1999), https://w2.vatican.va/content/john-paul-ii/en/travels/1999/documents/hf_jp-ii_hom_27011999_stlouis.html.

9. *Id.*

10. BENEDICT XVI, AFRICAE MUNUS, ¶ 83 (Nov. 19, 2011), http://w2.vatican.va/content/benedict-xvi/en/apost_exhortations/documents/hf_ben-xvi_exh_20111119_africae-munus.html.

11. BENEDICT XVI, GENERAL AUDIENCE (Nov. 30, 2011), http://w2.vatican.va/content/benedict-xvi/en/audiences/2011/documents/hf_ben-xvi_aud_20111130.html.

In early 2015, Pope Francis reaffirmed that “today capital punishment is unacceptable, however serious the condemned’s crime may have been.”¹² Later that year, he emphasized his plea for “the global abolition of the death penalty” in his address to the United States Congress because, as he stated, “every life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes.”¹³

The Catholic Church’s opposition to the death penalty has a basic grounding in human compassion. Pope Francis observed that the death penalty:

[E]ntails cruel, inhumane and degrading treatment, as is the anguish before the moment of execution and the terrible suspense between the issuing of the sentence and the execution of the penalty, a form of ‘torture’ which, in the

12. FRANCIS, LETTER TO THE PRESIDENT OF THE INTERNATIONAL COMMISSION AGAINST THE DEATH PENALTY (Mar. 20, 2015), https://w2.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco_20150320_lettera-pena-morte.html.

13. FRANCIS, ADDRESS TO THE JOINT SESSION OF THE UNITED STATES CONGRESS (Sept. 24, 2015), https://www.washingtonpost.com/local/social-issues/transcript-pope-franciss-speech-to-congress/2015/09/24/6d7d7ac8-62bf-11e5-8e9e-dce8a2a2a679_story.html; *see also* FRANCIS, ADDRESS TO THE DELEGATES OF THE INTERNATIONAL ASSOCIATION OF PENAL LAW (Oct. 23, 2014), https://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.html. (urging “Christians and men of good will . . . to fight . . . for the abolition of the death penalty, whether legal or illegal, and in all of its forms.”)

name of correct procedure, tends to last many years, and which oftentimes leads to illness or insanity on death row.¹⁴

The Bishops of the United States have, in accordance with the teaching of these Popes, long opposed the death penalty, including in their 2005 pastoral letter, “A Culture of Life and the Penalty of Death.” In that statement, the Bishops identified the multiple reasons for abolishing the death penalty, including that it “violates respect for human life and dignity,” and that “[i]ts application is deeply flawed and can be irreversibly wrong, is prone to errors, and is biased by factors such as race, the quality of legal representation, and where the crime was committed.”¹⁵ The Bishops also cited the Death Penalty Information Center statistics on the number of exonerations of persons previously sentenced to death, which currently stands at 166 since 1973.¹⁶ Thus, the Bishops of the United States in particular have sought to abolish the death penalty.¹⁷

14. FRANCIS, LETTER TO THE PRESIDENT OF THE INTERNATIONAL COMMISSION AGAINST THE DEATH PENALTY, *supra* note 12.

15. U.S. CONFERENCE OF CATHOLIC BISHOPS, A CULTURE OF LIFE & THE PENALTY OF DEATH, 11 (2005), <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/upload/penaltyofdeath.pdf>

16. *Id.*; see DEATH PENALTY INFORMATION CENTER, INNOCENCE DATABASE, <https://deathpenaltyinfo.org/policy-issues/innocence-database>.

17. See, e.g., National Catholic News Service, *Capital Punishment: Grave Doubts*, 1 ORIGINS 529, 531 (1972) (“This, then, is an appeal from the Indiana Catholic Conference to all people to take a strong stand asking for the abolishment of capital punishment in the state of Indiana.”); ROMAN CATHOLIC CHURCH – U.S. CATHOLIC

B. The Execution of an Innocent Person is Morally Indefensible

The Bishops' longstanding and profound moral opposition to the death penalty, even when applied to persons guilty of heinous crimes, takes on greater urgency when any state seeks to execute an innocent person. On this score, the Holy Scriptures are unequivocal: "the innocent and the just you shall not put to death, for I will not acquit the guilty."¹⁸ St. Thomas Aquinas teaches that "it is in no way lawful to slay the innocent" (*nullo modo licet occidere innocentem*).¹⁹

The radical injustice of punishing an innocent man is particularly grievous in the case of a sentence of death, which is by its nature final and irreversible. As St. Thomas Aquinas put it, "such a sentence is like the violence of robbers" (*tale iudicium simile est violentiae latronum*).²⁰ Pope Francis has also identified the convictions of innocent men and women as striking at the core of the death penalty's claim to justice: "[t]he death penalty loses all legitimacy due to the defective selectivity of the criminal

CONFERENCE, RESOLUTION AGAINST CAPITAL PUNISHMENT (1974), reprinted in CHURCHES SPEAK, ON: CAPITAL PUNISHMENT, at 3 (J. Gordon Melton ed., 1989) ("[t]he United States Catholic Conference goes on record as opposed to capital punishment"); U.S. CONFERENCE OF CATHOLIC BISHOPS, BISHOPS' STATEMENT ON CAPITAL PUNISHMENT IV (1980), <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/statement-on-capital-punishment.cfm>.

18. *Exodus* 23:7.

19. THOMAS AQUINAS, SUMMA THEOLOGIAE II-II, q. 64, art. 6.

20. *Id.*, q. 69, art. 4.

justice system and in the face of the possibility of judicial error. Human justice is imperfect, and the failure to recognize its fallibility can transform it into a source of injustice.”²¹

As his Petition sets forth, Mr. Dailey has made a more than credible showing that he is actually innocent of the murder committed by Jack Percy. No arguments about procedural issues can morally justify killing Mr. Dailey.

II. THE MORAL POSITION OF THE CATHOLIC CHURCH IS CONSISTENT WITH THIS COURT’S PRONOUNCEMENTS AGAINST SENTENCING TO DEATH A PERSON WHO IS ACTUALLY INNOCENT.

The Church’s moral position opposing the execution of an innocent person hardly needs further defense. It is as plainly correct as the notion that justice is good, and our constitutional scheme agrees entirely: “the execution of a legally and factually innocent person would be a constitutionally intolerable event.” *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’CONNOR, J., concurring). While this Court’s Eighth Amendment jurisprudence has not yet gone so far as to ban the death penalty,²² the Court’s

21. FRANCIS, LETTER TO THE PRESIDENT OF THE INTERNATIONAL COMMISSION AGAINST THE DEATH PENALTY, *supra* note 12.

22. As Pope St. John Paul II put it, the death penalty is “both cruel and unnecessary.” JOHN PAUL II, HOMILY AT THE PAPAL MASS IN ST. LOUIS, *supra* note 8.

The death penalty is also increasingly unusual. *See Glossip v. Gross*, 135 S. Ct. 2726, 2773-4 (2015) (BREYER, J., dissenting) (“Often when deciding whether a punishment practice is, constitutionally

decisions have made clear that the death penalty is reserved only for the most egregious offenses committed by the most egregious offenders. The Eighth Amendment thus cannot countenance the execution of a man who has mounted a credible claim of actual innocence.

A. The Eighth Amendment Serves to Protect the “Dignity of Man”

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed,

speaking, ‘unusual,’ this Court has looked to the number of States engaging in this practice ... It seems fair to say that it is now unusual to find capital punishment in the United States.”). The Court noted in *Gregg v. Georgia*, that “[a]t the close of 1974, at least 254 persons had been sentenced to death ... and, by the end of March, 1976, more than 460 were subject to death sentences,” 428 U.S. 153, 182 (1976). Since that time, the rate of issuance of death sentences has dropped dramatically: in 2018, only 42 death sentences were imposed in the United States, the death penalty was banned in 20 states and the District of Columbia, and 11 of the 30 states permitting the death penalty (as well as the federal government and the U.S. military) had not carried out an execution in at least 10 years, or, in some cases, much longer. John Gramlich, *California is one of 11 states that have the death penalty but haven’t used it in more than a decade*, Pew Research Center (Mar. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/>. As of 2019, according to the Death Penalty Information Center’s December 17, 2019 year-end report, fewer than 1% of all U.S. counties imposed death sentences. The report also notes that 21 states have now abolished the death penalty, and executions and new death sentences remained near historic lows for the fifth consecutive year. DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2019: YEAR END REPORT, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report>.

nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). Thus, “[w]hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.” *Id.* See also *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (punishment of criminals “must embrace and express respect for the dignity of the person”); *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (per curiam) (BRENNAN, J., concurring) (the Eighth Amendment bars a punishment that is “barbaric” or “excessive” as “[t]he infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering.”).

The Eighth Amendment’s interest in protecting human dignity is especially acute where the punishment is irrevocable. As this Court has recognized:

[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman, 408 U.S. at 306 (STEWART, J., concurring). The Court has thus limited this “irrevocable” punishment “to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper*

v. Simmons, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Thus, a sentence of death has been deemed excessive for crimes that involve neither death nor intended death. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 593 (1977) (plurality opinion) (“We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life.”) (internal citation omitted); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (death penalty is disproportionate and hence unconstitutional penalty for felon who neither kills, attempts to kill, nor intends to kill).

Similarly, the Court has held that a defendant who – due to age or cognitive ability – cannot form the requisite mental state, lacks culpability sufficient to fall within the “narrow category of the most deserving execution.” *See Atkins*, 536 U.S. at 321 (execution of persons with mental retardation violates the Eighth Amendment); *Roper*, 543 U.S. at 570-74 (execution of juveniles is disproportionately excessive because they lack moral culpability).

B. The Execution of an Innocent Person is Unconstitutional

Inasmuch as the Eighth Amendment permits the execution of only “those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution,’” *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319), the death penalty cannot be imposed upon an innocent person. Justice O’Connor put it best: “the execution of a legally and factually innocent person would be a constitutionally intolerable event.” *Herrera*, 506 U.S. at 419 (O’CONNOR,

J., concurring). *See also id.* at 431-32 (“[e]xecuting an innocent person epitomizes ‘the purposeless and needless imposition of pain and suffering.’” (BLACKMUN, J., dissenting) (quoting *Coker*, 433 U.S. at 592)).

While the Court has not expressly recognized a freestanding claim of actual innocence, it has left open the possibility of doing so. *See Herrera*, 506 U.S. at 427 (O’CONNOR, J., concurring) (in light of petitioner’s failure to make a “persuasive showing” of actual innocence, “the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence”); *see also DA’s Office v. Osborne*, 557 U.S. 52, 71 (2009) (“Osborne ... obliquely relies on an asserted federal constitutional right to be released upon proof of ‘actual innocence.’ Whether such a federal right exists is an open question.”); *House v. Bell*, 547 U.S. 518, 555 (2006) (“We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.”).

The Court has also used its original habeas jurisdiction to remand a capital case for an evidentiary hearing on the petitioner’s actual innocence claim. *See In re Davis*, 557 U.S. 952 (2009) (directing the district court to “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”). Implicit in this action was the Court’s recognition that “[t]he substantial risk of putting an innocent man to death clearly provide[d] an adequate justification for holding an evidentiary hearing.” *Id.* at 953 (STEVENS, J., concurring).

C. Mr. Dailey Has Made a Compelling Showing of Actual Innocence

Absent intervention by this Court, there is an overwhelming risk that an innocent man will be put to death. Without any physical or forensic evidence, and without testimony from a single eyewitness, the prosecution at Mr. Dailey's trial obtained a conviction based solely on Mr. Dailey's association with Percy on the evening of the murder, and the post-hoc testimony of three jailhouse informants who claimed – in exchange for leniency in their own cases – that Mr. Dailey told them he was responsible for the murder.

Mr. Dailey has come forward with compelling, post-conviction evidence that the statements placed before the jury were lies and that he is actually innocent. A sworn statement by Percy fully exonerates him, and that statement was corroborated by two independent witnesses to whom Percy made essentially the same statement: Mr. Dailey was innocent. In addition, prison inmates with no motive to fabricate have come forward to reveal the police officers' highly suggestive methods in motivating the three informants to falsely testify against Mr. Dailey. One witness testified to seeing two of the informants “fabricat[e]” a story to tell the state prosecutor. Mr. Dailey thus demonstrated more than the foundational weakness of the evidence of his guilt; he has made a “truly persuasive demonstration” that he is actually innocent. *See Herrera*, 506 U.S. at 417.

Yet, relying on a series of procedural technicalities, the Florida state courts denied Mr. Dailey a new trial where he could present this overwhelming evidence of innocence

to a jury. Chief among the perceived procedural obstacles was the conclusion that Percy's sworn statement and his similar admissions to other witnesses exonerating Mr. Dailey would have been inadmissible at trial. To reach this counter-intuitive judgment, the Florida Supreme Court stands *Chambers v. Mississippi*, 410 U.S. 284 (1973), on its head. Contrary to *Chambers'* instruction that "the hearsay rule may not be applied mechanistically to defeat the ends of justice," *id.* at 302, the Florida court did just that, applying a rigid four-factor analysis in a manner that precluded Mr. Dailey from presenting his evidence of innocence.

This Court was so concerned about the miscarriage of justice in Chambers' criminal trial that it required retrial. But the facts present here are far more egregious than in *Chambers*. First, the irrevocable termination of life was not at issue in *Chambers*. Convicted of killing a police officer, Chambers was sentenced to life imprisonment, not death. *Id.* at 285. Moreover, while Mr. Dailey's jury never got to hear evidence that Percy fully exonerated Mr. Dailey, in *Chambers*, the equivalent evidence was actually admitted in evidence. Gable McDonald's statement to Chambers' defense lawyer – stating that he was the shooter and not Chambers – was admitted without objection, and the written statement was read to the jury. *Id.* at 291. As to McDonald, the only question was whether Chambers' counsel could cross-examine him as a hostile witness once he tried to recant his prior, exonerating statement. *Id.* at 291-98. The State courts determined that defense counsel was properly precluded from doing so because of the State's "vouching" rule, that is, the defense called the witness and thus effectively vouched for his credibility. This Court rejected the reasoning:

“[w]e reject the notion that a right of such substance in the criminal process [as the right to confront and cross-examine those who give damaging testimony against the accused] may be governed by that technicality or by any narrow and unrealistic definition of the word ‘against’ [the defendant].” *Id.* at 298. The Court then went on to find that the State courts had also erred in precluding, on hearsay grounds, testimony from other witnesses who would have corroborated McDonald’s exonerating statement by stating that McDonald told them the same thing: McDonald was the shooter, not Chambers. *Id.* at 298-303. A new trial was constitutionally mandated.

Here, of course, no jury has ever heard Percy’s exoneration of Mr. Dailey, either in the form of Percy’s sworn affidavit or the corroborating testimony of other inmates to whom Percy separately and repeatedly over the years made the same statements. Ignoring *Chambers’* injunction to ensure that evidentiary rules not be applied “mechanistically to defeat the ends of justice”, *id.* at 302 – an instruction issued in a noncapital case – the Florida Supreme Court took that precise, formulaic approach. There are many flaws in the court’s mechanistic analysis, all recounted in the Petitioner’s brief, but perhaps none is as striking as the conclusion that Percy’s affidavit was not a statement against his interest. *Dailey v. State*, 279 So. 3d 1208, *1213 (Fla. 2019). As Percy himself explained at the evidentiary hearing as he invoked his Fifth Amendment right to refuse to answer questions about his prior sworn statement (R2 12139-41), a statement incriminating himself and wholly exonerating Mr. Dailey could very well affect his chances at parole. R2 12146-47.

When the post-trial evidence is considered as a whole, there can be little question that Mr. Daily has

demonstrated actual innocence. As this Court did in *Chambers*, it should ensure that Mr. Dailey has a chance to present that body of evidence in a retrial.

“[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), and the protections of the Constitution are framed to accomplish “the twofold aim of criminal justice: that guilt shall not escape or innocence suffer.” *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). This Court in *Herrera* repeated that principle: “the central purpose of any system of criminal justice is to convict the guilty and free the innocent.” 506 U.S. at 398. Before the Court now is a case in which the guilty (Pearcy) has been convicted, serving a life term in prison for his heinous crime. It remains for the Court to insist that the criminal justice system perform the second part of its task: free the innocent after affording Mr. Dailey a new trial.

CONCLUSION

For the foregoing reasons, the USCCB and FCCB respectfully request that this Court grant Mr. Dailey his petition for *certiorari* and remand his case for a new trial.

Respectfully Submitted,

OWEN PELL

Counsel of Record

VIRGINIA ROMANO

TAI H. PARK

WHITE & CASE LLP

1221 Avenue of the Americas

New York, New York 10020

(212) 819-8200

opell@whitecase.com

Counsel for Amici Curiae