APPENDICES

APPENDIX A

283 So.3d 782
Supreme Court of Florida.

James Milton DAILEY, Appellant,

v.

STATE of Florida, Appellee.

James Milton Dailey, Petitioner,

v.

Mark S. Inch, etc., Respondent.

No. SC19-1780

No. SC19-1797

November 12, 2019

Opinion

PER CURIAM.

James Milton Dailey, a prisoner under sentence of death and an active death warrant, appeals the circuit court's order dismissing in part and denying in part his third successive motion for postconviction relief, which was filed under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. We affirm, and we also deny Dailey's motion for stay of execution and his petition for a writ of habeas corpus.

BACKGROUND

On May 6, 1985, fourteen-year-old Shelly Boggio's "nude body was found floating in the water near Indian Rocks Beach in Pinellas County, Florida." *Dailey v. State*, 965 So. 2d 38, 41 (Fla. 2007). Boggio "had been stabbed repeatedly, strangled, and drowned." *Id.* A jury found Dailey guilty of Boggio's first-degree

murder and unanimously recommended death. *Dailey v. State*, 594 So. 2d 254, 256 (Fla. 1991). The trial court followed the recommendation. *Id*.

On direct appeal, we affirmed Dailey's conviction but reversed the sentence. *Id.* at 259. The trial court again sentenced him to death on remand, and we affirmed. *Dailey v. State*, 659 So. 2d 246, 248 (Fla. 1995), *cert. denied*, 516 U.S. 1095, 116 S.Ct. 819, 133 L.Ed.2d 763 (1996). In 2007, we affirmed the circuit court's denial of Dailey's initial motion for postconviction relief and denied his petition for a writ of habeas corpus. Dailey, 965 So. 2d at 48.

Dailey subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. *Dailey v. Sec'y, Fla. Dep't of Corr.*, No. 8:07-cv-1897-T-27MSS, 2008 WL 4470016, at *1 (M.D. Fla. Sept. 30, 2008). The federal district court dismissed or denied all claims and declined to issue a certificate of appealability. *Id*. at *10; *Dailey v. Sec'y, Fla. Dep't of Corr.*, No. 8:07-CV-1897-T-27MAP, 2011 WL 1230812, at *32 (M.D. Fla. Apr. 1, 2011), *amended in part*, *vacated in part*, No. 8:07-CV-1897-T-27MAP, 2012 WL 1069224, at *8 (M.D. Fla. Mar. 29, 2012) (amending opinion to include the denial of an additional claim of ineffective assistance of counsel and denying motion for certificate of appealability to the Eleventh Circuit Court of Appeals).

In 2018, we affirmed the circuit court's denial of Dailey's first successive postconviction motion. *Dailey v. State*, 247 So. 3d 390, 391 (Fla. 2018). Dailey's second successive postconviction motion was denied in part and dismissed in part by the circuit court; we affirmed on October 3, 2019. *Dailey v. State,* 279 So.3d 1208 (Fla. 2019).

After Governor DeSantis signed Dailey's death warrant on September 25, 2019, Dailey filed a third successive motion for postconviction relief. The motion raised four claims: (1) his execution would be unconstitutionally arbitrary; (2) newly discovered evidence proves that he is actually innocent and that the State committed Brady[1] and Giglio[2] violations; (3) the circuit court would violate his constitutional rights if it did not order the Florida Department of Corrections (DOC) to comply with his requests related to defense execution witnesses; and (4) the totality of his punishment—including over thirty years spent on death row—violates the Eighth Amendment.

Following an evidentiary hearing on one newly discovered evidence claim, the circuit court entered an order dismissing in part and denying in part the motion.

ANALYSIS

In this Court, Dailey appeals the denial of postconviction relief and the denial of certain records requests filed after the Governor signed his death warrant. Dailey also filed a habeas petition in this Court. We affirm the postconviction court's denial of relief and deny his habeas petition.

Arbitrariness Of Execution

In his first claim, Dailey contends that the circuit court erred in summarily rejecting his claim that his execution would be so arbitrary as to violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Because the record conclusively

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[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[2] *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

shows that Dailey is not entitled to relief, we affirm. *See* Fla. R. Crim. P. 3.851(f)(5)(B) ("If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing.").

Dailey argues that the circuit court wrongly concluded that "some of the arguments raised in" support of "this ground amount[ed] to untimely or procedurally barred claims." These included his "facial challenges to the clemency or warrant [selection] process," his assertion that his execution would be arbitrary because he is actually innocent, and his claim that he had been denied the chance to present newly discovered evidence at an updated clemency hearing.

We agree that Dailey's actual innocence claim is procedurally barred. Dailey has already unsuccessfully raised an actual innocence claim in his second successive postconviction motion. *Dailey*, 279 So.3d at 1217–18. He cannot present the claim again "by merely reframing it as a challenge to the warrant." Moreover, we have repeatedly held that freestanding actual innocence claims are not cognizable under Florida law. *Id.*; *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008).

The remaining claims fail on the merits. We have consistently rejected the assertion that the warrant selection process is arbitrary because there are no standards that constrain the Governor's discretion in determining which warrant to sign. *See*, *e.g.*, *Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017); *Bolin v. State*, 184 So. 3d 492, 502-03 (Fla. 2015); *Mann v. State*, 112 So. 3d 1158, 1162-63 (Fla. 2013); *Ferguson v. State*, 101 So. 3d 362, 366 (Fla. 2012); *Gore v. State*, 91 So. 3d 769, 780 (Fla. 2012); *Valle v. State*, 70 So. 3d 530, 551-52 (Fla. 2011). Related challenges to the clemency

process have also been denied. See, e.g., *Johnston v. State*, 27 So. 3d 11, 24 (Fla. 2010); *Marek v. State*, 8 So. 3d 1123, 1129-30 (Fla. 2009). And to the extent Dailey asserts that his execution would be arbitrary because he was not granted an additional clemency proceeding at which to present newly discovered evidence, his claim is foreclosed by our caselaw. *See*, *e.g.*, *Grossman v. State*, 29 So. 3d 1034, 1044 (Fla. 2010); *Johnston*, 27 So. 3d at 25-26. Accordingly, we conclude that the circuit court properly rejected this claim.

Newly Discovered Evidence, Brady, and Giglio

Dailey next argues that the circuit court erred in rejecting his claim that newly discovered evidence proves the State committed *Brady* and *Giglio* violations. We disagree.

In order to demonstrate entitlement to relief based on newly discovered evidence, two requirements must be satisfied. First, "the evidence 'must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence.' " *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (alteration in original) (quoting *Torres-Arboleda v. Dugger*, 636 So. 2d 1321, 1324-25 (Fla. 1994)). Second, the "evidence must be of such nature that it would probably produce an acquittal on retrial." *Id.* (citing *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991)). "If," as here, "the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence." *Walton v. State*, 246 So. 3d 246, 249 (Fla. 2018) (citing *Jones*, 591 So. 2d at 915), *cert. denied*, —— U.S. ——, 139 S. Ct. 1184, 203 L.Ed.2d 218

(2019). To be timely, a claim based on newly discovered evidence must be brought within one year of the date upon which it became discoverable. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008).

Dailey claims that newly discovered evidence exists in the form of: testimony from James Slater, a former assistant state attorney; statements made by Edward Coleman, a former inmate who was previously incarcerated with Dailey; and statements made by David Howsare, a former correctional officer. He also raises a *Brady* claim based on Slater's testimony and a *Giglio* claim based on Coleman's statements. We address each claim below.

James Slater

Dailey first alleges that the circuit court erred in denying his claim that testimony from James Slater constitutes newly discovered evidence proving that the State committed a *Brady* violation. When the lower court has ruled on a claim following an evidentiary hearing, we review "the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence." *Green v. State*, 975 So. 2d 1090, 1100 (Fla. 2008). The lower "court's application of the law to the facts," however, is reviewed de novo. *Id.*

In support of his postconviction motion below, Dailey attached an affidavit from former Assistant State Attorney James Slater. In the affidavit, Slater recalled that he worked at the State Attorney's Office in Pinellas County at the time the victim, Shelly Boggio, was murdered. He stated that he was involved in the investigation of Boggio's death and the resulting prosecution of Jack Pearcy, Dailey's codefendant. Slater explained that he remembered being called to the crime scene where Boggio's body was recovered.

He said that law enforcement told him that Pearcy attempted to have sex with Boggio, that Pearcy could not perform, and that Boggio teased Pearcy, causing him to become irate and stab her.

At the evidentiary hearing, Slater testified that his role in Pearcy's case was limited to appearing at the crime scene and testifying at a subsequent hearing. When Slater was asked whether he remembered law enforcement telling him that Pearcy attempted to have sex with Boggio but could not perform, he responded that, "[i]n [his] definition of law enforcement," he could not identify "any specific individual or source of that information." He explained that he "just had a general 34-year-old recollection that that's what this case was about." When asked if his recollection also included that Boggio teased Pearcy and he subsequently stabbed her, Slater replied, "That is what the affidavit indicated, yes."

Slater went on to explain that the longer he thought about it, "the less [he could] connect that type of motivation to anybody involved in that case." He admitted that he was not sure whether he "had gotten confused with another case" he was prosecuting at the time. He also confessed to feeling "tugged in two directions" and to feeling uncomfortable speaking to Dailey's attorneys alone.

Slater later clarified that he was positive the statements were made to him. But he said that he did not know who made the statements, where he was when the statements were made, or the context in which the statements were shared with him. He stated that he accordingly "question[ed] whether [the statements] had anything to do with this case."

In its final order, the circuit court rejected the claim. The court held that the claim was untimely, that Slater's testimony did not constitute favorable, admissible evidence, and that Slater's affidavit was inadmissible hearsay.

We affirm the circuit court's denial of relief. We first conclude that Dailey has failed to state a *Brady* claim based on Slater's testimony. *Brady* requires the State "to disclose material information within its possession or control that is favorable to the defense." *Taylor v. State*, 62 So. 3d 1101, 1114 (Fla. 2011). To establish a *Brady* violation, the defendant has the burden to show "(1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) because the evidence was material, the defendant was prejudiced." *Id*. (emphasis omitted); *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict. *Taylor*, 62 So. 3d at 1114; *Strickler*, 527 U.S. at 289, 119 S.Ct. 1936. "[A] 'reasonable probability' [is] 'a probability sufficient to undermine confidence in the outcome.'" *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Here, Dailey cannot make the requisite showing. Dailey argues that Slater's testimony and affidavit prove that the State suppressed evidence that Pearcy had confessed to Boggio's murder and had a clear motive for doing so. But even if this Court were to consider the affidavit that was held inadmissible below,

we would be left with inconsistent statements from Slater indicating—at best—that an unidentified member of law enforcement, at some unknown time, told Slater a piece of information that he cannot connect to Pearcy. Because Slater was not certain that the statements at issue "had anything to do with" Pearcy's case, Dailey has not demonstrated the existence of any exculpatory evidence that would have created a reasonable probability of a different verdict.

We also conclude that Dailey has failed to state a newly discovered evidence claim. The State alleges—and Dailey does not dispute—that Slater was listed as a witness at Dailey's trial. Dailey neglects to explain why he could not have discovered the information to which Slater testified either prior to trial or at some point during the decades that followed. Accordingly, his claim is untimely.

Edward Coleman

Dailey next contends that the circuit court erred in summarily dismissing his claim that statements from Edward Coleman constitute newly discovered evidence proving that the State violated *Giglio*. In an affidavit attached to Dailey's postconviction motion, Coleman indicated that he was incarcerated at Pinellas County Jail with Dailey and Pearcy. Coleman stated that he never saw Dailey talk about his case. He further alleged that Detective John Halliday pulled him into a private interview room on two separate occasions. Coleman claimed that on the first occasion, Detective Halliday asked if Dailey or Pearcy discussed their cases with other inmates. Coleman stated that Detective Halliday then instructed him "to listen carefully and try to get information." On the second occasion, Coleman alleged, Detective Halliday

had newspaper articles about Boggio's murder, directed him to look for specific details about the case, and promised to reduce his charges if he shared any information. Dailey alleges that this testimony would probably produce an acquittal or less severe sentence because it would cast doubt on the credibility of the inmates who testified against him at trial.

To the extent that Dailey contends Coleman's testimony constitutes newly discovered evidence, we conclude that his claim is untimely. Dailey has long known that Detective Halliday approached inmates housed at the Pinellas County Jail, pulled them into a private interview room, and showed them newspapers about Boggio's murder. In his 1999 amended motion for postconviction relief, Dailey alleged that trial counsel was ineffective for failing to call two inmates to testify that Detective Halliday approached them with newspaper articles. *See Dailey*, 279 So.3d at 1214–15. After waiving the claim, Dailey raised it again as a newly discovered evidence claim in his second successive postconviction motion, filed in 2017. *Id*.

This history indicates that Dailey has been on notice—since at least 1999—that other inmates might have been questioned by Detective Halliday. He fails to state any reason why Coleman's testimony has only become discoverable within the last year. Instead, he argues that he was not granted an evidentiary hearing at which to fully explain why the evidence could not have been discovered earlier. He therefore contends that this Court must accept the allegation in his postconviction motion that the evidence is newly discovered. This argument is misguided. Rule 3.851(e)(2)(C)(iv) states that a successive postconviction motion including a newly discovered evidence

claim based on a witness's testimony must contain "a statement of the reason why the witness ... was not previously available." Because Dailey's motion failed to do so, his claim cannot be considered timely.

Dailey also argues that this evidence proves the State violated *Giglio*. "[A] *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant." *Jimenez v. State*, 265 So. 3d 462, 479 (Fla. 2018) (quoting *Guzman v. State*, 868 So. 2d 498, 506 (Fla. 2003)). To establish a *Giglio* violation, Dailey must show that "(1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Moore v. State*, 132 So. 3d 718, 724 (Fla. 2013). Here, Dailey has not identified any false testimony presented during his trial, much less alleged that the State knew of its falsity or proved that any such statement was material. Accordingly, he is not entitled to relief.

David Howsare

Finally, Dailey argues that the circuit court erred in summarily dismissing his claim that statements from former Correctional Officer David Howsare constitute newly discovered evidence. Below, Dailey filed an affidavit in which Officer Howsare stated that he worked at the Pinellas County Jail while Pearcy was incarcerated there. According to Officer Howsare, Pearcy was known to manipulate guards and fellow inmates. Officer Howsare further stated that Pearcy engaged in a physical altercation with another inmate and attempted to secure favors from guards.

The circuit court concluded that the claim is untimely. We agree. Dailey neglects to explain why this information could not have been discovered prior to his trial or at some point during the subsequent decades of postconviction litigation. *See* Fla. R. Crim. P.

3.851(e)(2)(C)(iv). Accordingly, he is not entitled to relief.

Cumulative Analysis

Dailey next argues that the circuit court erred in failing to consider whether, when the allegations presented in this postconviction proceeding are considered cumulatively with admissible evidence developed in prior postconviction proceedings, he is entitled to a new trial. We disagree. Given that his newly discovered evidence claims were correctly rejected as untimely and that he failed to establish a *Brady* violation, no such cumulative analysis was required. *See Dailey*, 279 So.3d at 1216–17.

Defense Execution Witnesses

Dailey next asserts that the circuit court violated his Sixth and Eighth Amendment rights in refusing to direct the DOC to comply with his requests that (1) one or both of his designated legal witnesses be allowed access to a writing pad and pen during his execution; (2) one or both of his designated legal witnesses be allowed access to a telephone before and during the execution process; (3) he be afforded a second witness to his execution; and (4) one of his witnesses be allowed to view the IV insertion process. We disagree. We recently rejected a nearly identical claim in *Long v. State*, 271 So. 3d 938, 946-47 (Fla.), *cert. denied*, —— U.S. ——, 139 S. Ct. 2635, 204 L.Ed.2d 280 (2019). As we recognized in *Long*, "[t]he DOC is entitled to a presumption that it will properly perform its duties while carrying out an execution ... [and] our 'role is not to micromanage the executive branch in fulfilling its own duties relating to executions.' " *Long*, 271 So. 3d at 946 (alterations in original) (quoting *Hannon*, 228 So. 3d at 509); *see also* art. II, § 3, Fla. Const. ("The powers of the state government shall be

divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). Because Dailey has not demonstrated that the DOC's current policies and procedures are unconstitutional, and because "separation of powers principles preclude us from performing the executive function of establishing a procedure to be used for executions," we conclude that the circuit court did not err in refusing to direct the DOC to comply with Dailey's requests. *Long,* 271 So. 3d at 947.

Public Records

Dailey next challenges the circuit court's denial of his requests for certain public records under Florida Rule of Criminal Procedure 3.852(h)(3) and (i). "We review rulings on public records requests pursuant to Florida Rule of Criminal Procedure 3.852 for abuse of discretion," *Bowles v. State*, 276 So. 3d 791, 795 (Fla.) (quoting *Hannon*, 228 So. 3d at 511), *cert. denied*, No. 19-5617, —— U.S. ——, —— S.Ct. ——, 204 L.Ed.2d 1181, 2019 WL 3977767 (U.S. Aug. 22, 2019), and conclude that none exists here.

As we have recently explained:

Rule 3.852 is "not intended to be a procedure authorizing a fishing expedition for records." *Sims v. State, 753 So. 2d 66, 70 (Fla. 2000).* For this reason, records requests under Rule 3.852(h) are limited to "persons and agencies who were the recipients of a public records request at the time the defendant began his or her postconviction odyssey," *id.*; whereas, records requests under Rule 3.852(i) must "show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death

warrant was signed." *Asay [v. State*, 224 So. 3d 695, 700 (Fla. 2017)] (quoting *Tompkins v. State*, 872 So. 2d 230, 244 (Fla. 2003)).

Bowles, 276 So. 3d at 795 (alteration in original) (quoting *Hannon*, 228 So. 3d at 511). If "a defendant cannot demonstrate that he or she is entitled to relief on a claim or that records are relevant or may reasonably lead to the discovery of admissible evidence, the trial court may properly deny a records request." *Id.* (quoting *Asay*, 224 So. 3d at 700).

Here, Dailey requested records from the Pinellas County Sheriff's Office, the Office of the Governor, the State Attorney's Office, the Office of the Medical Examiner for the Eighth District, the Florida Commission on Offender Review, the DOC, the Office of the Attorney General, and the Florida Department of Law Enforcement. The circuit court denied all requests to which the agencies objected, concluding that none were related to a colorable claim for postconviction relief. Dailey subsequently moved for reconsideration of his requests to certain agencies;[3] his motions were denied.

Dailey has not presented any reason for us to hold that the circuit court abused its discretion in denying his requests. Dailey suggests that the circuit court erred in denying his requests that the DOC and the Office of the Medical Examiner for the Eighth District supply records related to the lethal injection protocol. His argument lacks merit. Because we have upheld the constitutionality of the current lethal injection

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[3] These include the Office of the Medical Examiner for the Eighth District, the State Attorney's Office, the Office of the Attorney General, and the DOC.

protocol, such records "are 'unlikely to lead to a colorable claim for relief.' " *Hannon*, 228 So. 3d at 512 (quoting *Walton v. State*, 3 So. 3d 1000, 1014 (Fla. 2009)). The circuit court properly denied these requests.

Dailey next alleges that rule 3.852 violates the Equal Protection and Due Process Clauses. He claims that certain restrictions in rule 3.852(h)(3) and rule 3.852(i)—which apply only to capital postconviction defendants—prevent him from obtaining public records to which he would otherwise be entitled. We disagree. We have rejected related challenges to the constitutionality of rule 3.852, *Wyatt v. State*, 71 So. 3d 86, 111 (Fla. 2011); *Howell v. State,* 133 So. 3d 511, 515-16 (Fla. 2014), and decline *to* rule otherwise here. The disputed limitations in rule 3.852(h)(3) and rule 3.852(i) are aimed at preventing capital postconviction defendants from engaging in an "eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate inquiry." *Sims*, 753 So. 2d at 68. Therefore, these restrictions are "reasonable in the context of capital postconviction claims." *Wyatt*, 71 So. 3d at 111.

Length Of Time On Death Row

Dailey next argues that the circuit court erred in summarily denying his claim that adding his execution to the more than thirty years he has spent on death row amounts to cruel and unusual punishment under the Eighth Amendment. We have previously rejected similar claims, *see*, *e.g.*, *Long*, 271 So. 3d at 946; *Gore*, 91 So. 3d at 780, and Dailey's arguments do not justify departure from our precedent. Accordingly, we affirm the circuit court's summary denial of this claim.

HABEAS PETITION

Dailey also petitions this Court for a writ of habeas corpus, raising five claims. In his first two claims, Dailey alleges that there is insufficient evidence to sustain his conviction and argues that his sentence is disproportionate both as compared to his codefendant and as compared to others convicted of similar crimes. Because these claims "could have been, should have been, or were raised on direct appeal," they are procedurally barred. *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992).

Next, Dailey requests that this Court "take a holistic view" of evidence we have previously held procedurally barred, along with errors committed at trial but deemed harmless on direct appeal. This claim is nothing more than an attempt to relitigate issues this Court has rejected in prior proceedings, or to restate claims raised in the current postconviction appeal. It is therefore procedurally barred. *See Green*, 975 So. 2d at 1115.

In his next claim, Dailey argues that allegations of ineffective assistance of postconviction counsel should provide a basis for the Court to consider evidence of actual innocence that would otherwise be procedurally barred. He presented this argument in his second successive postconviction motion, and we rejected it. *Dailey*, 279 So.3d at 1214–16. "Habeas corpus is not to be used for additional appeals of issues that ... were raised" in previous "postconviction motions." *Green*, 975 So. 2d at 1115. The claim is accordingly procedurally barred.

Finally, Dailey argues that the principles underlying the *Hurst*[4] decisions require this Court to find that his sentence is inappropriate. But we have already determined that Dailey is not entitled to *Hurst* relief. Dailey, 247 So. 3d at 391. He is therefore procedurally barred from raising the instant claim. See *Breedlove*, 595 So. 2d at 10 (concluding that habeas corpus proceedings may not be used to present "different grounds to reargue" an issue previously raised). Accordingly, we deny Dailey's habeas petition.

CONCLUSION

For the reasons expressed above, we affirm the circuit court's order dismissing in part and denying in part Dailey's third successive postconviction motion. We also deny Dailey's habeas petition and his motion for stay of execution.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, LAGOA, LUCK, and MUÑIZ, JJ., concur.

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[4] *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

APPENDIX B
IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

JAMES DAILEY,

Person ID: 416094, Defendant.

CASE NO. CRC85-07084CANO
UCN: 521985CF00708XXXXNO

DIVISION: T

AMENDED[1] FINAL ORDER DISMISSING, IN PART, AND DENYING, IN PART, DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED AND DENYING DEFENDANT'S MOTION FOR STAY; DIRECTIONS TO CLERK

THIS CAUSE came before the Court upon Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed, filed October 8, 2019, pursuant to Florida Rule of Criminal Procedure 3.851. On the same day, Defendant filed a Motion to Interview Jurors, which the Court denied in a separate order, and a Motion for Stay of Execution to Allow for a Full and Fair Determination of James Dailey's Actual Innocence Claims. The State filed responses to Defendant's motions on October 10, 2019. The Court held an initial hearing on

[1] This order is identical to the previously issued order except that a typo on page twelve was corrected.

the motion and response where the parties made arguments as to purely legal issues and the need for an evidentiary hearing on October 11, 2019. The Court held an evidentiary hearing on claim 2 as it relates to James Slater on October 14, 2019. Having conducted a hearing and heard testimony and the argument of counsel, and having considered the motion, response, relevant portions of the record, and applicable law, the Court finds as follows:

Procedural History

On June 27, 1987, a jury found Defendant guilty of the first-degree murder of fourteen-year-old Shelly Boggio. After a penalty phase, the jury unanimously recommended death. On August 7, 1987, the Court sentenced Defendant to death, The Florida Supreme Court affirmed Defendant's conviction on direct appeal, but struck two of the five aggravating circumstances and remanded for resentencing. *Dailey v. State*, 594 So. 2d 254 (Fla. 1991) (hereinafter, *Dailey I*).[2] On January 21, 1994, the Court resentenced Defendant to death. Defendant's sentence was affirmed on appeal. *Dailey v. State, 659 So. 2d 246 (Fla. 1995) (hereinafter, Dailey II). The* mandate issued on or about September 22, 1995. On or about November 21, 1995, the United States Supreme Court denied Defendant's petition for writ of certiorari. *Dailey v. Florida,* 516 U.S. 1095 (1996). Defendant subsequently filed collateral motions for relief in state and federal court, each of which was dismissed or denied. *Dailey v. State*, 965 So. 2d 38 (Fla. 2007) (hereinafter, *Dailey III*); *Dailey v. Sac's*, *Fla. Dep't of Corr.*, 2008 WL 4470016 (M.D. Fla. Sept. 30, 2008); *Dailey v. Sec'y, Fla. Dep't of Corr.*, 2011 WL 1230812 (M.D. Fla. Apr.

[2] The evidence is introduced at the guilt and penalty phases of trial is summarized in the appellate opinion.

1, 2011), *amended in part*, *vacated in part*, 2012 WL 1069224, at *1 (M.D. Fla. Mar. 29, 2012) (amending opinion to include the denial of an additional claim of ineffective assistance of counsel and denying motion for certificate of appealability to the Eleventh Circuit Court of Appeals).

On January 9, 2017, Defendant filed a successive motion to vacate death sentence, alleging that he is entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On April 12, 2017, the Court entered a final order denying Defendant's successive motion to vacate death sentence. Defendant appealed, and the Florida Supreme Court affirmed the Court's order. *See Dailey v. State*, 247 So. 3d 390 (Fla. 2018) (hereinafter, *Dailey IV*).

While the appeal of Defendant's successive motion was pending, Defendant filed a second successive motion to vacate judgments of conviction and sentence on June 21, 2017. The motion alleged claims of newly discovered evidence, *Brady*[3] and *Giglio*[4] violations, and an actual innocence claim. On September 14, 2017, the Florida Supreme Court relinquished jurisdiction for this Court to hear the motion. The Court entered a final order on March 20, 2018, denying, in part, and dismissing, in part, Defendant's second successive motion. The Florida Supreme Court affirmed this Court's order on October 3, 2019. *See Dailey v. State*, --- So. 3d ---, 44 Fla. L. Weekly S219a (Fla. Oct. 3, 2019) (hereinafter, *Dailey V*).

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[3] *Brady v. Maryland*, 73 U.S. 83 (1963).

[4] *Giglio v. United States*, 405 U.S 150 (19742).

On September 22, 2019, before *Dailey V* had issued, Governor Ron DeSantis signed a death warrant for Defendant. The Governor has set an execution week for the week beginning at noon on Monday, November 4, 2019, through noon on Monday, November 11, 2019. Defendant's execution has been set for Thursday, November 7, 2019, at 6:00 p.m. Both the Florida Supreme Court and this Court have issued scheduling orders for resolving any motions filed in this case in an expedited manner.

Motion For Postconviction Relief

Defendant's motion raises four broad claims, two of which contain multiple subclaims. Claim one argues that selecting Defendant for execution would be so arbitrary as to violate the United States Constitution. Claim two argues that newly discovered evidence, namely, testimony from a former prosecutor, an inmate incarcerated with Defendant pretrial, and a Pinellas County Jail corrections officer, proves that Defendant is actually innocent and that the State violated *Giglio* and *Brady*. Claim three argues that Defendant has a constitutional right at his execution for his legal witness to be allowed a writing pad and pen, to have two attorneys present, for attorney access to a phone, and to a witness to observe the insertion of the IV line. Claim four argues that the totality of the sentence imposed, including over thirty years spent on death row, is cruel and unusual.

Because Defendant's motion was clearly not filed within one year of the date the judgment became final, each of these claims are timely only if an exception is present *See* Fla. R. Crim. P. 3.85I(d). The rule provides three exceptions to the timeliness requirement:

> (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney

> and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Fla. R. Crim. P. 3.851(d)(2). A claim that postconviction counsel was ineffective for failing to file a previous claim, as opposed to a motion, is not an exception to the time bar. *See Dailey V*, 44 Fla. L. Weekly S219a. Further, a motion under rule 3.851 filed after the warrant is signed is automatically considered a successive motion. Fla. R. Crim. P. 3.851(h)(5). Such a claim shall be dismissed if "it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds there was no good cause for failing to assert those grounds in a prior motion," Fla. R. Crim. P. 3.851(e)(2).

"If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Fla. R. Crim. P. 3.851(5). Conversely, the Court must hold an evidentiary hearing when a movant makes a facially sufficient claim requiring a factual determination. *Mann v. State*, 112 So. 3d 1158, 1161 (Fla. 2013). Vague and conclusory allegations are not sufficient to require a hearing. *Valle v. State,* 70 So. 3d 530, 550 (Fla. 2011).

Ground One

In ground one, Defendant argues that his execution would be so arbitrary as to violate the Fifth,

Eighth, and Fourteenth Amendments to the United States Constitution. He makes several arguments in support of this ground. First, in Part A, he argues that the fact that he was chosen over more than 100 other warrant-eligible defendants demonstrates that the methodology for selecting eligible defendants for execution is arbitrary. Second, in Part B, he argues that issuing a warrant while his claims in *Dailey V* were still pending in the Florida Supreme Court is so arbitrary as to violate the above-mentioned amendments to the United States Constitution. Part B also contains other claims, which are organized under the same argument but appear to advance only loosely related arguments. Based on the claims raised in his prior rule 3.851 motion and the totality of the evidence, he claims he is innocent. He argues that the pending claims in *Dailey V* made the warrant premature and suggests that the filing of the warrant deprived him of an opportunity to argue his claims in court. Finally, he argues that he is forbidden from pursuing clemency based on his newly discovered evidence claims.

The State responds that this claim is untimely, procedurally barred, and meritless. The State argues that Defendant has not presented any basis for an exception to the timeliness requirement of rule 3.851. It claims that the motion is procedurally barred because Part A could have been raised on direct appeal or in a prior motion and Part B realleges allegations from his previous postconviction motions. Nevertheless, the State argues that the Florida Supreme Court has repeatedly rejected challenges to the warrant selection or clemency process like the ones Defendant raises in this claim. Regarding actual innocence, the State argues that the claim is not cognizable and Defendant

has never successfully demonstrated that newly discovered evidence shows his innocence.

1. Defendant's Actual Innocence and Clemency Claims [sic] are Untimely and Procedurally Barred.

The Court agrees that some of the arguments raised in this ground amount to untimely or procedurally barred claims. While this ground ostensibly deals with the selection process for death warrants, two of Defendant's arguments—that he is actually innocent and that he is unable to raise newly discovered evidence in clemency—are only loosely related to that claim, and appear to actually be independent claims for relief. As independent claims, these arguments are untimely or are procedurally barred. As to the actual innocence claim, Defendant has previously raised this claim. This Court and the Florida Supreme Court found it to be procedurally barred under well-settled law, and it is still procedurally barred at this time. *See Dailey V*, 44 Fla. L. Weekly S219a; *Tompkins v .State*, 994 So. 2d 1072, 1089 (Fla. 2008) (holding that Florida does not recognize freestanding actual innocence claims). As to the claim that he cannot present new evidence for clemency, this claim should have been brought once Defendant discovered the evidence he claims should be considered at a new clemency proceeding, which was discussed in his previous motion filed more than one year ago. *See Dailey V*, 44 Fla. L. Weekly S2I9a (discussing Defendant's previous newly discovered evidence claims). It is therefore both untimely and barred in a successive motion. As part of ground one relies on the fact that the warrant was issued while Defendant has a pending postconviction proceeding, it is based in part on facts that could not

have been discovered until the warrant actually issued. However, the portions of this claim asserting actual innocence or facial challenges to the clemency or warrant process are dismissed as untimely and procedurally barred.

2. Ground One is without Merit under Florida Supreme Court Precedent.

Regardless, all of the claims raised in ground one are without merit under Florida Supreme Court precedent. The Florida Supreme Court has clearly and repeatedly found that the Governor's discretion in granting clemency or signing death warrants does not render either process unconstitutional. *Hannon v, State*, 228 So. 3d 505, 509 (Fla. 2017); *Bolin v. State,* 184 So. 3d 492, 502-503 (Fla. 2015); *Pardo v. State*, 108 So. 3d 558, 568-569 (Fla. 2012); *Gore v. State*, 91 So. 3d 769, 780-781 (Fla. 2012); *Johnston v. State*, 27 So. 3d 11, 24-26 (Fla. 2010); *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009). The Court has rejected arguments that clemency proceedings must consider all aggravating and mitigating evidence or that defendants are entitled to updated clemency proceedings if there is new evidence. *See Pardo*, 108 So. 3d at 568-569; *Gore*, 91 So. 3d at 779; *Johnston*, 27 So. 3d at 25. While clemency does require some minimum due process, no specific procedures are mandated. *Marek*, 14 So. 3d at 998; *Johnston*, 27 So. 3d at 25-26. Courts should exercise care with claims dealing with the warrant or clemency process due to the separation of powers doctrine. *See Gore*, 91 So. 3d at 779; *Valle*, 70 So. 3d at 551-552. The Governor may issue a death warrant while a successive postconviction motion is pending where the Florida Supreme Court has ample opportunity to review the record and the claims raised. *Bolin*, 184 So. 3d at 503.

Defendant's case is not meaningfully different from the situations discussed by the Florida Supreme Court in cases such as *Hannon, Bohn, Pardo, Gore, Johnston, and Marek*. To the extent that he raises a facial challenge to the warrant or clemency procedures, those cases squarely reject his position. While it would certainly be cruel and unusual to execute an innocent person, a jury found that Defendant committed the murder in this case and he has yet to raise a successful claim overturning that verdict. Defendant cannot raise a procedurally barred actual innocence claim by merely refraining it as a challenge to the warrant. Like in *Bolin*, the fact that Defendant had a pending appeal at the time the warrant was issued was not fatal —the eighteen-page opinion in *Dailey V* suggests the Court had ample opportunity to review the record and his claims. And although Defendant asserts that he has new evidence that he wishes to present to the Governor for clemency, the Court will not intervene in such matters, as they are properly controlled by the Governor. *See Pardo*, 108 So. 3d 568-569; *Gore*, 91 So, 3d at 779; *Johnston*, 27 So. 3d at 25. In sum, Defendant's arguments in this ground do not present any reason for the Court to distinguish this case from numerous precedents upholding the Governor's discretion in signing warrants. Ground one is therefore denied.

Ground Two

Ground two presents newly discovered evidence, *Brady*, and *Giglio* claims based on three pieces of evidence. The Court held an evidentiary hearing on this claim solely as it relates to James Slater's testimony. The remaining claims are resolved without a hearing. The Court will consider each piece of evidence in turn, with newly discovered evidence, *Brady*, and *Giglio* ar-

guments for a single piece of evidence considered together. A newly discovered evidence claim has two prongs, which the Florida Supreme Court has described as follows:

> In order to set aside a conviction based on newly discovered evidence, two requirements must be satisfied. First, the evidence "must have been unknown by Page 6 of 19 the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (alteration in original) (quoting *Torres-Arboleda v. Dagger*, 636 So. 2d 1321, 1324-25 (Fla. 1994)). Second, the "evidence must be of such nature that it would probably produce an acquittal on retrial." *Id.* However, regardless of whether the "evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted" unless the evidence would be admissible at trial. *Sims v. State,* 754 So, 2d 657, 660 (Fla. 2000).

Dailey V, 44 Fla. L. Weekly S219a.

Defendant also argues that the same evidence gives rise to a *Brady* claim, a *Gigli*o claim, or both. To state a claim under *Giglio,* Defendant must allege "(1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Guzman v. State*, 868 So. 2d 498, 505 (Fla. 2003). A statement is material under *Gigli*o "'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* at 506. To state a claim under *Brady*, Defendant must allege "(1) that the State possessed evidence favorable

to the defendant; (2) that the defendant did not possess the evidence, nor could he obtain it with any reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different." *Roberts v. State*, 995 So. 2d 186, 189 (Fla. 2008) (internal quotations omitted). Like with newly discovered evidence, a *Brady* claim fails if "the evidence could not have been properly admitted at trial or would not be admissible on retrial." *Jon*es, 709 So. 2d at 519.

1. James Slater

As to former Assistant State Attorney James Slater, Defendant alleges that Mr. Slater responded to the crime scene where the victim's body was discovered. Defendant's motion alleges that Slater told postconviction counsel that Jack Pearcy admitted to attempting to have sex with the victim, that Pearcy "could not perform," that the victim teased Pearcy, and that he reacted by stabbing her. Pearcy's affidavit, attached to Defendant's motion, is slightly different—while it recounts the same general facts, it does not indicate that Pearcy was the original source of this information. Instead, the affidavit only indicates that unspecified law enforcement told him this information. The State's response argues that this claim is untimely because Slater was listed as a witness for Defendant's trial and Defendant could have previously obtained his testimony. The State alternatively argues that the evidence would not produce an acquittal on retrial because the statement was not something Slater heard firsthand, it does not contradict the State's theory that Defendant and Pearcy committed the murder together, and the rule of completeness

would require introducing Pearcy's other statements made that incriminated Defendant.

a. Evidentiary Hearing Testimony

The Court held an evidentiary hearing on this claim, at which Defendant was present telephonically.[5] The transcript of the evidentiary hearing is attached to this order. Defendant called Slater as his first witness. Slater testified that he was only involved in this case because he was on duty when the victim's body was found and he was subpoenaed one hearing. As to the remainder of his affidavit, Slater appeared to have significant trouble remembering the, details of this case. He indicated that he did not previously discuss a confession with Defendant's postconviction counsel. He testified that the portion of the affidavit indicating that Pearcy tried to have sex with the victim but could not perform was just his general 34-year-old recollection of what the case was about. [sic] He testified that he could not recall any particular source of that [sic] information. He indicated that he had had two weeks to think about the case since he spoke with postconviction counsel, and the more he thinks about it, the less he can connect that statement to anyone. He testified that he might have confused this case with another. He also testified that he had spoken with the State on the telephone and had told

[5] Defendant appeared telephonically from Florida State Prison. Due to a power surge, Defendant was disconnected multiple times. The Court immediately stopped the proceedings in both instances and waited for Defendant to reconnect. After the second instance, Defendant indicated that he would like the hearing to continue if he disconnected again, but the connection held for the remainder of the hearing.

postconviction counsel that he felt tugged in two directions.

On cross-examination, Slater testified that he had not thought about this case since he left the State Attorney's Office in 1985, three months after this murder. He testified that he did not know the victim's name at the time when he responded to the crime scene, and he was "foggy" as to whether there was a suspect identified at the time. As to the paragraph in the affidavit indicating that Pearcy confessed to trying to have sex with the victim and stabbing her, he testified that he did not know who made the statement, when it was made, or what the context was. He did testify that he was positive the statement was made to him, but he could not connect the statement to this ease. He explained that he had a general thought that the case was about that issue, but he could not place it anywhere. He indicated that he now questioned whether it had anything to do with this case.

Defendant then called Colin Kelly, an investigator for postconviction counsel. He testified that he and attorney Chelsea Shirley visited Slater on September 27, 2019. He testified that Slater agreed to sign the affidavit, did not appear hesitant at all, and seemed to recall the case. He testified that he notarized the affidavit, and that he would not have done so (and is not permitted to do so) if the affiant is distressed, under the influence, or having trouble recalling. He testified that Slater read it before he signed it, had an opportunity to make any changes, and actually did make a change to the affidavit.

At multiple points during the hearing, Defendant moved to introduce Slater's affidavit into evidence, at which points the State objected. The State argued that

the affidavit was hearsay and was not relevant to the proceeding. Defendant argued that the affidavit was not being admitted for the truth of the matter asserted because it went to show the existence of *Bra*dy evidence, it was *Chambers v. v.* [*sic*] *Mississippi*, 410 U.S. 284, 289 (1973), and it was admissible as a statement against interest. The State responded that it was being offered for the truth of the matter asserted and, because it was hearsay within hearsay, additional exceptions would be necessary to admit each level of hearsay,

> b. This claim is untimely because it could have been discovered more than one year ago through the exercise of due diligence.

First, after the hearing, there can be no question that this claim is untimely. Although the State made persuasive arguments regarding timeliness at the October 11, 2019, [sic] hearing, the Court nonetheless granted an evidentiary hearing in an abundance of caution due to the allegations in this claim and so that the vague testimony in Slater's affidavit could be developed. However, Defendant has presented no evidence or allegations showing that he could not have ascertained this evidence earlier with the use of due diligence. In fact, the evidence shows that he could have. Defendant did not dispute the State's assertion that Slater was listed as a witness at trial. There is no reason Defendant could not have contacted him or deposed him at any time in the last thirty years to determine if he was aware of any information about the crime. In this claim and others, Defendant has argued that the State cannot argue that his *Brady* claims are untimely based on *Banks v. Dretke*, 540 U.S. 668, 696 (2004), which stated, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in

a system constitutionally bound to afford defendants due process." But the Florida Supreme Court has found that *Banks* did not overrule Florida law holding that the State does not have the duty to prepare the defense's case. *Smith v. State*, 931 So.2d 790, 805-806 (Fla. 2006); *see also Jimenez v. State*, 265 So. 3d 462, 480 (Fla. 2018) (rejecting the argument that *Banks* required consideration of a claim that could have been raised on direct appeal). As in *Smith*, Defendant has not presented evidence that the State concealed Slater—to the contrary, he was listed as a witness and was available to the defense. Accordingly, this claim is dismissed as untimely. Nevertheless, in an abundance of caution, for the reasons below, the Court finds that this claim would not entitle Defendant to relief if it were timely.

c. Slater's affidavit is hearsay and is not admissible in support of this claim.

As the Court ruled at the hearing and as argued by the State, Slater's affidavit is hearsay that is not admissible in this proceeding and would not be admissible at a new trial. When hearsay is presented within hearsay, each pan of the combined statements must conform with an exception to the hearsay rule. § 90.805, Fla. Stat. (2019). The statement in Slater's affidavit is at least triple hearsay—not only is Pearcy's alleged confession hearsay, but the unspecified law enforcement officer's statement and Slater's affidavit itself are also hearsay. Even if the Court presumes [sic] that Pearcy's alleged and unproven confession is a statement against interest under section 90.804(2)(c), Florida Statutes, or is not offered for the truth of the matter asserted, Defendant has not shown that the other levels of hearsay were not offered for the truth of the matter asserted or fall under

an exception. The affidavit is therefore inadmissible hearsay under the Evidence Code.

The affidavit is also not admissible under *Chambers*. *Chambers* held that the defendant's due process rights were violated when state law prevented him from introducing a third party's *confession* to the crime for which he was convicted. *Bearden v. State*, 161 So. 3d 1257, 1264-1265 (Fla. 2015); *see Chambers*, 410 U.S. at 298-303. The Florida Supreme Court has held that courts should evaluate whether statements are admissible under *Chambers* using a four-factor test:

> (I) the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the confession or statement is corroborated by some other evidence in the case; (3) the confession or statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of court confession or statement, the declarant must be available for cross-examination.

Bearden, 161 So. 3d at 1265.

Defendant has not presented any direct evidence of a confession that might be admissible under *Chambers*, and even if the mere inference of a confession might be admissible under *Chambers* in some circumstances, the factors clearly weigh against admissibility here. The affidavit does not state that Pearcy made any confession. It merely indicates that "law enforcement told" Slater certain details about the crime. The affidavit does not explain how law enforcement came to that knowledge. Slater further testified at the hear-

ing that he did not discuss "a confession" with Defendant's postconviction counsel on September 27, 2019. Postconviction counsel appears to be drawing an inference from Slater's affidavit that law enforcement's knowledge must have come from a confession. But this inference is speculation and does not make the affidavit subject to analysis under *Chambers*. Regardless, under the factors described in *Chambers* and *Bearden*, the affidavit is not admissible. The first factor weighs against admissibility. It is unknown to whom, or when, the alleged confession was made, undercutting the reliability of the alleged confession significantly. The second factor also weighs against admissibility. As explained more fully below, the circumstances of the case not only do not corroborate the existence of this confession, but actually suggest the confession probably never occurred. Under the third factor, the statement would have been against Pearcy's interest if it were truly given near the time the body was found. But the under the final factor, Slater's testimony at the hearing and the circumstances of the case seriously call the truthfulness of the affidavit into question, as more fully explained below. Considering all four factors together, they clearly weigh against admitting the affidavit. Accordingly, as the Court found at the hearing, the affidavit was not admissible.

d. Slater's testimony does not provide any favorable evidence admissible at trial.

Defendant is not entitled to relief on this claim because he has not proven that Pearcy's alleged confession (or similar favorable evidence admissible at trial) ever existed. Slater did not even reach the much-vaunted crucible of cross-examination before his testimony withered in court. Even on direct examination, Slater constantly testified that he was not sure, did

not remember, or did not know almost anything about this case. He contradicted his affidavit on direct examination, indicating that paragraph 7 was his general impression of the case, not something law enforcement told him. While he did contradict himself again on cross-examination—saying that he was positive someone made the statement contained in his affidavit—he also said he could not be positive it was in reference to this case. Given the clear deficiencies in Slater's memory and inconsistencies on display at the hearing, the Court finds that his testimony—and his affidavit, if the Court were to consider it—is wholly without credibility. But even if the Court had found Slater's testimony credible, he never testified that Pearcy confessed or clearly testified that law enforcement in this case knew Pearcy unsuccessfully attempted to have sex with the victim or stabbed her because she made fun of him. Slater's impression of the case, particularly given that he worked on this case in only a minor capacity 34 years ago, is not admissible or favorable evidence. In short, Slater's testimony does not provide the Court with any admissible, favorable evidence, newly discovered or otherwise.

Although Slater did not testify that Pearcy confessed, the circumstances of the case further demonstrate that it is highly unlikely that law enforcement knew of a confession as alleged in Defendant's motion. Slater testified that he only worked on this case because he was on duty when the victim's body was found and was subpoenaed for a later hearing. At the time when the victim's body was found, she was not yet identified. (*See Exhibit A: Deposition of Detective John Halliday*, 5, 20). The victim was not identified for several days, and Pearcy was not identified as a suspect until even later than that. (*See Ex. A* at 24.) Accordingly, in order to find that law enforcement told

Slater about a confession, the Court would have to presume that Pearcy confessed before he was even found or identified as a suspect. Further, the Court would have to presume that the State was fully aware of this confession but chose not to use it in Pearcy's trial. This is even more absurd when the Court considers that the State always pursued the theory that Defendant and Pearcy acted together—meaning that Pearcy's alleged confession here was not inconsistent with Defendant's guilt. It is far more likely that the statement in Slater's affidavit was due to Slater misremembering this case that had he little involvement in over thirty years ago. In sum, the evidence does not show that this confession from Pearcy ever existed. Nor does it show that other evidence supporting the statement in Slater's affidavit ever existed. There is therefore nothing in this argument on which Defendant could base a newly discovered evidence, *Brady*, or *Giglio* claim.

2. Edward Coleman

As to Edward Coleman, Defendant has filed an affidavit based on Coleman's experience as an inmate in Pinellas County Jail during the time when Defendant was incarcerated there. Coleman's affidavit indicates that he was housed in the same pod as Defendant and Pearcy for a short time. He alleges that he never witnessed Defendant talk about his case. He alleges that he was pulled into a private interview room by Detective John Halliday on two occasions. According to his affidavit, on the first occasion, Detective Halliday asked if Defendant or Pearcy talked about their cases with anyone else, and Coleman answered that Defendant did not, and he did not know if Pearcy did, Detective Halliday instructed him to listen carefully and try to get information. On the second occasion,

Detective Halliday bad newspaper articles about the case, directed Coleman to look for certain details about the case, and promised to reduce his charges if he was to learn anything. The affidavit indicates that he was contacted by an investigator for Defendant on September 29, 2019.

The State argues that this claim is meritless, untimely, and procedurally barred. It argues that Defendant and trial counsel knew that Detective Halliday questioned numerous inmates at the jail at the time of trial. The State argues that the essence of this claim was raised in Defendant's original postconviction motion, which alleged that Michael Sorrentino and James Wright were approached by Detective Halliday and shown newspaper articles about the murder. Defendant raised a similar claim again in 2017, which the Court denied after an evidentiary hearing. The State therefore claims that the use of reasonable due diligence would have led to Coleman sooner. The State also argues that the evidence would not have resulted in an acquittal or a less severe sentence because the inmates who testified against Defendant at trial volunteered information and were not pulled out of the pod by Detective Halliday.

a. Defendant's claims regarding Edward Coleman are untimely and procedurally barred.

The Court agrees that this claim is untimely and procedurally barred. The instant claim is now Defendant's third motion raising a claim relating to Detective Halliday's conduct based on testimony from Pinellas County Jail inmates, First, Defendant's 1999 motion for postconviction relief raised a claim that counsel was ineffective for failing to call Sorrentino and Wright to testify that Detective Halliday approached them with newspaper articles about the murder. (*Ex.*

B: Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence, 25-26; *Ex. C: November 19, 2001 Transcript of Proceedings*, 6.) Postconviction counsel waived this claim for strategic reasons with Defendant's consent. (*Ex. D. June 29, 2004 Transcript of Proceedings*, 6¬7; *Ex, E: November 5, 2004, Transcript of Proceedings*, 7-8.) Defendant brought this same claim again in his 2017 motion to vacate his judgment and sentence, which the Court dismissed as untimely. (*Ex. F: Defendant's Second Successive Motion to Vacate Judgments of Conviction and Sentence*, 8; *Ex. G: Final Order Denying in Part and Dismissing in Part Defendant's Second Successive Motion to Vacate Judgments of Conviction and Sentence*, 11-15.)

Defendant alleges no reason why he could not have brought this claim in 1999 or in 2017 with either of his previous claims asserting similar facts. Without such a reason, this claim is both untimely and successive. While this claim is not precisely the same as those prior claims, it is closely related, and Defendant offers no good reason for failing to bring this claim in either of those prior motions. *See* Fla. R. Crim. P. 3.851(e)(2). Nor does'Defendant make any allegations suggesting that he could not have found Coleman more than one year ago with due diligence. *See id.* at (d)(2). The facts Defendant discovered forming the basis of his prior claims discussed above put him on notice by 1999, at the very least, that inmates sharing the same pod as Defendant may have been questioned by a detective or seen other inmates being brought into an interview room. Defendant offers no reason why he could not have found Coleman and learned of his testimony at that time. Nor does he offer any reason why he could not have found Coleman at the time of his motion in 2017, when he also raised a similar

claim. Defendant's allegations do not meet the requirements of rule 3.851(d) or (e)(2), and therefore should be summarily dismissed.

b. Even if not procedurally barred, Defendant's claims regarding Edward Coleman would be denied because his testimony would not change the outcome of the trial.

Regardless, Defendant would not be entitled to relief on this claim if it were timely because there is no prejudice. Under either the *Jone*s newly discovered evidence test or *Brady*, this evidence would not have changed the outcome of the original trial and would not cause a different result in a new trial. The Court previously found that Sorrentino's and Wright's testimonies were weak evidence at best and entirely irrelevant at worst because neither inmate testified that they saw any of the snitches who testified in this trial. (*Ex. G* at 13-14.) The same reasoning applies to Coleman's testimony. Coleman's affidavit indicates that he did not see Defendant talk about his case to anyone, that Detective Halliday asked him about Defendant and Pearcy, that Detective Halliday brought newspapers with him, and that Detective Halliday asked him to look for details about the case with a promise of a deal. He does not allege that he saw Detective Halliday question or offer the same deal to the snitches who testified at trial. Like Sorrentino's and Wright's testimonies, Coleman's testimony would therefore be weak impeachment testimony. There is not a reasonable probability that such evidence would produce an acquittal on retrial or that the outcome of the original proceeding would have been different.

c. To the extent Defendant raises a *Giglio* claim with regard to Edward Coleman's testimony, it is vague, conclusory, and without merit.

Although Defendant's motion purports to allege a *Gigli*o claim in relation to Coleman's testimony, he does not set out any facially sufficient claim. The sole allegations concerning false testimony are on page 24, where Defendant alleges that the State "withheld *Giglio* evidence" and "misrepresent(ed) key facts at trial." Defendant does not specify any false testimony, much less explain how the State knew it was false or why it was material. Such a vague and conclusory claim is not sufficient. *See Valle*, 70 So. 3d at 550. Regardless, given the weakness of Coleman's evidence as impeachment, it is unlikely that Defendant could show that the State put on false testimony and knew that the testimony was false. Merely showing that two witnesses' testimonies are in conflict does not establish a *Giglio* violation, *Ferrell v. State*, 29 So. 3d 959,978 (Fla. 2010): Defendant's *Giglio* claim would therefore also be denied were it timely raised.

3. David Howsare

As to Corrections Officer David Howsare, Defendant filed an affidavit from Officer Howsare based on his experience working at Pinellas County Jail in the mid-to-late 1980s. Officer Howsare's affidavit attests to Pearcy's reputation at the jail, including assertions that he was manipulative, that. he was used as an example of bad behavior, and that he tried to manipulate other inmates. The State argues that this claim is untimely, as Defendant has known that Pearcy was housed at [sic] the jail and could have obtained testimony from Officer Howsare [sic] decades ago. Further, the State argues that Officer Howsare's testimony would not be admissible as character evidence. Pearcy

did not testify at Defendant's trial and has consistently refused to do so.

The Court agrees with the State. Defendant is not entitled to relief on this untimely, conclusory claim. Defendant offers no allegations explaining why this evidence could not have been located at the time of trial, much less in the decades of postconviction litigation following the appeal. Further, Defendant has not made any showing explaining how this evidence is even relevant, much less that it would produce an acquittal on retrial or would have changed the outcome of the original proceedings. The affidavit largely amounts to show that Officer Howsare and other corrections officers found Pearcy to be manipulative. It is unclear if Defendant intends to argue that this evidence shows that Pearcy manipulated Defendant into committing the crime, that Pearcy framed Defendant for the crime, or something else entirely. Regardless, it is weak evidence for either of those propositions, and it would not likely have led to a different result. To the extent Defendant raises a *Giglio* claim with regard to this evidence, he has not explained what false testimony the State presented, alleged that the State. knew it was false, or shown how it was material. Defendant has not set out any timely, facially sufficient claim with regard to this evidence. The claim is therefore dismissed.

4. Cumulative Analysis

Defendant requests that the Court consider the cumulative effect of the allegedly newly discovered evidence, the evidence presented in previous postconviction motions, and the evidence presented at the trial. He also argues that the Court should consider the effect of *Hurst* and the effect of several errors found harmless on his direct appeal. A cumulative analysis

is unnecessary. As with Defendant's previous motion, "given that all of Dailey's newly discovered evidence claims were either correctly rejected as untimely or based on inadmissible evidence, no such analysis [is] necessary." *Dailey V*, 44 Fla. L. Weekly S219a. Defendant is therefore not entitled to a cumulative analysis on these claims.

Ground Three

In ground three, Defendant requests that the Court direct the Department of Corrections (DOC) to comply with several requests and claims that his constitutional rights will be violated if they do not do so. First, he requests that his legal witness or witnesses be allowed access to a writing pad and pen during his execution. He indicates that he anticipates that DOC will allow this request, but deny all of his other requests. Second, he requests that his witness or witnesses be allowed access to a telephone before and during the execution process. Third, he requests a second witness. Finally, he requests that one of his witnesses be allowed to view the IV insertion process.

The State responds that the claim is premature and that the DOC or the prison warden has discretion and authority in these areas. First, the State argues that, based on Justice Luck's concurring opinion in *Long v. State*, 271 So. 3d 938, 946 n.6 (Fla. 2019), the claim is premature because Defendant only anticipates that DOC will deny these requests. On the merits, the State argues that section 922.11, Florida Statutes, affords the warden discretion in selecting or excluding witnesses from the execution. They argue that DOC has policies limiting what is allowed inside the prison and the execution viewing room, and the courts should not micromanage execution policies beyond determining whether a procedure is unconstitutional.

The State asserts that Defendant has raised only speculative violations of his constitutional rights that do not establish a valid claim. Finally, the State notes that the Florida Supreme Court rejected a nearly identical claim in *Long*.

Defendant is not entitled to relief on this claim. As the State argues, a nearly identical claim was raised in *Long*. The Florida Supreme Court affirmed the denial of that claim. The Court observed that the defendant had not demonstrated that DOC's existing policies and procedures violated his rights and that the courts could not micromanage the executive branch in fulfilling its own duties relating to executions. *Id*. at 946-947. Defendant has not demonstrated any reason why this case is meaningfully different from *Long*. As the Supreme Court found in that case and the State argues here, Defendant asks the Court to micromanage DOC's policies concerning witnesses in order to prevent hypothetical violations of his rights. The Court presumes that DOC will properly perform its duties related to the execution. *Long*, 271 So. 3d at 946. Ground three is therefore denied.

Ground Four

In ground four, Defendant argues that the totality of his punishment, including the time he spent on death row, violates the Eighth Amendment. Defendant alleges that he has spent thirty years on death row, and that the psychological pain he has endured during that time is more severe than the death sentence itself. [sic] Defendant acknowledges that the Florida Supreme Court [sic] has rejected this argument, but argues that the United States Supreme Court and other courts in the country have reached a

"doctrinal stalemate." He bases this argument on Justice Stevens's concurring opinion on denial a writ of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995).

The State argues that this claim is untimely and without merit. As to timeliness, the State argues that *Lackey* does not create a new rule of constitutional law because it was issued in 1995. On the merits, the State argues that binding precedent has consistently rejected this claim. Finally, the State argues that Defendant cannot use collateral challenges and appeals to delay his execution and then complain about the length of time he waited for execution.

This claim is timely, but Defendant is nonetheless not entitled to relief. As to timeliness, this claim is based on the total amount of time Defendant has spent on death row. Defendant could not have known how long he would spend on death row until his execution was scheduled. Therefore, this claim is based on facts that could not have been discovered until the warrant was signed. Given that Florida caselaw has yet to find any period of time on death row to be cruel and unusual, there was no particular point prior to now at which Defendant should have filed this claim. Finding this claim untimely would simply encourage defendants to file motions periodically raising similar claims in hopes of timely filing a motion after a particular threshold was reached. Filing a single motion after the warrant has issued and Defendant is aware of the total length of his stay on death row is fax more economical. Accordingly, this claim is timely.

Regardless,. as Defendant admits, the Florida Supreme Court has repeated held that lengthy periods on death row prior to an execution are not cruel and unusual. *See, e.g., Long*, 271 So. 3d at 938; *Jimenez*, 265 So. 3d at 475; *Branch v. State*, 236 So. 3d 981,988

(Fla. 2018); *Muhammad*, 132 So. 3d at 206-207; Gore, 91 So. 3d at 780-781. *Lackey*, a twenty-four-year-old memorandum opinion from two United States Supreme Court Justices concurring in the denial of certiorari, has no precedential value and does not provide any reason for this Court to ignore binding precedent. Nor is Defendant's period of incarceration on death row so long as to distinguish him from previous cases. *See, e.g., Long*, 271 So. 3d at 946 (over thirty years); *Muhammad*, 132 So. 3d at 206 (over three decades). Based on the Florida Supreme Court's precedent, this claim is denied.

Motion To Stay

Defendant also filed a motion to stay. The Court previously reserved ruling on this motion until after the Court ruled on Defendant's motion. At the October 14 hearing, Defendant argued that [sic] the Court should grant the stay despite the denial of Defendant's [sic] rule 3.851 motion because legal proceedings will still be ongoing in the Florida Supreme Court and the federal courts.

The Court finds it would not be appropriate to grant a stay at this time. This Court has now rejected Defendant's claims within the timeframe set by the Florida Supreme Court. The Court does not anticipate that the Florida Supreme Court or the federal courts will be unable to review these claims under the time constraints required by the warrant. Further, if this Court is incorrect in that assessment, the Florida Supreme Court or the federal courts have the power to issue a stay as well. Defendant's motion to stay is therefore denied.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed is hereby **DISMISSED IN PART and DENIED IN PART** as fully explained in the body of this order. The Florida. Supreme Court's September 26, 2019 [sic] scheduling order requires a notice of appeal to be filed by 10:00 a.m., Thursday [sic] October 17, 2019.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant's Motion for Stay of Execution to Allow for a Full and Fair Determination of James Dailey's Actual Innocence Claims is hereby **DENIED**.

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED to transmit the record of these proceedings to the Clerk of the Supreme Court of Florida **immediately**. No notice of appeal shall be required.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 16th day of October, 2019. A true and correct copy of this order has been furnished to the parties listed below.

/s/ Pat Siracusa,
Pat Siracusa, Circuit Judge