No. 19-1094

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 Florida Supreme Court

BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General of Florida

AMIT AGARWAL
Solicitor General
* *Counsel of Record*

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General
TIMOTHY A. FREELAND
Senior Assistant Attorney General
STEPHEN D. AKE
Senior Assistant Attorney General
OFFICE OF THE
ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3681
amit.agarwal@myfloridalegal.com

Counsel for Respondent

CAPITAL CASE
QUESTION PRESENTED

Under Florida law, a successive postconviction motion asserting claims based on purported newly discovered evidence is timely only if the prisoner establishes that "the facts on which his claim[s] [are] predicated were [previously] unknown" to him "and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.851(d). Here, Petitioner brought a third successive postconviction motion raising *Brady* and *Giglio* claims based on purported newly discovered evidence. The Florida Supreme Court determined that Petitioner's evidence does not satisfy the requirements of Rule 3.851 and that his claims fail on the merits.

The question presented is:

Whether the Florida Supreme Court erred in concluding that Petitioner's third successive postconviction motion does not meet the requirements of Rule 3.851.

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INTRODUCTION

James Dailey has filed five state postconviction motions. Although he has repackaged his precise claims each time, he has raised the same allegations repeatedly: that police tainted his trial by manipulating jailhouse witnesses and that his co-defendant, Jack Pearcy, is solely responsible for killing fourteen-year-old Shelly Boggio. But Dailey has never substantiated these allegations, even though Florida courts have afforded him, in total, eight evidentiary hearings. On three separate occasions, for example, Dailey claimed that an affidavit established his innocence, but at the ensuing evidentiary hearing, the affiant recanted.

This case arises from Dailey's third successive state postconviction motion. He raises the same underlying allegations but fashions his claims as *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) claims. The claims are procedurally barred under Florida law, so this Court lacks jurisdiction. But even putting aside that insuperable hurdle, this case presents no issue that warrants review.

STATEMENT OF THE CASE

A. Offense of Conviction

On May 5, 1985, Shelly Boggio, her twin sister, and a friend were hitchhiking near St. Petersburg, Florida. *Dailey v. State*, 594 So. 2d 254, 255 (Fla. 1991). Dailey and two friends, Jack Pearcy and Dwaine Shaw, picked them up and took them to a bar. *Id*. At some point, Shelly's sister and friend left; Gayle Bailey, who was Pearcy's girlfriend, met up with the group; and Bailey, Shelly, and the three men went to another bar, where they stayed until around midnight. *Id*.

Over the course of the evening, Dailey made advances on Shelly and tried to dance with her, but she rebuffed him. *Id*. at 258; *see also In re Dailey*, 949 F.3d 553, 561 (11th Cir. 2020). Shelly was a fourteen-year-old in seventh grade, and Dailey was thirty-eight years old. *Dailey v. State*, 659 So. 2d 246, 246 (Fla. 1995); *Dailey v. Sec'y, Fla. Dep't of Corrs.*, 2019 WL 6716073, at *2 (M.D. Fla. Dec. 10, 2019); Arrest Affidavit, *State v. Dailey*, No. 1985-CF-007084 (Fla. Cir. Ct. Feb. 12, 1986).

After the bars, Dailey, Shelly, and the rest of the group went to Pearcy's house. *Dailey*, 594 So. 2d at 255. Shaw and Bailey stayed there for the rest of the night, but Dailey and Pearcy took Shelly back out. *See id*. They drove her "to a deserted beach." *Dailey*, 659 So. 2d at 246.

At the beach, "Dailey tortured [Shelly] with a knife" and "attempted to sexually assault her." *Id*. at 246-47. When Shelly fought back, Dailey "stabbed [her] over thirty times." *Dailey v. Sec'y, Fla. Dep't of Corrs.*, 2011 WL 1230812, at *16 (M.D. Fla. Apr. 1, 2011), *amended in part, vacated in part on other grounds*, 2012 WL 1069224 (M.D. Fla. Mar. 29, 2012). He then "grabbed [her] and threw her into the waterway." *Id*. "He choked her and held her head under water until she quit struggling and died." *Id*. Shelly's naked body was left "floating in the water." *Dailey*, 594 So. 2d at 256.

Afterward, Dailey and Pearcy returned to Pearcy's house. *Id*. at 255; *Dailey v. State*, 965 So. 2d 38, 42 (Fla. 2007). Dailey entered the house "carrying a bundle" and "wearing only wet pants." *Dailey*, 594 So. 2d at 255. A few hours later, he and Pearcy went to a self-service laundromat. *Id*. at 255-56. Meanwhile, Shelly's body was

discovered in the water. *Id.* "[H]er underwear was found 140 feet from her other clothing, with a trail of blood leading from the clothing to the underwear." *Id.* at 258. She "had been stabbed both prior to and after the removal of her shirt," and her "jeans had been removed and thrown in the waterway." *Id.*

Hours after the murder, Dailey, Pearcy, Shaw, and Bailey fled to Miami "without any forewarning or planning." *Dailey*, 949 F.3d at 563. "Dailey was acting bizarre"; "he was unusually quiet, and he spoke alone with Pearcy in hushed tones." *Id.* Dailey spent "only a single night in Miami before taking a bus to Arizona." *Id.*

In June 1985, a month after the murder, Pearcy gave a 40-page sworn statement to police. *Dailey*, 2019 WL 6716073, at *2. "He explained in detail how Dailey butchered and drown[ed] the 7th-grade girl during a rape." *Id.* His account was "consistent with physical facts of the case, even down to the vomit that he emitted upon seeing the slaughter, which was found the next day near where [Shelly] bled." *Id.*; *see also id.* at *2 n.2 (noting that the "Medical Examiner testified that the vomit did not match the contents of [Shelly's] stomach").

B. Conviction and Direct Appeal

1. The State tried and convicted Pearcy for his role in the murder and then tried Dailey. *Dailey*, 594 So. 2d at 256. At Dailey's trial, the State offered testimony from people such as Shaw and Bailey who saw Dailey, Pearcy, and Shelly the night of the murder. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9. Shaw and Bailey testified that they saw Dailey and Pearcy when they returned from the beach. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9. Dailey and Pearcy entered

the house together without Shelly, and Shaw and Bailey both noticed that Dailey's pants were wet. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9.

The State also offered testimony from three inmates who were at the same jail as Dailey when he was awaiting trial. *Dailey*, 965 So. 2d at 42. They testified that Dailey had confessed to them and that he and Pearcy had devised a scheme to evade responsibility for killing Shelly: Pearcy would refuse to testify in Dailey's case, and after Dailey was acquitted, Dailey would confess, providing Pearcy a basis for attacking his conviction on appeal. *Dailey*, 594 So. 2d at 256. The State corroborated the inmates' testimony with notes that Dailey and Pearcy passed to each other in jail. *Dailey*, 2019 WL 6716073, at *2. The notes were "consistent with co-actors ('partners' as Dailey says in one note) who [we]re trying to game their respective trials," and "[o]ne of Pearcy's notes expressly implicate[d] Dailey as [Shelly's] murderer, consistent with Pearcy's [1985 sworn] statement." *Id.*

In keeping with the scheme corroborated by their own notes, Pearcy refused to testify at Dailey's trial. *Dailey*, 594 So. 2d at 256; Order, *State v. Dailey*, No. 1985-CF-007084 (Fla. Cir. Ct. Jan. 26, 1987) (holding Pearcy in contempt for refusing to testify).

"Dailey presented no evidence during the guilt phase" of the trial, and the jury found him "guilty of first-degree murder and unanimously recommended" the death penalty. *Dailey*, 594 So. 2d at 256. "At sentencing, Dailey requested the death penalty and the court complied." *Id.* Based on the evidence presented during the

guilt and penalty phases, the court found beyond a reasonable doubt that Dailey's motive for taking Shelly to the deserted beach was sexual battery. *Id.* at 258.

2. In his appeal, Dailey raised various prosecutorial-misconduct claims, challenged the trial court's jury instructions, and asserted that the court erred at sentencing. *Id.* at 256-59. He did not challenge the sufficiency of the evidence. *See id.* The Florida Supreme Court rejected his prosecutorial-misconduct and jury-instruction claims, denying a couple of them based on harmlessness after finding that the State offered "substantial evidence of guilt" at trial. *Id.* at 258. But the Court held that the trial court committed certain sentencing errors not at issue here, and it remanded for resentencing. *Id.* at 259.

On remand, the trial court "resentenced Dailey to death after finding three aggravating and numerous mitigating circumstances." *Dailey*, 659 So. 2d at 247. It found that he had a prior violent felony, that he killed Shelly during a sexual battery, and that the murder was heinous, atrocious, or cruel. *Id.* at 247 n.3. Those aggravating circumstances, the court concluded, outweighed the mitigating circumstances, which included, among other things, that Dailey "served in the Air Force and saw duty in Vietnam on three occasions." *Id.* at 247 n.4, 248.

The Florida Supreme Court unanimously affirmed Dailey's death sentence in 1995, *id.* at 248, and this Court denied his petition for a writ of certiorari in 1996, *Dailey v. Florida*, 516 U.S. 1095 (1996).

C. Postconviction Proceedings

1. *Florida's Postconviction Regime.* Florida Rule of Criminal Procedure 3.851 governs death-row prisoners' requests for state postconviction relief. Fla. R. Crim. P. 3.851(a). It permits them to file an initial postconviction motion and successive motions, subject to a few gatekeeping requirements. R. 3.851(e). Prisoners who satisfy the requirements can pursue not only federal constitutional claims but also state claims based on newly discovered evidence of innocence. *See* R. 3.851(a); *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008). Dailey has raised a host of newly-discovered-evidence claims over the past 30 years, including several in the postconviction motion at issue here (his third successive motion). *See, e.g.*, *Dailey v. State*, 279 So. 3d 1208, 1212 (Fla. 2019). All the claims have failed, many of them because they did not satisfy Rule 3.851's gatekeeping requirements. *See id.* at 1214-16; *Dailey*, 949 F.3d at 556 ("In the 33 years since Dailey's trial, he has filed a direct appeal, four state postconviction motions, two state habeas petitions, two federal habeas petitions, one Rule 60(b) motion, and one Rule 60(d) motion. In none of them did he succeed in convincing a court to vacate his conviction.").

a. *Florida's Gatekeeping Requirements.* Under Rule 3.851, all postconviction motions must be filed within one year "after the [prisoner's] judgment and sentence become final." Fla. R. Crim. P. 3.851(d)(1). Any claims raised after that are time-barred unless one of three exceptions applies. R. 3.851(d)(2). Just one of the exceptions is relevant here: a claim is not time-barred if it is based on newly discovered evidence—that is, if "the facts on which the claim is predicated were

unknown" until the year preceding the prisoner's motion "and could not have been ascertained [earlier] by the exercise of due diligence." R. 3.851(d)(2)(A).

Rule 3.851 imposes additional requirements for successive motions. A prisoner filing a successive motion must not only satisfy Rule 3.851's timeliness requirement but also (1) allege "grounds for relief" that are "new or different" from grounds that he alleged in prior motions and (2) establish "good cause" for not previously raising the grounds. R. 3.851(e)(2).

If a prisoner does not satisfy these threshold requirements, his postconviction claims are procedurally barred. *Mills v. State*, 684 So. 2d 801, 804-05 (Fla. 1996).

b. *Newly-Discovered-Evidence Claims.* To prevail on a newly-discovered-evidence claim, a prisoner must satisfy two prongs. First, he must establish that the evidence is in fact newly discovered; he must satisfy the same test for newly discovered evidence set forth in Rule 3.851, showing that the evidence only recently became "known" to him and that he "could not have known of it" earlier "by the use of diligence." *See Tompkins*, 994 So. 2d at 1086. Second, the prisoner must show that the newly discovered evidence "would probably produce an acquittal on retrial." *Id.*

Prisoners can raise newly-discovered-evidence and federal constitutional claims based on the same evidence. Dailey, for example, asserted in his underlying postconviction motion that newly discovered evidence establishes *Brady*, *Giglio*, and newly-discovered-evidence claims. Third Successive Motion at 19-22, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 8, 2019). Under such circumstances, if the purported new evidence does not satisfy the test for newly discovered evidence, both

the federal constitutional and newly discovered evidence claims are untimely and procedurally barred as a matter of state law. *See Mungin v. State*, 2020 WL 728179, at *1-2 (Fla. Feb. 13, 2020) (dismissing newly-discovered-evidence, *Brady*, and *Giglio* claims because the underlying evidence "became discoverable through due diligence more than a year before" the prisoner filed his successive motion).

2. *Dailey's Initial Postconviction Motion.* Dailey filed his first postconviction motion in 1997. Initial Motion, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Apr. 1, 1997). He raised 15 claims, asserting, among other things, that:

- His trial counsel were ineffective because they did not proffer the testimony of two jail inmates who "were approached by [police] prior to trial and shown newspaper articles regarding [Shelly's] murder." Amended Initial Motion at 25-26, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Nov. 12, 1999). According to Dailey, such testimony would have "debilitated the credibility" of the inmates who testified on behalf of the State because it "would have shown the jury that [police] w[ere] attempting to suggest facts to potential witnesses." *See id.*

- The State violated *Brady* because it failed to disclose to Dailey that police "supplied facts about [the] murder to" Paul Skalnik, one of the inmates who testified on behalf of the State. *Id.* at 53.

- The State violated *Brady* and *Giglio* because it failed to disclose that it offered leniency to Skalnik. *Id.* at 53-54, 87-88. That information "should have been disclosed," Dailey asserted, because "deals in exchange for testimony are valuable and exculpatory avenues of impeachment." *Id.* at 54.

"[A]fter briefing, a legal hearing, and five evidentiary hearings," the state trial court issued an 81-page order denying Dailey's motion. *Dailey*, 2019 WL 6716073, at *2; Order, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. July 20, 2005). The trial court dismissed Dailey's claim that trial counsel should have called jail inmates to testify, because Dailey abandoned the claim during an evidentiary hearing "for

strategic reasons." Order at 19-20, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. July 20, 2005). And the court rejected Dailey's *Brady* and *Giglio* claims on the merits. *See id*. at 41, 65-66. The Florida Supreme Court affirmed. *Dailey*, 965 So. 2d at 41.

Dailey later filed a petition for a writ of habeas corpus in federal district court, in which he attacked parts of the Florida Supreme Court's decision. *Dailey*, 2011 WL 1230812, at *4-28. The court denied the petition, concluding that Dailey failed to prove any "constitutional errors in his underlying conviction and sentence" and that "any arguable error was harmless based on the facts and the record." *Id*. at *2.

3. *First Successive Postconviction Motion*. In Dailey's first successive motion, he sought relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The trial court denied the motion, and the Florida Supreme Court affirmed because "*Hurst* does not apply retroactively to Dailey's" death sentence. *Dailey v. State*, 247 So. 3d 390, 391 (Fla. 2018).

4. *Second Successive Postconviction Motion*. In 2017, Dailey filed a second successive motion, raising several newly-discovered-evidence claims. *Dailey*, 279 So. 3d at 1212.

He first claimed that "newly discovered evidence exist[ed] in the form of testimony from" three inmates who were jailed with him before his trial. *Dailey*, 279 So. 3d at 1214. The testimony mirrored the inmate testimony that Dailey relied on in his initial postconviction motion: the inmates asserted that "detectives came to the county jail, called the[m] into an interview room," and showed newspaper articles to them about Shelly's murder. *Id*.

Both the trial court and the Florida Supreme Court rejected the claim, finding it "untimely or otherwise procedurally barred." *Id.* at 1214-15. Dailey, the Florida Supreme Court explained, had known for years that police interviewed and showed newspaper articles to inmates before his trial. *Id.* Therefore, a claim based on that information was "clearly procedurally barred." *Id.*

Next, Dailey claimed that "newly discovered evidence discredit[ed] the testimony of Paul Skalnik." *Id.* at 1215. Again, Dailey relied on evidence that he advanced in his initial postconviction motion, namely, evidence that "the State was considering offering [Skalnik] a reduced sentence in exchange for testifying against Dailey." *Id.* The trial court and the Florida Supreme Court held that the claim was untimely and procedurally barred. *Id.*

Finally, Dailey raised a series of claims based on a 1985 police report, various documents that were "created in the 1980s," and a 2017 affidavit from Pearcy in which Pearcy stated that he killed Shelly. *Id.* at 1213-16. The state trial court and the Florida Supreme Court denied all the claims. *Id.* Pearcy recanted his affidavit at an evidentiary hearing, and the remaining evidence was time-barred. *Id.*

5. *Third Successive Postconviction Motion*. Dailey's third successive motion underlies this proceeding. It advances two grounds for relief that are relevant here: (1) an affidavit from James Slater, who was an Assistant State Attorney during the time of Dailey's trial, and (2) an affidavit from Edward Coleman, who was jailed with Dailey before the trial. Third Successive Motion at 19-21, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 8, 2019).

a. *Slater Affidavit*. In September 2019, Governor Ron DeSantis signed Dailey's death warrant.[1] *Dailey*, 949 F.3d at 556 n.2. A few days later, Dailey's defense team showed up at Slater's home unannounced, Slater let them in, and during their visit, he signed an affidavit. *See* App. 30a; Evidentiary Hear'g Tr. at 30, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 15, 2019).

In the affidavit, Slater averred: "Law enforcement told me that Pearcy attempted to have sex with [Shelly] but that Pearcy couldn't perform. [Shelly] began teasing Pearcy. Pearcy became irate and stabbed [her.]" Third Successive Motion at 66, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 8, 2019). Based on that averment, Dailey raised a newly-discovered-evidence claim and a *Brady* claim in his motion. *Id*. at 20-22. He alleged that "law enforcement was aware that Pearcy admitted to" killing Shelly, that Slater's affidavit creates a reasonable doubt about Dailey's culpability, and that the State violated *Brady* by not disclosing Pearcy's admission. *See id*. at 19-20, 23.

In its response to Dailey's motion, the State argued that his claims based on Slater's affidavit are untimely and procedurally barred under Rule 3.851. *See* Resp. to Third Successive Motion at 13, 26, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 10, 2019). Dailey, the State asserted, has not "shown that he timely raised" the information obtained from Slater "within one year of [it] being discoverable through due diligence." *Id*. at 13-14. Slater "was listed as a witness for Dailey's trial

[1] The warrant has since expired, and Governor DeSantis has not signed a new one. *Dailey*, 949 F.3d at 556 n.2.

in 1986," and Dailey has offered no explanation "as to why [an affidavit from Slater] could not have been previously obtained." *Id.* at 14.

b. *Coleman Affidavit*. Dailey raised a newly-discovered-evidence claim and a *Giglio* claim based on Coleman's affidavit. Third Successive Motion at 21, 24, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 8, 2019). In the affidavit, Coleman asserted that around the time of Dailey's trial, police "pulled [him] out of [his] pod and into a separate room"; discussed Dailey's case with him, with newspapers in hand; noted that the State "needed help"; and offered him leniency in exchange for helpful testimony. *Id.* at 69-70. In his motion, Dailey did not explain how these averments—which mirror inmate testimony that he advanced in prior motions—constitute newly discovered evidence. *Id.* at 21.

The State argued in its response that Dailey's claims based on Coleman's affidavit, too, are untimely and procedurally barred. *See* Resp. to Third Successive Motion at 18-23, 26-27, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 10, 2019) (citing Fla. R. Crim. P. 3.851). Dailey, the State explained, has known for decades that police questioned jail inmates before his trial—indeed, "the direct appeal record includes a letter from James Dailey to Jack Pearcy claiming that a 'cop' showed [an inmate] a newspaper article during an interview." *Id.* at 18. "Moreover, the substance of [the Coleman claims] was already raised in Dailey's original postconviction motion; Dailey alleged that [two inmates] were approached by [police] and shown newspaper articles about the murder." *Id.*

c. *Evidentiary Hearing*. The trial court granted Dailey an evidentiary hearing, at which he offered testimony from Slater. App. 29a. On the stand, Slater had "significant trouble remembering the details of" Dailey's case, and he retreated from the averments in his affidavit: "[h]e testified that he might have confused [Dailey's] case with another," "[h]e testified that the portion of [his] affidavit indicating that Pearcy tried to have sex with" Shelly was "just his general 34-year-old recollection of what the case was about," and "[h]e testified that he could not recall any particular source of that information." *Id.* According to Slater, before Dailey's defense team showed up at his home seeking an affidavit, he had not thought about Dailey's case for over 30 years. *Id.* at 30a.

d. *Trial Court Decision*. The trial court denied all of Dailey's claims. *Id.* at 46a. As a threshold matter, it concluded that Dailey's "motion was clearly not filed within one year of the date [his] judgment became final," so his claims are timely under Rule 3.851 "only if an exception is present." *Id.* at 21a. Then, the court "consider[ed] each piece of evidence in turn, with newly discovered evidence, *Brady*, and *Giglio* arguments for a single piece of evidence considered together." *Id.* at 26a-27a.

Slater Testimony. Dailey's request for relief based on Slater's testimony is untimely, the court ruled, because Dailey has known since his trial that Slater was involved in the case and "[t]here is no reason [Dailey] could not have contacted [Slater] or deposed him . . . in the last thirty years to determine if he was aware of any information about the crime." *Id.* at 31a-32a.

The court also held, in the alternative, that Dailey's claims fail on the merits. *Id*. at 34a-36a. Slater, the court found, "is wholly without credibility," and "he never testified that Pearcy confessed" or that law enforcement knew that Pearcy stabbed Shelly. *Id*. at 35a. Therefore, Slater's testimony is not exculpatory, and it neither constitutes newly discovered evidence of innocence nor establishes a *Brady* violation. *Id*. at 35a-36a.

Coleman Affidavit. Dailey's request for relief based on Coleman's affidavit is also untimely, the court concluded. *Id*. at 37a-40a. There is "no reason why [Dailey] could not have" sought relief based on testimony from Coleman "in 1999 or 2017 with either of his previous [postconviction motions] asserting similar facts." *Id*. at 38a. He "made no allegations suggesting that he could not have found Coleman more than a year ago with due diligence." *Id*.

In the alternative, the court held that Dailey's newly-discovered-evidence and *Giglio* claims based on the affidavit fail on the merits. First, Dailey failed to even "set out a facially sufficient [*Giglio*] claim" because he raised only "vague" and "conclusory" *Giglio* allegations. *Id*. at 40a. Second, Coleman's affidavit establishes neither a newly-discovered-evidence nor a *Giglio* claim because it "would not have changed the outcome of the original trial." *Id*. at 39a-40a.

e. *Florida Supreme Court Decision*. The Florida Supreme Court unanimously affirmed the trial court. *Dailey v. State*, 283 So. 3d 782, 794 (Fla. 2019).

First, the Court held that Dailey's newly-discovered-evidence claims fail because Slater's testimony and Coleman's affidavit do not qualify as newly discovered

evidence. *Id.* at 788-90. Dailey could have discovered the information provided by Slater and Coleman years ago. *Id.* "Slater was listed as a witness at Dailey's trial," and "Dailey neglect[ed] to explain why he could not have discovered the information to which Slater testified either prior to trial or at some point" thereafter. *Id.* at 790. And although Dailey "has been on notice" for years that police questioned jail inmates before his trial, he "fail[ed] to state any reason why Coleman's testimony has only [recently] become discoverable." *Id.*

Second, the Court held that Dailey "failed to state a *Brady* claim based on Slater's testimony." *Id.* at 789. Under *Brady*, a defendant must "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.* (quotation marks omitted). But Slater's testimony, the Court concluded, satisfies neither the first nor third prong. *Id.* at 789-90. "[A]t best," the testimony indicates that "an unidentified member of law enforcement, at some unknown time, told Slater a piece of information that he cannot" specifically connect to Dailey's case. *Id.* The testimony therefore cannot be considered "exculpatory evidence that would have created a reasonable probability of a different verdict." *Id.*

Finally, the Court held that Coleman's affidavit does not support a *Giglio* claim. *Id.* at 790-91. "To establish a *Giglio* violation," a defendant must show that "(1) the testimony given was false; (2) the prosecutor knew the testimony was false;

and (3) the statement was material." *Id.* at 791 (quotation marks omitted). But Coleman's affidavit establishes none of these prongs. *Id.*

D. Related Proceedings

1. Dailey has another petition for certiorari pending before this Court, in which he seeks review of the Florida Supreme Court decision denying his second successive postconviction motion. *See Dailey v. Florida*, No. 19-7309. In the petition, Dailey asserts that *Chambers v. Mississippi*, 410 U.S. 284 (1973) requires admission of Jack Pearcy's 2017 affidavit, even though Pearcy recanted the affidavit at an evidentiary hearing and the trial court found that the affidavit is "hearsay of an exceptionally unreliable nature." *Dailey*, 279 So. 3d at 1213 (quotation marks omitted).

2. Dailey is litigating a fourth successive motion in state court. *See* Fourth Successive Motion at 1, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Dec. 27, 2019). He is seeking relief based on another affidavit from Pearcy, though Pearcy recently recanted the affidavit. *See id.* at 6; Evidentiary Hear'g Tr. at 61, 88, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Mar. 16, 2020).

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction because the decision below rests on an independent and adequate state ground.

"In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The doctrine applies when a "state law determination" is "sufficient to support" a prisoner's state court judgment, such as when a state gatekeeping requirement bars the prisoner's postconviction claims. *See id.*; *Walker v. Martin*, 562

U.S. 307, 310-11 (2011) (holding that California's time bar on postconviction claims is an independent and adequate state ground); *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (analyzing one of Florida's gatekeeping requirements and concluding that it is an independent and adequate state ground). Under those circumstances, "the same judgment would be rendered by the state court after [this Court] corrected [the state court's] views of federal laws," so any opinion by this Court would be "an advisory opinion." *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

That is the case here. This Court's review would have no impact on the judgment below because Dailey's *Brady* and *Giglio* claims are procedurally barred under Florida law. As Dailey himself admits, the Florida Supreme Court "rested its denial of [the] claims on a state procedural rule"—Rule 3.851. *See* Pet 14-15. The Florida Supreme Court determined that Slater's testimony and Coleman's affidavit do not qualify as newly discovered evidence, which renders Dailey's *Brady* and *Giglio* claims untimely under Rule 3.851. *See Dailey*, 283 So. 3d at 788-90; *Porter v. State*, 653 So. 2d 374, 377 (Fla. 1995) (holding that a prisoner's claims in a successive motion are untimely and procedurally barred if "the evidence upon which they are based does not qualify as newly discovered").

It is thus clear from the face of the Florida Supreme Court's decision that it rests on an independent and adequate state ground. But even if that were not clear, the independent and adequate state ground doctrine would still apply.

This Court "presume[s]" that the doctrine is inapplicable if a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the

federal law," but the presumption is rebuttable. *See Coleman*, 501 U.S. at 735 (quotation marks omitted); *Johnson v. Williams*, 568 U.S. 289, 301-02 (2013) (noting that the presumption set forth in *Coleman* is rebuttable). And here, the presumption would be rebutted because the record establishes "as an empirical matter" that the Florida Supreme Court's decision rests on Rule 3.851. *See Johnson*, 568 U.S. at 302 (quoting *Coleman*); *cf. Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) ("strong evidence can refute" the presumption that an unexplained state court decision relies on the grounds articulated below). Throughout these proceedings, the State has raised Rule 3.851's timeliness requirement; the state trial court found that the requirement bars relief; the Florida Supreme Court affirmed the trial court without qualification; and Dailey states in his petition that the Florida Supreme Court's decision rests on Rule 3.851. Pet 14-15

II. This case presents neither the conflict nor the split that Dailey alleges.

Dailey contends that the decision below conflicts with *Banks v. Dretke*, 540 U.S. 668 (2004) and implicates a split among lower courts because the Florida Supreme Court read into *Brady* a "due diligence requirement." Pet. 2. According to Dailey, the Court "held that *Brady* is not violated if the suppressed evidence could have been discovered independently by the defendant." *Id.* The Court, however, did not hold that. Nor did it otherwise weigh in on whether a defendant's diligence can be considered when applying *Brady*. This case therefore neither presents the conflict

with *Banks* that Dailey alleges nor implicates the "due diligence question" on which he asserts lower courts are split. *See id.* at 15 (quotation marks omitted).

A. The Florida Supreme Court did not hold that a defendant must show diligence to prove a *Brady* violation.

1. Dailey asserts that the Florida Supreme Court used "a four-prong test to determine compliance with the rule of *Brady*," one that requires a prisoner to show that he "does not possess the evidence [at issue] nor could he obtain it himself with any reasonable diligence." *Id.* at 13 (quotation marks omitted). But Dailey identifies no language in the Florida Supreme Court's decision supporting this claim. Instead, he cites a 1998 Florida precedent discussing a four-prong test and posits that the Court applied the precedent here. *Id.*

The Florida Supreme Court, however, neither applied a four-part *Brady* test nor held that *Brady* requires due diligence—it did not even mention diligence in passing on the merits of Dailey's *Brady* claim. The Court expressly applied the three-part test for *Brady* that this Court articulated in *Strickler v. Greene*, 527 U.S. 263 (1999). Citing *Strickler*, the Court stated that *Brady* requires a defendant 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." *Dailey*, 283 So. 3d at 789 (quotation marks omitted). Then, the Court held that Dailey's *Brady* claim lacks merit because Slater's testimony is not exculpatory and because Dailey did not establish prejudice. *Id.* at 789-90.

Thus, the Court did not even address the prong of *Brady*—the suppression prong—that presents the "due diligence question." *See* Pet. 15, 21-23. According to

Dailey, the lower-court split over diligence stems from some courts holding that "evidence is not suppressed if the defendant" could have "take[n] advantage of it" with due diligence. *Id.* at 21-23 (quotation marks omitted). So based on Dailey's own articulation of the split, the Florida Supreme Court's decision does not implicate it.

2. Dailey also asserts that the Florida Supreme Court grafted onto *Brady* a due diligence requirement because it found his claim untimely under Rule 3.851. Pet. 13-15. Rule 3.851's timeliness requirement, Dailey argues, "is simply a codified due diligence requirement," *id.* at 14, because a prisoner relying on newly discovered evidence to establish timeliness must show that the evidence "could not have been ascertained by the exercise of due diligence," *id.* at 14-15 (quoting Fla. R. Crim. P. 3.851(d)).

Rule 3.851's timeliness requirement, however, has nothing to do with *Brady*. It is a threshold procedural requirement that a prisoner must satisfy if he seeks postconviction relief from a Florida court based on newly discovered evidence. Fla. R. Crim. P. 3.851(d). It is not a substantive requirement that Florida courts have read into *Brady*; rather, Florida applies the same test for *Brady* claims as this Court. *See Dailey*, 283 So. 3d at 789. Dailey objects, in other words, to Florida's gatekeeping requirements, not to the Florida Supreme Court's application of *Brady*. And there is nothing improper about Florida's requirements. *See Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 69-70 (2009) (approving Alaska's gatekeeping requirements, which also impose a time bar and require prisoners who seek to avoid the bar to offer "newly available" evidence that they "diligently pursued").

Indeed, if accepted, Dailey's argument would eviscerate state gatekeeping requirements like Rule 3.851. At bottom, Dailey asserts that when a court in a state postconviction proceeding holds that gatekeeping requirements bar a federal claim, this Court should construe the court's decision as adding elements to the federal claim. That would nullify state gatekeeping requirements. Courts would have to set them aside or face reversal for failing to properly apply the tests for *Brady*, *Giglio*, and other federal claims. States' "substantial discretion" over their postconviction regimes would be rendered illusory, and their interest in finality would be trampled. *See Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987); *Duncan v. Walker*, 533 U.S. 167, 179 (2001) (states have a "well-recognized interest in the finality of state court judgments").

In sum, this case does not present the conflict or split that Dailey claims it does. The Florida Supreme neither required Dailey to prove diligence to establish a *Brady* claim nor otherwise addressed whether a defendant's diligence can be considered when assessing *Brady*'s suppression prong.

B. In any event, even assuming that the Florida Supreme Court held that *Brady* requires diligence, its decision neither conflicts with *Banks* nor implicates a split.

1. Dailey asserts that the Florida Supreme Court's decision conflicts with *Banks* because *Banks* rejected a "prosecutor may hide, defendant must seek" rule and the Court in effect applied such a rule by requiring him to prove diligence. Pet. 2. But Dailey misconstrues *Banks*. Even if the Court required Dailey to prove diligence to establish a *Brady* violation, it did not apply the rule rejected in *Banks*.

In *Banks*, a prisoner filed a federal habeas petition alleging that the State violated *Brady* because at trial it withheld that one of its witnesses was a police informant. *Banks*, 540 U.S. at 683-84. The Fifth Circuit ruled that the claim was procedurally defaulted because the prisoner did not raise it in his state postconviction proceedings, but this Court reversed. *Id.* at 688, 705.

Before this Court, the prisoner argued that under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), he had cause for not raising the claim because the State lied to him during his trial that it had disclosed all *Brady* material and then persisted in that misrepresentation during his state postconviction proceedings. *Banks*, 540 U.S. at 690-91, 694. The State countered that the prisoner could not establish cause because he made no effort during the postconviction proceedings to investigate the trial witness "and ascertain his true status." *Id.* at 695 (quotation marks omitted). According to the State, "the question of cause" for procedural default "revolves around the [defendant]'s conduct." *Id.* (quotation marks omitted). "[T]he prosecution can lie and conceal and the prisoner still has the burden to discover the evidence so long as the potential existence of a prosecutorial misconduct claim might have been detected." *Id.* at 696 (quotation marks and citation omitted).

This Court rejected the State's argument and found that the prisoner established cause. *Id.* at 698. The State's rule that "prosecutor may hide, defendant must seek," the Court concluded, is untenable. *Id.* at 696. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id.* Further, the Court's "decisions lend no support to the notion that defendants must

scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695. And finally, contrary to the State's contentions, "[t]he 'cause' inquiry . . . turns on events or circumstances external to the defense." *Id.* at 696 (quotation marks omitted).

Banks thus rejected a rule that requires a prisoner alleging cause to show that he "scavenge[d]" for *Brady* material despite the State's repeated misrepresentations that the material does not exist. *See id.* at 695-96.

The Florida Supreme Court did not apply that rule. It had no occasion to because this is not a federal habeas proceeding presenting the issue of cause for procedural default. Moreover, Dailey did not allege in his underlying postconviction motion that the State lied to him about *Brady* material, so the Court's decision cannot be read as requiring prisoners to scavenge for *Brady* material in the face of ongoing State misrepresentations. *See* Third Successive Motion at 19-25, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 8, 2019). Therefore, even under Dailey's reading of the decision below, this case presents no conflict with *Banks*.

2. Nor does it implicate any lower-court split. Because the Florida Supreme Court plainly did not apply a four-part *Brady* test that requires diligence, Dailey's claim that the Court grafted a diligence requirement onto *Brady* depends on his argument that Rule 3.851's time bar is "a codified due diligence requirement." Pet. 14-15. But even accepting that argument, this case does not present the "due diligence question," *id.* at 15—i.e., whether evidence was suppressed under *Brady* when the defendant could have accessed it at trial with reasonable diligence. Instead,

it presents only the question whether a prisoner raising a *Brady* claim in a state postconviction motion may be required to prove that during the limitations period for his motion, he could not have accessed the evidence that he claims was suppressed at trial.

And Dailey identifies no split over that question. He cites no cases that even address it. None of the cases that he relies on in claiming that this case implicates a split (*see* Pet. 16-20) involved a dispute over whether *Brady* bars a state gatekeeping requirement like Rule 3.851's time bar. *See United States v. Tavera*, 719 F.3d 705, 710 (6th Cir. 2013) (considering a direct appeal of a federal conviction); *In re Sealed Case*, 185 F.3d 887, 891 (D.C. Cir. 1999) (same); *People v. Chenault*, 845 N.W. 2d 731, 735 (Mich. 2014) (considering a direct appeal of a state conviction); *Prewitt v. State*, 819 N.E. 2d 393, 397 (Ind. Ct. App. 2004) (same); *Com. v. Tucceri*, 589 N.E. 2d 1216, 1217 (Mass. 1992) (same); *State v. Parker*, 198 S.W. 3d 178, 179 (Mo. Ct. App. 2006) (same); *Amado v. Gonzalez*, 758 F.3d 1119, 1129-30, 1138 (9th Cir. 2014) (considering an appeal in a federal habeas proceeding which presented no dispute over a state postconviction timeliness requirement); *Banks v. Reynolds*, 54 F.3d 1508, 1514 (10th Cir. 1995) (same); *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 117-18 (2d Cir. 2015) (same); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 269 (3d Cir. 2016) (en banc) (same); *State v. Williams*, 896 A.2d 973, 975 (Md. 2006) (considering an appeal in a state postconviction proceeding which presented no dispute over a state postconviction timeliness requirement).

3. Finally, even if this case presented the question whether courts may consider diligence as part of the suppression prong of *Brady*, review would not be warranted. This Court has repeatedly denied petitions presenting similar questions, and Dailey identifies no change in circumstance that makes review now appropriate. *See Yates v. United States*, 139 S. Ct. 1166 (2019); *Snow v. Nicholson*, 138 S. Ct. 2637 (2018); *Woods v. Smith* , 138 S. Ct. 61 (2017); *Georgiou v. United States*, 136 S. Ct. 401 (2015); *Rigas v. United States*, 131 S. Ct. 140 (2010); *Cazares v. United States*, 552 U.S. 1056 (2007).

III. The decision below is correct.

Dailey asserts that review is warranted because the Florida Supreme Court erred in denying his *Brady* and *Giglio* claims and the error "will produce a shocking and manifest miscarriage of justice if not corrected." Pet. 2. But the Court did not err. Dailey's *Brady* and *Giglio* claims are not only procedurally barred but also without merit.

1. Slater's testimony does not establish a *Brady* violation because it is not "favorable" evidence. *See Strickler*, 527 U.S. at 281-82 (*Brady* requires a showing that "[t]he evidence at issue [is] favorable to the accused, either because it is exculpatory, or because it is impeaching"). Dailey contends that Slater's testimony is exculpatory because it shows that Pearcy admitted to police that he killed Shelly. But Slater offered no testimony indicating that Pearcy admitted to killing Shelly, nor did he offer any other testimony helpful to Dailey. *See* App. 35a; *Dailey*, 283 So. 3d at 789.

At the evidentiary hearing, Slater rebuffed Dailey's efforts to elicit exculpatory testimony from him. *See* App. 34-35a; Evidentiary Hear'g Tr. at 30-31, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 15, 2019). He "never testified that Pearcy confessed [n]or clearly testified that law enforcement . . . knew Pearcy . . . stabbed" Shelly. App. 35a. Instead, he "constantly testified that he was not sure, did not remember, or did not know almost anything about th[e] case," prompting the trial court to find him "wholly without credibility" and to determine that his testimony included no "admissible, favorable" evidence. App. 34a-35a.

The trial court's credibility finding is entitled to deference—indeed, Dailey does not appear to challenge it—and the court's conclusion that Slater offered no favorable evidence is sound. *See Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) ("[The Court] give[s] singular deference to a trial court's judgments about the credibility of witnesses.").

2. Coleman's affidavit does not establish a *Giglio* violation. According to Dailey, the affidavit shows that the State withheld evidence that he could have used to impeach the three inmates who testified at trial, namely, evidence that the police suggested facts and offered deals to the inmates. *See* Pet. 28-29, 32. But the affidavit offers no evidence about the inmates. Coleman does not purport in the affidavit to have any personal knowledge about the police's interactions with the inmates; he does not "allege that he saw [the police] question or offer [a] deal to" them. App. 39a. He merely asserts that the police spoke to him and offered to reduce his charges if he had helpful information. *See id.* That is not "material impeachment evidence" that

Giglio required the State to disclose—Coleman had no role in the trial. *See* Pet. at 28-29. Dailey might have found it useful to know that the police approached Coleman, but *Giglio* does not "require the prosecutor to share all useful information with the defendant." *See United States v. Ruiz*, 536 U.S. 622, 629 (2002).

Moreover, Dailey's claim that the Florida Supreme Court went astray by focusing its *Giglio* analysis on false testimony is misguided. First, Dailey alleged in his postconviction motion that the "State violated . . . *Giglio* by presenting false evidence at [his] trial." Third Successive Motion at 22, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Oct. 8, 2019). The Florida Supreme Court did not err in addressing the claim that Dailey raised. Second, the Court's ultimate conclusion that Dailey is not entitled to *Giglio* relief is correct.

3. Even assuming that Slater's testimony is exculpatory and that Coleman's affidavit impeaches the three inmates, Dailey has not established prejudice. *See Strickler*, 527 U.S. at 281-82. He argues that he has done so because a holistic, cumulative review of the trial and postconviction record "undermines confidence in the verdict." Pet. 29-33. Slater's testimony, Coleman's affidavit, and other evidence, Dailey claims, shows that "Pearcy alone killed Boggio." *Id.* at 33. But Dailey relies on a "selective portrayal of the record." *Dailey*, 2019 WL 6716073, at *2 (rejecting Dailey's prejudice argument in a federal habeas proceeding because he relied on a "selective portrayal of the record").

Despite advocating for a holistic, cumulative review, Dailey ignores Pearcy's 1985 sworn statement to police in which "Pearcy explained the details of the murder,"

describing "how Dailey butchered and drown[ed] [Shelly] during a rape." *Id.* He ignores that "Pearcy's statements in that lengthy sworn interview are consistent with physical facts of the case." *Id.* He ignores that the "damning trial testimony" from the three inmates was "backed up" by inculpatory notes written "in [his] and Pearcy's hand." *Id.* He ignores that two witnesses testified at trial that when he returned to Pearcy's house the night of the murder, he was shirtless and his pants were wet. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9. And finally, he ignores the evidence showing that the day after the murder, he fled to Miami, stayed there for just a day, and then disappeared from Florida altogether. *Dailey*, 949 F.3d at 564.

When weighed against the "substantial evidence of [his] guilt," *Dailey*, 594 So. 2d at 258, the evidence that Dailey advances does not require a new trial. Slater's speculative testimony, Coleman's barebones affidavit, and the other pieces of evidence cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the" jury's 35-year-old verdict. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida

AMIT AGARWAL
Solicitor General
* *Counsel of Record*

CAROLYN M. SNURKOWSKI
Assistant Deputy Attorney General

TIMOTHY A. FREELAND
Senior Assistant Attorney General

STEPHEN D. AKE
Senior Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3681
amit.agarwal@myfloridalegal.com

Counsel for Respondent

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