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

REPLY BRIEF FOR PETITIONER

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The petition shows that the evidence used by the State to obtain a capital verdict against petitioner was disturbingly weak to begin with, and is further undermined by evidence that the State withheld from petitioner in violation of *Brady* and *Giglio*. The State's opposition to the petition does not come to grips with these points: it distorts the record and does not meaningfully engage the *Brady* and *Giglio* errors committed below. Especially because these errors led to a sentence of death, this Court's intervention is imperative.

A. The State's account of the facts is misleading.

The State devotes much of its opposition to defending its factual case against petitioner. Opp. 2-5, 27-28. In its key respects, this presentation is demonstrably inconsistent with the record.

1. At the outset, third-party review of the evidence establishes the weakness of the State's case. In their *amicus* brief supporting Dailey's other pending petition for certiorari, No. 19-7309, the U.S. and Florida Conferences of Catholic Bishops ("Catholic Bishops Br."), after a close review of the record, label the evidence against Dailey "shockingly sparse" (Br. 3) and "vanishingly thin" (Br. 5), concluding that "the evidence of Mr. Dailey's actual innocence is not only credible; it is overwhelming." Br. 7. In another *amicus* brief supporting that petition, current and former prosecutors ("Prosecutors Br.") who have defended the death penalty likewise conclude that, absent review by this Court, there is a "substantial likelihood that an innocent man could soon be executed for a crime that he did not commit." Br. 17. That conclusion is

confirmed by journalists' review of the case. See, *e.g.*, Pet. 6 n.3.

2. Although space constraints preclude complete review of the record here, the primary evidentiary points made by the State are wrong.

First, the centerpiece of the State's presentation is a graphic description of Shelly Boggio's brutal murder that places the knife in Dailey's hand. Opp. 2-3, 27-28. But the State fails to mention that this account rests solely on the word of Jack Pearcy, whose description of the murder, as the Catholic Bishops explain, came in "a series of self-serving statements [he made] to the police in an attempt to shift the blame to Mr. Dailey." Br. 3. Because Pearcy acknowledged being present when the victim was killed, the State's repeated observation that his statement "was 'consistent with the physical facts of the case'" (Opp. 3; see *id.* at 28) gives him no additional credibility and is wholly nonprobative of Dailey's guilt. Pearcy subsequently affirmed Dailey's innocence on at least four occasions. Pet. 5.

Second, the principal evidence cited by the State tying Dailey to the crime rests on the assertion that, after the group including the victim arrived at Pearcy's house, "[Oza] Shaw and [Gayle] Bailey stayed there for the rest of the night, but Dailey and Pearcy took Shelly back out" (Opp. 2); "Shaw and Bailey testified that they saw Dailey and Pearcy when they returned from the beach"; and "Dailey and Pearcy entered the house together without Shelly, and Shaw and Bailey both noticed that Dailey's pants were wet." Opp. 3-4; see *id.* at 28. This account is misleading.

Bailey, Pearcy's girlfriend, did state that Pearcy, Dailey, and the victim left the house together. Pet. 3.

But Shaw gave a very different account. His evidence indicated that, during the period the murder occurred, Pearcy and the victim left the house *without* Dailey; that Shaw himself, and not Dailey, left with Pearcy and the victim; that Pearcy deposited Shaw at a telephone booth, where he made a lengthy call before returning to the house alone; that Pearcy subsequently returned to the house *without* the victim; and it was only afterwards that Pearcy and Dailey left together, returning with wet pants. Pet. 3-5; No. 19-7309 Pet. 2. Shaw's account is confirmed by telephone records indicating that he made the call he described. No. 19-7309 Pet. at 8-9. Far from establishing Dailey's guilt, this evidence tends to confirm that Pearcy committed the crime—and that he did so alone.

Third, the State reports that, "[h]ours after the murder, Dailey, Pearcy, Shaw, and Bailey fled to Miami." Opp. 3; *id.* at 28 (Dailey "then disappeared from Florida altogether"). In fact, this evidence also tends to support Dailey's innocence. The trip to Miami was Pearcy's idea; Pearcy registered at a Miami hotel under an alias but Dailey registered under his own name; and Dailey subsequently lived and worked in Arizona and California (*i.e.*, "disappeared from Florida") under his own name. No. 19-7309 Pet. 2-3. These actions suggest that Pearcy, and not Dailey, had something to hide. After all, Shaw and Bailey also "fled to Miami" with Pearcy, yet the State does not suggest that *they* were involved in the murder.

Fourth, the State's case at trial in fact rested overwhelmingly on the testimony of three almost laughably unreliable jailhouse informants, who claimed that Dailey confessed to them that he committed a brutal

murder, but did so only after a detective seeking incriminating evidence in return for favorable treatment visited the jail. See Pet. 3-4, 5-6. The Catholic Bishops thus report that "the evidence against Mr. Dailey consisted entirely of testimony given by three jailhouse informants who each sought, in exchange for their testimony, lenient treatment from the State in their own unrelated cases" (Br. 4), while the *amicus* Prosecutors explain that "the informants' testimony was quite simply the keystone to the prosecution case." Br. 9. That being so, it is telling that the State's brief in opposition glosses over this testimony and wholly ignores the account of the State's star—and since discredited—witness, Paul Skalnik. See Pet. 5-6 & n.3.[1]

B. The decision below does not rest on an independent and adequate state ground.

The State begins its legal argument by contending that this Court lacks jurisdiction because the courts below rested their decisions on a Florida procedural bar—a newly discovered evidence requirement—that purportedly constitutes an independent and adequate

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[1] The State does claim that the testimony of the other two informants was "corroborated" by notes that "Dailey and Pearcy passed to each other in jail" and that one of Pearcy's notes implicated Dailey as the killer. Opp. 4; *id*. at 28. On examination, Pearcy's notes encourage Dailey to provide favorable testimony at Pearcy's trial; in his responsive notes, "Dailey appeared eager to appease his co-defendant, whom prosecutors planned to put on the stand." Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. Times Magazine (Dec. 4, 2019), https://tinyurl.com/wc8d3a8. This exchange shows that Pearcy sought Dailey's assistance, not that Dailey actually committed the crime.

state ground for their rulings. Opp. 16-18. This contention is wrong.

1. It is manifest from the face of the Florida Supreme Court's decision that the ruling below decided a federal constitutional question. That court treated as *separate* contentions the "newly discovered evidence" claim that (the State asserts) triggered the procedural bar upon which it now relies, and the *Brady* and *Giglio* claims advanced in the petition. Pet. App, 6a ("Dailey claims that newly discovered evidence exists * * *. He *also* raises a *Brady* claim * * * and a *Giglio* claim * * *. We address *each claim* below.") (emphasis added).

The court proceeded to address and expressly resolve petitioner's *Brady* claim (see *id*. at 8a-9a ("[w]e first conclude that Dailey has failed to state a *Brady* claim based on Slater's testimony")) and *Giglio* claim (*id*. at 11a (spelling out elements of a *Giglio* violation and holding them not established)). The court subsequently addressed what it characterized as the "newly discovered evidence claim." *Id*. at 9a ("We *also* conclude that Dailey has failed to state a newly discovered evidence claim.") (emphasis added) *ibid*.

Given that treatment of the federal claims, this Court plainly has jurisdiction. See, *e.g.*, *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985). There is no ambiguity on the point: the courts below expressly resolved the federal claims presented in the petition. The State acknowledges as much when it is off its guard, noting that the court below "pass[ed] on the merits of Dailey's *Brady* claim." Opp. 19.

2. Moreover, whatever the effect of state procedural limits in other circumstances, a state *could not*

apply a newly discovered evidence rule that incorporates a due-diligence requirement to preclude a *Brady* claim. If, as we submit, the *Brady* doctrine as interpreted in *Banks* bars a state from withholding exculpatory evidence that a defendant could uncover through the exercise of diligence, a state rule that limits consideration of a *Brady* claim that the defendant failed to uncover would itself violate *Brady*—a point we made in the petition (at 15) but that the State simply ignores.

The courts below recognized this very point. The trial court noted petitioner's contention that "the State cannot argue that his *Brady* claims are untimely based on *Banks*." Pet. App. 31a. But that court noted that the Florida Supreme Court reads *Brady* as including a due-diligence requirement. *Id.* at 28a. It therefore rejected petitioner's *Brady* argument because "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." *Id.* at 32a. And as the State recognizes, "the Florida Supreme Court affirmed the trial court without qualification." Opp. 18. Accordingly, as explained in the petition (at 14-15), the newly discovered evidence rule applied below and invoked by the State is necessarily premised on a misapplication of *Brady*, and is not an independent and adequate state ground for the decision below.

C. The challenge to the Florida courts' due-diligence requirement is properly presented here.

We showed in the petition that the courts are divided on whether the *Brady* rule includes a due-diligence element and that the holding below contributes

to this conflict. Pet. 11-25. The State does not deny that there is such a conflict. But it insists that the question is not presented here because the court below, although expressly applying a due-diligence requirement to preclude consideration of newly discovered evidence, did not address whether "a defendant's diligence can be considered when addressing *Brady*'s suppression prong." Opp. 21; see *id.* at 19-21. This argument is wrong.

1. The State is correct in observing that the recitation of the *Brady* test articulated in the decision below does not expressly include a due-diligence requirement. See Pet. App. 8a (quoting *Strickler*, 527 U.S. at 281-82). But as we showed in the petition (at 13-14 & n.7), the Florida Supreme Court in recent years has repeatedly applied a diligence requirement in rejecting *Brady* claims; the State does not deny that is so. And as we have just explained, the trial court relied on Florida Supreme Court precedent in expressly applying a due-diligence screen in rejecting petitioner's *Brady* claim, while "the Florida Supreme Court affirmed the trial court without qualification." Opp. 18. The holding below therefore must be understood to have been infected by the Florida Supreme Court's long-standing application of a due-diligence test to *Brady* claims.

Moreover, the court below characterized petitioner's claim as being "that newly discovered evidence proves the State committed *Brady* and *Giglio* violations," and then indicated that "[i]n order to demonstrate entitlement to relief based on newly discovered evidence," "it must appear that defendant or his counsel could not have known [of it] by the use of

diligence." Pet. App. 5a (citation and internal quotation marks omitted). The Florida Supreme Court proceeded to reject petitioner's "newly discovered evidence claim" regarding Slater's testimony for failure to satisfy this requirement. *Id.* at 9a. It therefore appears that, at least in part, the due-diligence ruling below was "interwoven with the federal law" *Brady* and *Giglio* claims. *Caldwell*, 472 U.S. at 327.

2. The State is equally wrong in its further argument that a due-diligence requirement governing *Brady* claims is consistent with *Banks*. Opp. 21-24. The State understands *Banks* to address the requirements, not of *Brady*, but of the federal habeas cause-and-prejudice requirement. Although *Banks* did arise in the federal habeas context, the Court explained that "cause" in a habeas case "[c]orrespond[s] to the second *Brady* component (evidence suppressed by the State)." 540 U.S. at 691. Accordingly, the Court was discussing the constitutional *Brady* rule, and not the habeas requirements, when it held: "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at 696 (citation omitted). This point is apparent from the State's own brief, which appears to recognize that the myriad federal and state decisions applying *Banks* to reject a *Brady* due-diligence rule were interpreting the Constitution. Opp. 24; see Pet. 16-20 (citing cases).

D. The Florida Supreme Court misapplied *Brady* and *Giglio*.

Even if the State were correct that the due-diligence issue is not presented here, the Florida Supreme Court's additional errors in its application of *Brady* and *Giglio*—made in the context of a capital

case, where the evidence of guilt is strikingly weak—warrant this Court's attention.

1. We showed in the petition that the Florida Supreme Court's approach to *Brady* was backwards. The court first held that there was no *Brady* violation, and then rejected Dailey's argument that the *Brady* evidence should be considered cumulatively with the other evidence in the case because Dailey "failed to establish a *Brady* violation, [so] no * * * cumulative analysis was required." Pet. App. 12a. In fact, however, it is only when viewed in the context of the entire record that a court can determine whether the suppressed evidence could have affected the outcome of the case and therefore was material within the meaning of *Brady*, Pet. 26-27. The States makes no response to this point at all.

And the Florida court's error on this element of *Brady* was not an inconsequential procedural hiccup. The court rejected Dailey's *Brady* claim for lack of materiality, a holding that could well have been different had the court considered the *Brady* materials in light of the verdict's "already * * * questionable validity." *Agurs*, 427 U.S. at 113.

2. We also showed in the petition that the court below either misunderstood *Giglio* or failed to address Dailey's *Giglio* argument. Pet. 27-29. Dailey argued to the Florida Supreme Court that the State improperly *failed to disclose* the impeachment evidence provided by Coleman's statement that Detective Halliday promised to reduce inmates' charges in return for inculpatory testimony against Dailey—but the Florida Supreme Court rejected the claim because Dailey failed to show that the State *presented false testimony* at trial. The court therefore responded to Dailey's

claim of apples by noting the absence of oranges. This obvious analytical error, too, demands correction in a capital case.

Here again, the State fails to address Dailey's argument. The State maintains that Coleman's testimony was not material. Opp. 25-26. But that argument—which is wrong on its own terms[2]—simply disregards the nature of the error committed by the court below. The State also maintains that Dailey argued to the circuit court that the prosecution presented false testimony at trial. Opp. 27. But that is beside the point: Dailey argued to the Florida Supreme Court that the State failed to disclose impeachment evidence, and that court left his constitutional claim unresolved.

E. The cumulative effect of the suppressed evidence undermines confidence in the verdict.

Finally, and crucially, there is every reason to believe that the evidence withheld from Dailey in violation of *Brady* and *Giglio*, if viewed in the context of the State's "shockingly sparse" case (Catholic Bishops Br. 3), "could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (citations and internal quotation marks omitted).

In arguing to the contrary (Opp. 27-28), the State relies on the following bits of evidence to show that its case was sufficiently strong to survive consideration of the withheld evidence:

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[2] Coleman's evidence is material because it is the first direct proof showing that Halliday promised leniency in return for inculpatory testimony. Pet. 28-29.

- since-recanted statements offered by Pearcy in a self-serving effort to evade his own responsibility for the crime;
- discredited and self-evidently outlandish testimony offered by jailhouse informants who stated that Dailey confessed the crime to them—but only after a detective visited the jail to offer them leniency in exchange for inculpatory evidence;
- testimony by Pearcy's girlfriend that Dailey left Pearcy's house with Pearcy and the victim, which is contradicted by the evidence of another witness—supported by telephone records—that Pearcy and the victim left the house with that witness but *without* Dailey, and that Pearcy returned alone;
- and evidence that the day after the murder, all those at Pearcy's house, including two people who unquestionably had no involvement in the crime, "fled to Miami" *at Pearcy's suggestion*.

Given the weakness of this case, Slater's evidence that Pearcy had a motive for committing the crime and confessed to the murder, as well as Coleman's testimony that jailhouse informants were offered a deal for their testimony, "is sufficient to 'undermine confidence' in the verdict" (*Wearry*, 136 S. Ct. at 1006 (citation omitted))[3] —and that certainly is true when the

[3] The State maintains that Slater's testimony was too equivocal to be favorable to Dailey within the meaning of *Brady*. Opp. 25-26. As we acknowledged in the petition (at 6-8), Slater indicated—after being contacted by current and former assistant state's attorneys—that he no longer was sure that his recollection concerned the Boggio case. But given both Slater's initially

evidence is viewed cumulatively. This Court should intervene in light of the "substantial likelihood that an innocent man could soon be executed for a crime that he did not commit." Prosecutors Br. 17.

CONCLUSION

The petition for a writ of certiorari in this case and in No. 19-7309, *Dailey* v. *Florida*, should be granted.

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unequivocal account and that his description of the victim's body and location matched that of the Boggio case, this evidence could well have swayed the jury.

Respectfully submitted.

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