No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

James Milton Dailey,

Petitioner,

v.

State of Florida,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

APPENDIX TO PETITION

THIS IS A CAPITAL CASE

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Supreme Court of Florida

No. SC18-557

JAMES MILTON DAILEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

October 3, 2019

PER CURIAM.

James Milton Dailey, a prisoner under sentence of death, appeals the circuit court's order denying his second 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. For the reasons that follow, we affirm.

I. BACKGROUND

Dailey was convicted of and sentenced to death for the murder of Shelley Boggio. We have described the facts of the crime as follows:

> Shelley Boggio's nude body was found floating in the water near Indian Rocks Beach in Pinellas County, Florida. She had been

> stabbed repeatedly, strangled, and drowned. On the day of the murder, Shelley, her twin sister Stacey, and Stephanie Forsythe had been hitchhiking along a road near St. Petersburg, Florida. They were picked up by Dailey, Jack Pearcy, and Dwayne "Oza" Shaw. The three men drove the girls to a local bar. Stacey and Stephanie returned home shortly thereafter, but Shelley remained with the group and returned to Jack Pearcy's house. Dailey was living in Pearcy's home, where he had his own bedroom. Pearcy and his girlfriend, Gayle Bailey, shared a second bedroom. Shaw, a friend of Pearcy's from Kansas, was temporarily staying at Pearcy's house while he resolved marital issues. He slept on a couch in the living room.
>
> Shaw testified that on the night of the murder he drove with Pearcy and Boggio to a public telephone booth, where he was dropped off. Pearcy and Boggio then drove off alone. After speaking on the phone for several minutes, Shaw returned to the house on foot and fell asleep on the couch. Shaw testified that when he woke up later that night, he saw Pearcy and Dailey, but not Boggio, entering the house together. Shaw noticed that Dailey's pants were wet.
>
> The State presented testimony from the lead detective in the case, John Halladay, and three informants who were inmates at the same facility where Dailey was held while awaiting trial. One of the inmates, Paul Skalnik, testified that Dailey had struck a deal with Pearcy, who had also been charged with Boggio's murder. Skalnik testified that he relayed messages between Dailey and Pearcy. According to Skalnik, Dailey promised that if Pearcy did not testify at Dailey's trial, Dailey would attempt to exonerate Pearcy once he was acquitted.
>
> Based on the testimony of Shaw, Skalnik, and several other witnesses, Dailey was found guilty of first-degree murder and was sentenced to death.

Dailey v. State, 965 So. 2d 38, 41-42 (Fla. 2007) (footnote omitted). On direct appeal, we upheld the conviction but reversed the sentence. *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1991). The trial court again sentenced Dailey to death on remand. *Dailey v. State*, 659 So. 2d 246, 247 (Fla. 1995). We affirmed, *id.* at 248, and the Supreme Court denied Dailey's petition for a writ of certiorari, *Dailey v.*

Florida, 516 U.S. 1095 (1996). Thereafter, we affirmed the denial of Dailey's initial postconviction motion and denied his petition for a writ of habeas corpus. *Dailey*, 965 So. 2d at 41. We also affirmed the denial of his first successive postconviction motion. *Dailey v. State*, 247 So. 3d 390, 391 (Fla. 2018).

On June 21, 2017, Dailey filed a second successive postconviction motion, raising three claims. He asserted that: (1) newly discovered evidence requires that his conviction be overturned; (2) the State committed *Brady*[1] and *Giglio*[2] violations; and (3) his death sentence is unconstitutional because he is innocent. Following a case management conference, the circuit court granted an evidentiary hearing on two newly discovered evidence claims. Dailey subsequently requested that the court take judicial notice of certain documents; his request was denied.

After the evidentiary hearing, the circuit court issued a final order rejecting all claims. Dailey now appeals the circuit court's order and its denial of his request for judicial notice.

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1. *Brady v. Maryland*, 373 U.S. 83 (1963).

2. *Giglio v. United States*, 405 U.S. 150 (1972).

II. ANALYSIS

A. Newly Discovered Evidence

In his first claim, Dailey argues that newly discovered evidence exists in the form of: (1) an affidavit from Jack Pearcy, his codefendant; (2) testimony from Mike Sorrentino, James Wright, and Travis Smith, former inmates who were housed at the same jail as Dailey; (3) documents indicating that Paul Skalnik, an inmate who testified on behalf of the State at trial, is not a credible witness; and (4) an Indian Rocks Beach Police report.

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 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.* 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).

1. Jack Pearcy's affidavit

Dailey first appeals the circuit court's denial of his claim that a newly discovered affidavit from Jack Pearcy proves that Pearcy, who also was convicted of murdering Boggio, is solely responsible for the murder. When the lower court has ruled on a newly discovered evidence claim following an evidentiary hearing, we review its "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 the affidavit, Pearcy states: "James Dailey was not present when Shelly Boggio was killed. I alone am responsible for Shelly Boggio's death." But Pearcy refused to testify about any substantive assertion in the affidavit at the evidentiary hearing. After admitting that he signed the affidavit, he testified that its contents were not true. When asked to identify the untruthful statements, he responded, "I'm not sure. There's quite a few lines on there." Pearcy eventually stated that paragraphs one and two—which listed his name and status as an inmate, and recognized that he had been convicted of Boggio's murder and sentenced to life imprisonment—were true. When questioned about the truthfulness of each remaining paragraph, Pearcy invoked the Fifth Amendment. He continued to do so after the court compelled him to answer.

Following the hearing, the circuit court held that the affidavit was inadmissible hearsay. Dailey alleges that the court erred in so ruling because the affidavit is admissible as a statement against interest and a third-party admission of guilt under *Chambers v. Mississippi*, 410 U.S. 284 (1973). Because neither exception to the hearsay rule applies, we affirm the lower court's ruling.

Dailey first argues that the affidavit is admissible as a declaration against interest under section 90.804(2)(c), Florida Statutes (2017). But the circuit court was justified in concluding that under the circumstances here, Pearcy's assertion that he alone killed Boggio was not a statement which "a person in the declarant's position would not have made . . . unless he or she believed it to be true." § 90.804(2)(c), Fla. Stat. (2017). Pearcy had already been convicted of the crime to which he confessed. He did not expose himself to any additional criminal liability for Boggio's murder by accepting sole responsibility for her death. *See Marek v. State*, 14 So. 3d 985, 995 (Fla. 2009). Further, given that Pearcy claimed the affidavit was false and refused to testify about any of its substantive assertions, we agree with the circuit court's determination "that Pearcy's affidavit is hearsay of an exceptionally unreliable nature and does not qualify as a statement against interest."

Nor does the affidavit qualify as a third-party admission of guilt under *Chambers*. In *Bearden v. State*, 161 So. 3d 1257, 1265 (Fla. 2015), we identified

four factors relevant to determining whether a third party's hearsay confession may be admitted as substantive evidence:

> (1) 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.

Dailey contends that the second factor has been met because the statements in Pearcy's affidavit are corroborated by Juan Banda—who testified that Pearcy said Dailey was innocent of the crime for which he had been sentenced to death—and Travis Smith—who testified that Pearcy claimed the murder charge "was his charge and his charge alone." But regardless of any corroborating evidence, we conclude that all other factors weigh heavily in favor of excluding the affidavit. The first factor is not satisfied; the affidavit was executed more than thirty years after the murder, not shortly after the crime occurred. The affidavit similarly fails to meet the third factor. Pearcy's statement in the affidavit that he alone killed Boggio is not unquestionably against his interest. Pearcy had already been tried, convicted, and sentenced for Boggio's murder at the time the affidavit was executed. Finally, questions about the truthfulness of the affidavit arose when Pearcy testified that its contents were false. But Pearcy's persistent invocation of

the Fifth Amendment caused him to be unavailable for cross-examination. We therefore affirm the circuit court's denial of relief.

2. Testimony from Mike Sorrentino, James Wright, and Travis Smith

Dailey next argues that the circuit court erred in rejecting his claim that newly discovered evidence exists in the form of testimony from Mike Sorrentino, James Wright, and Travis Smith. All three are former inmates who were once incarcerated with Dailey. At the evidentiary hearing, each testified that detectives came to the county jail, called him into an interview room where newspaper articles about Boggio's murder were in plain view, and asked him if he had any information about the crime. Dailey contends that this testimony proves that detectives were attempting to suggest facts to potential witnesses.

Smith additionally stated that he knew Pablo DeJesus and James Leitner, two inmates who testified against Dailey at trial. Smith said that he never saw Dailey discuss his case with either of them. Smith claimed to have heard DeJesus and Leitner planning to tell prosecutors false information about Dailey in order to receive reduced sentences. Dailey contends that this testimony would have cast doubt on DeJesus's and Leitner's credibility.

The circuit court held that the instant claim was "untimely or otherwise procedurally barred." We agree. In his 1999 motion for postconviction relief, Dailey alleged that his trial counsel was ineffective for failing to utilize the

testimony of Wright, Sorrentino, and Smith. He claimed that Wright and Sorrentino could have testified that they were approached by detectives prior to his trial and were shown newspaper articles regarding the murder. Dailey further explained that Smith could have provided testimony that he overheard DeJesus and Leitner discussing their plan to falsely testify against Dailey. In 2004, Dailey chose to waive the claim "for strategic purposes," and the claim was later dismissed by the trial court.

This history demonstrates that the information Dailey now contends is newly discovered was known to him in 1999. "To be considered timely filed as newly discovered evidence," a successive rule 3.851 motion must be "filed within one year of the date upon which the claim became discoverable." *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). Because the motion was filed eighteen years after the claim was discovered, the claim is clearly procedurally barred.

In response, Dailey argues that his prior postconviction counsel was ineffective for waiving the earlier claim. He contends he is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). But his reliance on those decisions is misplaced. We have previously recognized that *Martinez* and *Trevino* only apply "to federal habeas proceedings" and therefore "do[] not provide an independent basis for relief in state court." *Banks v. State*, 150 So. 3d 797, 800 (Fla. 2014) (quoting *Howell v. State*, 109 So. 3d 763,

774 (Fla. 2013)). "Moreover, we have 'repeatedly held that claims of ineffective assistance of postconviction counsel are not cognizable.' " *Id.* (quoting *Howell*, 109 So. 3d at 774). Accordingly, we affirm the circuit court's denial of relief.

3. Evidence discrediting Paul Skalnik's testimony

Dailey next argues that the circuit court erred in summarily dismissing his claim that newly discovered evidence discredits the testimony of Paul Skalnik, an inmate who testified against Dailey at trial. We review a circuit court's summary rejection of a postconviction claim de novo, "accepting the movant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively shows that the movant is entitled to no relief." *Pardo v. State*, 108 So. 3d 558, 561 (Fla. 2012) (quoting *Gore v. State*, 91 So. 3d 769, 774 (Fla. 2012)).

In support of his claim, Dailey relies on documents allegedly demonstrating that: Skalnik had made false allegations against correctional officers; Skalnik had been described by a probation officer as manipulative; Skalnik's trial testimony about his criminal history was incomplete; and that the State was considering offering him a reduced sentenced in exchange for testifying against Dailey, even though Skalnik claimed at trial that he had not made a deal with the State. Finally, Dailey claimed that Skalnik's former attorney would testify that Skalnik had received preferential treatment from the State.

The circuit court found that the claim was untimely. We agree. As recognized by the circuit court, all evidence presented by Dailey "could have been discovered earlier through due diligence." The date on each document supporting this claim reflected that it was created in the 1980s. And information about any arrangement Skalnik had with the State "would have also been discoverable through due diligence around 1987," when Dailey was tried and sentenced.

Dailey neglects to explain why this information could not have been discovered earlier. Instead, he argues that his postconviction counsel was ineffective for failing to previously discover it and contends that any untimeliness should be excused under *Martinez* and *Trevino*. Because this argument is meritless, we affirm the circuit court's summary dismissal of the instant claim.

4. Indian Rocks Beach Police report

Dailey next argues that the circuit court erred in summarily dismissing his claim that a newly discovered Indian Rocks Beach Police (IRBP) report proves he was not with Pearcy when Boggio was killed. The report contains statements made by Oza Shaw, who testified against Dailey at trial, during an interview with IRBP detectives in May of 1985. According to the account in the report, Shaw told the detectives that he, Dailey, Pearcy, and Boggio all went to Pearcy's house on the night of the murder. Pearcy and Boggio then gave Shaw a ride to a nearby telephone booth. After making a phone call, Shaw walked back to the house. He

later observed Pearcy return home to pick up Dailey, but did not see Boggio with Pearcy. Pearcy and Dailey then left the house together, and Shaw fell asleep. He was awakened when the two returned later that night. As they entered the house, Shaw noticed that Dailey's pants were wet.

The version of events described in the IRBP police report differed from Shaw's original trial testimony, in which Shaw did not mention seeing Pearcy return home alone to pick up Dailey. Rather, in the trial testimony, Shaw only recalled seeing Pearcy and Dailey return home together at the end of the night. Dailey appears to argue that Shaw's statements in the IRBP report suggest that Pearcy killed Boggio alone.

The circuit court denied the claim as untimely, concluding that the IRBP report had been "raised in the context of a *Brady* claim, which [Dailey] abandoned at the evidentiary hearing on [his] initial postconviction motion." Dailey asserts that, contrary to the lower court's holding, the *Brady* claim in his earlier postconviction motion is distinguishable from the claim at hand because they relate to different documents associated with different law enforcement officers.

Regardless of whether the *Brady* claims are distinct, we conclude that the circuit court properly denied relief. First, the claim is untimely because Dailey has failed to explain why information in a report from 1985 could not have been previously discovered by use of reasonable diligence. He only argues that prior

postconviction counsel was ineffective for failing to discover it and asserts entitlement to relief under *Martinez* and *Trevino*. This argument is unavailing.

We note that in any event, the statements in the IRBP report fail to satisfy the second prong of *Jones*. In the version of events described in the IRBP report, Shaw still recalled seeing Pearcy and Dailey return to the house together without Boggio late that night. He also remembered that Dailey's pants were wet; Boggio was found in the water. *Dailey*, 965 So. 2d at 41. Therefore, the statements in the IRBP report would not probably produce an acquittal upon retrial. The instant claim is accordingly meritless.

5. Cumulative analysis

Dailey next argues that the circuit court erred in failing to conduct a cumulative analysis. Generally, in determining whether newly discovered evidence would likely produce an acquittal upon retrial, a court must evaluate "the effect of the newly discovered evidence, in addition to all of the admissible evidence that could be introduced at a new trial." *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014). But given that all of Dailey's newly discovered evidence claims were either correctly rejected as untimely or based on inadmissible evidence, no such analysis was necessary. Thus, Dailey is not entitled to relief on this claim.

B. *Giglio* Violations

Dailey next argues that the lower court erred in summarily dismissing his claim that the State committed two *Giglio* violations.[3] First, Dailey contends that the State failed to correct Paul Skalnik's false trial testimony about his criminal history. At trial, Skalnik testified that the charges against him were "grand theft . . . not murder, not rape, no physical violence in my life." Dailey asserts that this testimony is a significant understatement of Skalnik's criminal history because it omits that Skalnik had previously been charged with lewd and lascivious conduct on a child under fourteen years of age.

The second alleged *Giglio* violation stems from the State's impeachment of Oza Shaw at the evidentiary hearing on Dailey's initial postconviction motion. There, Shaw testified that on the night of the murder, he saw Pearcy come home alone, without Boggio, and walk into Dailey's bedroom. He claimed that the pair then left the house and returned together later that night. On cross-examination, the State impeached Shaw with his trial testimony, which made no mention of Pearcy returning home without Boggio to pick up Dailey. Dailey contends that the State's line of questioning was improper because it suggested that Shaw's

3. Though *Brady* is listed in the heading of the claim and is cited once in the body of the brief, Dailey does not raise any arguments under *Brady*.

testimony at the hearing was a recent fabrication, even though Shaw provided an identical version of events in the May 1985 interview with IRBP detectives.

The circuit court rejected both *Giglio* claims. We affirm because each claim fails on the merits. 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). The statement is "material 'if there is any reasonable possibility that it could have affected the' " judgment of the factfinder. *Id.* (quoting *Tompkins v. State*, 994 So. 2d 1072, 1091 (Fla. 2008)).

Even assuming he could establish the first two prongs of *Giglio*, Dailey's first claim fails because Skalnik's testimony about his criminal history was not material. Dailey suggests that the jury would be less likely to believe Skalnik's testimony about Dailey if it knew of the lewd and lascivious conduct charge. But Skalnik's credibility was already compromised because the jury was aware that he had committed multiple crimes. And Skalnik was not the only witness against Dailey; two other inmates also testified that Dailey confessed to the murder. *Dailey*, 594 So. 2d at 256. Accordingly, there is no reasonable possibility that information regarding Skalnik's lewd and lascivious assault charge would have affected the jury's verdict.

Initially, we note that while Dailey's next claim is based on postconviction testimony, Dailey has not cited to any case holding that *Giglio* applies to postconviction proceedings. *Cf. Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68-69 (2009) (rejecting *Brady*'s applicability at the postconviction stage). In any event, this claim fails under the first prong of *Giglio*. Though Dailey suggests that the State's questioning of Shaw was somehow misleading, he has not asserted that any part of Shaw's testimony at the evidentiary hearing was false. Accordingly, the claim is meritless.

C. Judicial Notice

Dailey next argues that the lower court erred in declining to take judicial notice under section 90.202, Florida Statutes (2017), of certain records, including court files of Pearcy, court files of the three inmates who testified against Dailey at trial, and deposition testimony from the prosecutor who tried Dailey's case. In the 2003 deposition, the prosecutor testified that she would not use Skalnik as a witness again, because she feared he would testify dishonestly.

Judicial notice is reviewed for an abuse of discretion. *See Morton v. State*, 995 So. 2d 233, 244 (Fla. 2008). We conclude that the circuit court did not abuse its discretion in declining Dailey's request because the documents were not relevant to either of the claims that were granted an evidentiary hearing. Dailey is therefore not entitled to relief on this claim.

D. Actual Innocence

Dailey last contends that the circuit court erred in summarily rejecting his claim that he is actually innocent. His argument lacks merit because freestanding claims of actual innocence are not cognizable under Florida law. *Tompkins*, 994 So. 2d at 1089. Accordingly, we affirm the circuit court's denial of relief.

III. CONCLUSION

For the reasons above, we affirm the circuit court's order denying in part and dismissing in part Dailey's successive motion for postconviction relief.

It is so ordered.

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

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED BY 4:00 P.M. ON TUESDAY, OCTOBER 8, 2019. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED BY 4:00 P.M. ON FRIDAY, OCTOBER 11, 2019. NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Pinellas County,
Frank Quesada, Judge - Case No. 521985CF007084XXXXNO

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for Amicus Curiae Right Reverend Neil Lebhar, Bishop of the Gulf Atlantic Diocese of the Anglican Church in North America

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for Amicus Curiae the Innocence Network

Filing # 97252696 E-Filed 10/14/2019 05:07:07 PM

Supreme Court of Florida

MONDAY, OCTOBER 14, 2019

CASE NO.: SC18-557
Lower Tribunal No(s).:
521985CF007084XXXXNO

JAMES MILTON DAILEY vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and Clarification is hereby denied.

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

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

CHRISTINA Z. PACHECO
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ELLIOT H. SCHERKER
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HON. FRANK QUESADA, JUDGE
LAURA FERNANDEZ
MICHAEL R. UFFERMAN
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SETH E. MILLER
SARA ELIZABETH MACKS
HON. KEN BURKE, CLERK
HON. ANTHONY RONDOLINO, CHIEF JUDGE
HON. PAT EDWARD SIRACUSA, JR., JUDGE

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.: CRC85-07084CFANO
UCN: 521985CF007084XXXXNO
DIV.: K
APP. NO.: SC17-1073

FILED
CRIMINAL COURT RECORDS
2018 MAR 20 AM 11:21
KEN BURKE
CLERK OF CIRCUIT COURT

FINAL ORDER DENYING IN PART AND DISMISSING IN PART DEFENDANT'S SECOND SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE; ORDER DISMISSING STATE'S MOTIONS TO STRIKE; DIRECTIONS TO CLERK

THIS CAUSE came before the Court upon Defendant's Second Successive Motion to Vacate Judgments of Conviction and Sentence, filed June 21, 2017, pursuant to Florida Rule of Criminal Procedure 3.851, and the State's Answer, filed July 11, 2017. On November 5, 2017, the Court held a case management conference and heard the parties' legal arguments. On January 3, 2018, the Court held an evidentiary hearing. Having considered the pleadings, the legal arguments of the parties, the record, the evidence received at the evidentiary hearing, and the 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).[1] 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). 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

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

motions for relief in state and federal court, each of which was dismissed or denied. Dailey v. State, 965 So. 2d 38 (Fla. 2007); Dailey v. Sec'y, 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. 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's appeal from the Court's order denying his successive motion to vacate death sentence is pending before the Florida Supreme Court in appellate case number SC17-1073.

On June 21, 2017, Defendant filed the instant motion, a second successive motion to vacate judgments of conviction and sentence. That same day, Defendant filed a motion in the Florida Supreme Court in appellate case number SC17-1073, requesting a temporary relinquishment of jurisdiction to this Court for consideration of the instant motion. On July 11, 2017, the State filed its answer to Defendant's second successive motion. On July 24, 2017, this Court entered a non-final order holding Defendant's second successive motion in abeyance pending completion of the appeal in appellate case number SC17-1073 or until jurisdiction otherwise returned to the Court. On July 27, 2017, the State filed a motion for rehearing, which the Court denied on August 15, 2017. On September 14, 2017, the Florida Supreme Court granted Defendant's motion to relinquish jurisdiction and relinquished jurisdiction to this Court for a period of sixty days. Defendant subsequently requested extensions of the relinquishment period from the Florida Supreme Court, which extended the relinquishment period through April 12, 2018.

On October 5, 2017, the Court held a status check to set the case management conference. The State, Attorney General, and counsel for the Defendant appeared at the status check. Due to scheduling issues, the parties unanimously agreed to set the case management conference for November 5, 2017.

On November 5, 2017, the Court held a case management conference pursuant to Rule 3.851(f)(5)(B). Assistant State Attorneys Kristi Aussner and James Hellickson, as well as Assistant Attorney General Christina Pacheco were present for the State. Assistant Capital Collateral

Regional Counsel Chelsea Shirley, Maria DeLiberato, and Julissa Fontán were present for the Defendant. The Court granted Defendant's request to appear at the case management conference via telephone.[2] At the case management conference, the Court heard legal argument relating to the timeliness of the instant motion and the parties agreed that they would be available on January 2, 2018, for an evidentiary hearing if the Court found that an evidentiary hearing was necessary. On November 13, 2017, the Court entered a non-final order granting an evidentiary hearing in part on Defendant's motion and set the evidentiary hearing for January 3, 2018.[3]

The State and Defendant filed several motions regarding three issues in advance of the evidentiary hearing. First, on December 8, 2017, and December 11, 2017, the State filed substantively-identical requests for judicial notice, asking this Court to take judicial notice of Jack Pearcy's companion court file in CRC85-07851CFANO. On December 12, 2017, Defendant filed a request for judicial notice, asking the Court to take judicial notice of Pearcy's court file in CRC85-07851CFANO, Pearcy's court files in twelve Kansas case numbers, James Leitner's two Pinellas court files, Leitner's Colorado case file, Pablo DeJesus' five Pinellas court files, Paul Skalnik's ten Pinellas court files, and Skalnik's fifteen court files in other jurisdictions.[4] On December 15, 2017, the State filed an objection to the Defendant's request for judicial notice. Second, on December 11, 2017, Defendant filed two requests for additional public records, asking the Court to order the Pinellas County Sheriff's Office (PCSO) and the Florida Department of Law Enforcement (FDLE) to provide copies of prospective State witness Detective John Halliday's personnel files. On December 18, 2017, PCSO filed an objection to the request for public records. On December 20, 2017, FDLE filed an objection to the request for public records. Third, on December 18, 2017, Defendant filed a verified motion for foreign attorney Laura Fernandez to appear *pro hac vice*. On December 19, 2017, the State filed a "motion to clarify" Ms. Fernandez's proposed representation.

On December 21, 2017, the Court held a status check to resolve the three issues raised in advance of the evidentiary hearing. Counsel for the State, Attorney General, and PCSO appeared in person. Counsel for the Defendant, FDLE, and Ms. Fernandez appeared by telephone. At the

[2] The Court's October 25, 2017, order is hereby incorporated by reference.
[3] The Court's November 13, 2017, order is hereby incorporated by reference.
[4] At the Clerk's request, Defendant filed copies of these documents on compact discs because the volume of the documents (over 6,000 pages) was too burdensome for the Clerk to file in paper form. Defendant provided the State and the Court with courtesy copies on compact discs.

status check, the Court orally denied Defendant's requests for additional public records, granted the motion for Laura Fernandez to appear *pro hac vice*, and notified the Defendant that it would not take a blanket judicial notice of all the court records requested by the Defendant. Instead, the Court instructed Defendant to bring paper copies of the requested documents for judicial notice to the evidentiary hearing, to establish their relevancy at the evidentiary hearing. That same day, the Court entered written orders denying the request for additional public records and granting the motion to appear *pro hac vice*, to memorialize its oral ruling.[5]

On January 3, 2018, the Court held the evidentiary hearing. The Defendant was present at the evidentiary hearing with his counsel, Assistant Capital Collateral Regional Counsel Chelsea Shirley, Maria DeLiberato, and Julissa Fontán, *pro hac vice* counsel Laura Fernandez, and Innocence Project director Seth Miller. Assistant State Attorneys James Hellickson, Glenn Martin, Sara Macks, and Kristi Aussner appeared with Assistant Attorney General Christina Pacheco for the State.

After Defendant failed to bring paper copies of his proposed records for judicial notice to the evidentiary hearing, the Court orally granted Defendant ten days' leave to file a reduced list of records for judicial notice and explain how the records were relevant to his motion. On January 10, 2018, the State filed an objection to Defendant's reduced list of records for judicial notice, and attached a copy of the Defendant's reduced list of proposed records for judicial notice. On January 18, 2018, the Court held a status check at which it heard additional legal argument regarding the request for judicial notice and reserved ruling pending a written order. On January 19, 2018, the Court entered a written order granting in part and denying in part Defendant's request for judicial notice.[6] That same day, Stenographic Court Reporting filed the evidentiary hearing transcript.

On February 19, 2018, the parties timely filed their written closing arguments. Defendant simultaneously filed a motion to file written closing arguments in excess of page limitation. On February 22, 2018, the Court entered a written order granting Defendant's motion to exceed the page limitation.[7] On February 23, 2018, the State filed a motion to strike portions of Defendant's closing argument. On February 26, 2018, Defendant filed a response to the State's motion to strike.

On March 1, 2018, the State filed a notice of supplemental authority. On March 2, 2018,

[5] The Court's two December 21, 2017, orders are hereby incorporated by reference.
[6] The Court's January 19, 2018, order is hereby incorporated by reference.
[7] The Court's February 22, 2018, order is hereby incorporated by reference.

Defendant filed a reply to the State's notice of supplemental authority. That same day, the State filed a motion to strike Defendant's reply.

ANALYSIS

Defendant raises three claims in the instant, second successive motion to vacate judgments of conviction and sentence. First, Defendant claims that newly-discovered evidence exists in the form of (A) an affidavit from codefendant Jack Pearcy, (B) affidavits from Frank Sorrentino and James Wright, inmates who were housed at the Pinellas County Jail with the Defendant, (C) various documents indicating that Paul Skalnik, a Pinellas County Jail inmate who testified against the Defendant at trial, testified dishonestly at trial and has a reputation for dishonesty, and (D) an Indian Rocks Beach Police report. Second, Defendant claims that the State violated Brady[8] and Giglio[9] by failing to correct Paul Skalnik's false testimony at trial and by misrepresenting Oza Shaw's testimony to the Court during the evidentiary hearing on Defendant's initial motion for postconviction relief. Third, Defendant claims that he is actually innocent and contends that his death sentence violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the Florida Constitution.

A motion for collateral relief from a death sentence must be filed within one year after the judgment and sentence become final. See Fla. R. Crim. P. 3.851(d)(1). Pursuant to Rule 3.851(d)(1), a judgment and sentence become final upon expiration of the time permitted to file a petition for writ of certiorari with the United States Supreme Court seeking review of the Florida Supreme Court's decision affirming a judgment and sentence of death or, if filed, upon the U.S. Supreme Court's disposition of the petition. Defendant's judgment and sentence became final on November 21, 1995, when the Supreme Court of the United States denied Defendant's petition for writ of certiorari to review the Florida Supreme Court's opinion affirming his sentence. Unless Defendant can establish that the instant motion falls under an enumerated exception to the time limit, it must be dismissed as untimely. See Fla. R. Crim. P. 3.851(e)(2). To that end, Defendant alleges that his motion is timely pursuant to the exception enumerated in Rule 3.851(d)(2)(A), which permits an otherwise untimely claim if "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." Fla. R. Crim. P. 3.851(d)(2)(A).

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

[9] Giglio v. United States, 405 U.S. 150 (1972).

In order to set aside a conviction based on a newly discovered witness or evidence, the Defendant must allege and prove that 1) 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 them by the use of diligence, and 2) the nature of the evidence is such that it would probably produce an acquittal on retrial. See Rutherford v. State, 926 So. 2d 1100, 1107 (Fla. 2006) (citing Jones v. State, 591 So. 2d 911, 915–16 (Fla. 1991) (Jones I)). In determining whether the newly discovered evidence requires a new trial, the Court must weigh the newly discovered evidence against the evidence presented at trial and must consider whether the evidence constitutes impeachment evidence or relates to the merits of the case. See Jones v. State, 709 So. 2d 512, 521 (Fla. 1998) (Jones II). "The trial court should also determine whether this evidence is cumulative to other evidence in the case. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence." Id.

Claim One (A) – Newly-Discovered Evidence Based on Affidavit of Codefendant Jack Pearcy

Defendant claims that newly-discovered evidence exists establishing that codefendant Jack Pearcy is solely responsible for Shelly Boggio's death. In support of his claim, Defendant attaches an affidavit, executed by Jack Pearcy on April 20, 2017, in which Jack Pearcy attests that Defendant was not present when Shelly Boggio was killed and that Jack Pearcy alone is responsible for her death. Defendant concludes that Jack Pearcy's affidavit could not have been discovered earlier using due diligence and is of the nature such that it would probably produce an acquittal upon retrial.

In response, the State contends that Claim One (A) is untimely and procedurally barred because Defendant raised a similar affidavit by Pearcy as newly-discovered evidence in Defendant's initial motion for postconviction relief. See Dailey v. State, 965 So. 2d 38, 46 (Fla. 2007). The State contends that the only difference between Pearcy's prior affidavit and the instant affidavit is that Pearcy now admits that he alone is responsible for Shelly Boggio's death, a difference which the State believes is crafted to overcome the evidentiary hurdles Defendant previously faced in the evidentiary hearing on Pearcy's prior affidavit. See id. (holding that the trial court's treatment of Jack Pearcy's affidavit as uncorroborated hearsay was proper where Jack Pearcy refused to testify to the contents of the affidavit and the affidavit did not qualify as a statement against interest because Pearcy did not take full responsibility for the murder). The State concludes that, because Pearcy previously provided a similar affidavit, the instant affidavit is

successive and time-barred. The State further argues that Pearcy's statement is inadmissible hearsay which does not fall under any exception to the rule against hearsay. In its non-final order entered on November 13, 2017, the Court found that Claim One (A) was timely and granted an evidentiary hearing.

Summary of Evidentiary Hearing Testimony[10]

Witnesses Jack Pearcy, Lisa Bort, Juan Banda, and Travis Smith testified at the evidentiary hearing as to Claim One (A). Jack Pearcy refused to testify to any meaningful assertion in the affidavit. After admitting that he signed an affidavit in this case, Pearcy testified that the statements in the affidavit were not true. (*V. 2: p. 12, lines 1–6*). When asked which statements in the affidavit were not true, Pearcy replied, "I'm not sure. There's quite a few lines in there." (*V. 2: p. 12, lines 7–9*). During a proffer, Pearcy admitted that paragraphs 1 and 2 of his affidavit[11] were true statements and invoked the Fifth Amendment when asked whether the remaining paragraphs of the affidavit were true. (*V. 2: p. 14, line 14 – p. 16, line 6*). After the Court compelled Pearcy to answer counsel's questions, Pearcy refused to answer the question and continued to invoke the Fifth Amendment. (*V. 2: p. 19, line 23 – p. 20, line 3*).

Lisa Bort, a CCRC attorney and notary, testified that she accompanied Ms. Shirley to visit Jack Pearcy in prison. (*V. 2: p. 29*). Ms. Bort testified that Mr. Pearcy read each line of the affidavit before signing it. (*V. 2: p. 31, lines 7–10*). Neither she nor Ms. Shirley coerced, forced, or promised Pearcy anything in order to obtain his signature on the affidavit. (*V. 2: p. 34*). Ms. Bort further testified that Pearcy did not seem hesitant or distressed, and that he appeared to understand the contents of the affidavit. (*V. 2: pp. 32–33*). Ms. Bort had no concerns that would have prevented her from notarizing Pearcy's signed affidavit. (*V. 2: p. 33, lines 19–23*).

Juan Banda, who was incarcerated with Pearcy, testified that Pearcy told him on two occasions that Dailey was innocent. (*V. 1: pp. 80–83*). Mr. Banda testified that Pearcy has never told him that Pearcy is solely responsible for Shelly Boggio's death, and has never admitted his guilt. (*V. 1: pp. 86–87*).

Travis Smith, who was incarcerated with Pearcy, testified that Pearcy told him that he

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[10] Citations to the January 3, 2018, evidentiary hearing transcript will be designated by the volume number followed by the page number, "v._: p._," mirroring the citation format used by counsel in their written closing arguments.

[11] Paragraph 1 reads: "My name is Jack Pearcy and I am an inmate at Sumter Correctional Institution. My DOC number is: 106311. I was James Dailey's co-defendant in the above mentioned case." Paragraph 2 reads: "I was tried and sentenced to life imprisonment with the possibility of parole for the murder of Shelly Boggio."

committed the crime himself and he did it. (*V. 1: p. 61, lines 1–4*).

Findings

The Jones test for newly-discovered evidence requires the Defendant to allege *and prove* that there is newly-discovered evidence which 1) 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 them by the use of diligence, and 2) the nature of the evidence is such that it would probably produce an acquittal on retrial. See Rutherford v. State, 926 So. 2d 1100, 1107 (Fla. 2006). The newly-discovered evidence alleged in this claim is Pearcy's affidavit which attests, in pertinent part, that he alone is responsible for Shelly Boggio's death and that Dailey was not present when she was killed. At the evidentiary hearing, however, Pearcy testified that "quite a few lines" of the affidavit are false statements, and refused to testify as to any meaningful assertion in the affidavit. Accordingly, the Court found that the affidavit was inadmissible hearsay and did not admit the affidavit into evidence, but accepted it as a proffer. Unless a hearsay statement falls under an exception to the rule against hearsay, it is inadmissible as evidence. See § 90.802, Fla. Stat. (2017).

To that end, Defendant contends that the Court must consider Pearcy's affidavit as evidence under the hearsay exception for statements against interest or as a third-party admission of guilt under Chambers v. Mississippi[12] and Holmes v. South Carolina.[13] Defendant contends that Pearcy's affidavit qualifies as a statement against interest or third party admission of guilt because the difference between the current affidavit and Pearcy's prior sworn statements expose him to prosecution for perjury. In response, the State contends that the affidavit is inadmissible hearsay which does not qualify as a declaration against penal interest because Pearcy's affidavit does not expose him to criminal liability, citing to Marek v. State, 14 So. 3d 985, 995 (Fla. 2009). Additionally, the State contends that the Court should not consider Pearcy's affidavit as a third-party admission to guilt under Chambers and its progeny because the affidavit lacks the sufficient indicia of reliability for admission of hearsay statements.

This Court is persuaded by the State's argument and finds that Pearcy's affidavit is

[12] 410 U.S. 284, 289 (1973) (holding that, because Mississippi does not allow a defendant to impeach his own witness, the trial court violated Chambers' due process rights when it prohibited Chambers from introducing evidence that another person had confessed to the crime).

[13] 547 U.S. 319, 331 (2006) (holding that a South Carolina rule of evidence which prohibited defendants from introducing evidence of third-party guilt if the prosecution had introduced forensic evidence which strongly supports a guilty verdict was unconstitutional).

inadmissible hearsay which does not fall under any exception to the rule against hearsay and is not the kind of statement which is admissible as a third party admission of guilt under Chambers. To qualify as a statement against interest, the declarant must be unavailable to testify and give

> [a] statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

§ 90.804(2)(c), Fla. Stat. (2017). Pearcy's refusal to testify after being compelled to do so rendered him unavailable to testify to the substance of his affidavit. See § 90.804(2), Fla. Stat. (2017). However, the statements made in Pearcy's affidavit are not contrary to his interests and do not expose Pearcy to liability. Pearcy has already been convicted and sentenced for Shelly Boggio's murder. See Dailey v. State, 965 So. 2d 38, 46 (Fla. 2007) (affirming the Court's finding that Pearcy's prior sworn statement was inadmissible hearsay and noting that Pearcy has had numerous opportunities to testify on Dailey's behalf after his conviction for this offense). Taking full responsibility for a crime for which he has already been convicted and sentenced is not contrary to Pearcy's pecuniary interests because it does not further expose him to any criminal liability. Additionally, Florida's civil statutes of limitation prevent Pearcy's affidavit from exposing him to civil liability. See §§ 95.11(3)(o), 95.11(4)(d), Fla. Stat. (2017) (providing a four-year statute of limitations for intentional torts and a two-year statute of limitations for wrongful death actions).

Noting that Pearcy is already serving a life sentence for the murder in this case, the Court is not persuaded by Defendant's argument that the potential for a perjury charge is so significant that Pearcy would not have made the statement if it were not true. Indeed, Pearcy's failure to answer counsel's questions after the Court compelled him to do so exposed Pearcy to being held in direct criminal contempt and his sworn testimony that "quite a few lines" of the affidavit are not true exposed him to prosecution for perjury. Pearcy's nonchalant demeanor at the evidentiary hearing, admission that portions of his affidavit are not true statements, and refusal to testify after being compelled to do so indicate that Pearcy is not genuinely concerned about exposing himself to minor criminal liability related to his testimony. Additionally, Pearcy's testimony that "quite a

few lines" of his affidavit were not true and subsequent refusal to testify to any meaningful assertions in the affidavit is a peculiar set of circumstances which prompts this Court to find that Pearcy's affidavit is hearsay of an exceptionally unreliable nature and does not qualify as a statement against interest.

Additionally, the Court finds that Pearcy's affidavit is not admissible as a third party admission under Chambers. In Bearden v. State, 161 So. 3d 1257 (Fla. 2015), the Florida Supreme Court explained that courts should evaluate whether a statement is admissible as a third party admission of guilt using a four-factor test:

> (1) 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.

Id. at 1265. Pearcy's affidavit fails each factor of the test set forth in Bearden. First, the affidavit is not a spontaneous statement because Pearcy made the statement approximately thirty years after the offense. Second, the affidavit is not corroborated by other significant evidence. To the contrary, Pearcy testified that portions of the affidavit were not true, which discredits his own statement. Additionally, Travis Smith's testimony that Pearcy told him that it was Pearcy's charge alone and Juan Banda's testimony that Pearcy told him Dailey is innocent both constitute inadmissible hearsay statements which do not fall under any exception to the rule against hearsay. Ms. Bort's testimony, while establishing that Pearcy knowingly and voluntarily signed the affidavit, does not corroborate the facts contained in the affidavit. Third, the affidavit is not unquestionably against Pearcy's interests. Pearcy has already been tried, convicted, and sentenced to life for Shelly Boggio's murder. Pearcy exposes himself to no criminal or civil liability by confessing to her murder now.[14] Fourth, the facts and circumstances of this case prompt this Court to highly question the veracity of the statement, and Pearcy's refusal to testify as to any meaningful assertion in the

[14] While there was some proffered testimony tending to suggest that Pearcy's refusal to testify to his affidavit could be motivated by a desire to eventually be released on parole, there was no evidence to show that it was actually Pearcy's reason for refusing to testify. (*V. 2: pp. 21–22*). Even if it had amounted to relevant, admissible testimony, the nature of Florida's parole system does not prompt this Court to be concerned that Pearcy's affidavit would create any unquestionable liability as it relates to parole.

affidavit demonstrate that he is unavailable for cross-examination as to the truthfulness of the affidavit. Accordingly, this Court finds that Pearcy's affidavit is inadmissible as a third party admission under Chambers and Bearden. See id.; see also Marek, 14 So. 3d at 995.

Although Mr. Pearcy's affidavit formed the basis for Defendant's allegation of newly-discovered evidence, Defendant failed to provide any admissible evidence to prove his claim. Thus, Claim One (A) fails the first prong of the Jones test. Because the Defendant failed to prove the existence of any newly discovered evidence, the Court is unable to weigh the evidence under the second prong of the Jones test. Therefore, Claim One (A) is denied.

Claim One (B) – Newly-Discovered Evidence Based on Affidavits of Michael Frank Sorrentino and James Wright

Defendant claims that he has uncovered newly-discovered evidence that detectives actively sought out snitches to testify against the Defendant at trial. In support of his claim, Defendant attaches affidavits from Michael Sorrentino and James Wright. On June 12, 2017, Mr. Sorrentino executed an affidavit in which he attests that he was incarcerated with Defendant at the Pinellas County Jail and remembers that detectives came to the jail, placed newspaper articles about Defendant's case on a table, and asked him if anything looked familiar. Defendant also attaches an affidavit from James Wright, executed on May 9, 2017, in which Mr. Wright indicates that detectives came to the jail, provided newspaper articles about Shelly Boggio's murder, and asked Mr. Wright if the Defendant had told Mr. Wright anything about Defendant's case.

In response, the State maintained that Claim One (B) is untimely because the Defendant alleged, in his 1999 motion for postconviction relief, that trial counsel was ineffective for failing to call Sorrentino and Wright as witnesses at trial. The Court granted a hearing on Claim One (B) out of an abundance of caution.

Summary of Evidentiary Hearing Testimony

James Wright testified that he was incarcerated with the Defendant in the Pinellas County Jail during 1985 or 1986. (*V. 1: p. 17, lines 12–15*). Mr. Wright testified that a detective, whose name he could not recall, showed him a newspaper article about the Defendant's case. (*V. 1: pp. 18–19*). According to Mr. Wright, the detective asked him whether he had any information about the Defendant's case or if the Defendant had been talking to other inmates about his case. (*V. 1: p. 19, lines 8–15*). Although Mr. Wright's affidavit states that no one from Dailey's *trial* team ever came to speak with him, he testified at the evidentiary hearing that no one from Dailey's *defense*

team ever came to speak with him. (*V. 1: p. 30, lines 1–14*). Upon further cross-examination, Mr. Wright clarified that he meant that no one from Dailey's trial team came to visit him when he was in the county jail with Dailey. (*V. 1: pp. 31–32*). Mr. Wright testified that he spoke to Dailey's attorneys in 2003, but could not recall their names. (*V. 1: p. 33, lines 12–20*). Mr. Wright was not subpoenaed to testify at the 2003 evidentiary hearing. (*V. 1: p. 33, lines 21–23*).

Travis Smith testified that police officers came to the jail, showed him newspaper clippings about Dailey's case, and asked him if he had any information about the case. (*V. 1: pp. 57–58*). Mr. Smith testified that he talked with Dailey's defense team prior to trial and talked to Dailey's postconviction team. (*V. 1: pp. 62–63*).

Michael Sorrentino testified that he was incarcerated in the same pod as Mr. Dailey when an investigator began bringing inmates out of their cells to a conference room. (*V. 1: p. 68*). Mr. Sorrentino testified that, when it was his turn to go to the conference room, several articles about Dailey's case lay on a table, and the investigator asked him if Dailey ever talked about his case. (*V. 1: pp. 68–69*). Mr. Sorrentino testified that he had never talked to any of Dailey's attorneys before Ms. Shirley contacted him in May 2017. (*V. 1: pp. 72–73*).

Detective Halliday testified that he talked to a number inmates who were incarcerated with Dailey. (*V. 2: p. 40*). Detective Halliday recalled interviewing James Wright, Michael Sorrentino, and Travis Smith. (*V. 2: pp. 40, 42–46*). Detective Halliday testified that he never took a newspaper article into the interview, nor were there articles laying on the table when he was interviewing the inmates. (*V. 2: p. 42*).

Findings

As an initial matter, the Court notes that it granted a hearing on Claim One (B) out of an abundance of caution. At the evidentiary hearing, the State renewed its prior objection to the timeliness of the claim and maintained that Mr. Sorrentino and Mr. Wright's testimonies did not amount to newly discovered evidence. Having carefully considered the issue, the Court is persuaded that Claim One (B) is untimely or otherwise procedurally barred.

In his 1999 motion for postconviction relief, Defendant alleged that trial counsel was ineffective for failing to call Mr. Wright and Mr. Sorrentino as witnesses who would have testified that Detective Halliday approached them in the jail with articles about the murder, which would have been useful to impeach the snitch testimony at trial. *(See Exhibit A: Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence, pp. 25–26 (ROA pp. 29–30); Exhibit B:*

November 19, 2001, Transcript of Proceedings, p. 6, lines 13–20). Postconviction counsel waived the claim before the Defendant's postconviction evidentiary hearing due to a strategic reason, and Defendant agreed to the waiver. (*See Exhibit C: June 29, 2004, Transcript of Proceedings, p. 6, line 11 – p. 7, line 2*; *Exhibit D: November 5, 2004, Transcript of Proceedings, p. 7, lines 17 – p. 8, line 3*). After the Defendant expressly consented to abandoning the claim, the Court dismissed the claim. (*See Exhibit E: July 14, 2005, Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, pp. 19–20*). The instant claim does not qualify for the exception enumerated in Rule 3.851(d)(2)(A) because the facts alleged in Mr. Wright's and Mr. Sorrentino's newly discovered witness affidavits are the same facts which are alleged as an ineffective assistance of counsel claim Dailey raised in 1999 and waived in 2004. Therefore, Claim One (B) is dismissed as untimely. See Fla. R. Crim. P. 3.851(d)(2); see also Fla. R. Crim. P. 3.851(2).

Defendant contends that the Court should, nevertheless, consider the claim pursuant to the exception enumerated in Rule 3.851(d)(2)(C) because his postconviction counsel was ineffective and neglectful for failing to call them as witnesses at the initial postconviction evidentiary hearing. In support of his argument, Defendant cites to Martinez v. Ryan, 566 U.S. 1, 9 (2012) (holding, upon review of a federal habeas petition, that defendants are entitled to effective assistance of counsel during initial-review collateral proceedings). The State contends that ineffective assistance of prior postconviction counsel is not recognized by Florida law because Rule 3.851(d)(2)(C) allows for the filing of an untimely *motion* for postconviction relief when counsel, through neglect, failed to file the motion, and does not create an exception for the filing of untimely *claims*. The State further contends that Dailey cannot now argue that his prior postconviction counsel was ineffective for waiving the claim when Dailey specifically agreed with postconviction counsel's waiver.

The Court agrees that Martinez does not extend relief to this Defendant because this is not a federal habeas proceeding. In fact, binding authority supports the State's position that allegations of ineffective assistance of postconviction counsel do not qualify as an exception to the time bar under Rule 3.851(d). See Howell v. State, 145 So. 3d 774, 775 (Fla. 2013) (holding that defendants may not evade the time bar established by Rule 3.851(d)(1) by alleging that postconviction counsel was ineffective for failing to raise any specific claim).

Even if Defendant's claim were timely as newly discovered evidence, the Court notes that

Mr. Sorrentino's and Mr. Wright's testimonies do not amount to the kind of newly discovered evidence which would entitle the Defendant to relief under Jones. Assuming that Mr. Wright's and Mr. Sorrentino's testimonies meet the first prong of Jones, Claim One (B) would fail the second prong of Jones. Their testimonies are not relevant to any material issue at trial because neither man testified that they saw any snitches who testified in this trial be called into the interview room. Because Mr. Wright and Mr. Sorrentino each testified that they were interviewed in a private room without other inmates, the men can only speculate or provide hearsay testimony as to what was discussed during other inmates' interviews. Even if relevant and admissible, the weight of Mr. Wright's and Mr. Sorrentino's testimonies is weak. While their testimonies do not appear to be cumulative to the other evidence introduced at trial, their testimonies would amount to impeachment evidence, the value of which is questionable because Mr. Wright and Mr. Sorrentino did not testify to seeing any snitch who testified in this case be called into the interview room where the inmates were allegedly shown newspaper articles about Dailey's case. Neither Mr. Wright nor Mr. Sorrentino could remember the name of the investigator who allegedly showed them news articles about Dailey's case such to be used to impeach Detective Halliday's testimony that he did not show newspaper articles to the inmates. Therefore, the Court finds that, even if the claim was timely filed, the overall weight of the newly discovered evidence is weak such that there is no reasonable probability that it would produce an acquittal upon retrial. See Jones v. State, 709 So. 2d 512, 521–22 (Fla. 1998) (Jones II).

Cumulative Analysis

Defendant asks this Court to conduct a cumulative analysis of all newly discovered evidence presented in his conjunction with his current motion, along with all the evidence presented at trial and evidence presented in his previous postconviction motion. Noting that there was no newly discovered evidence proven to support Claim One (A) and Claim One (B) is untimely and otherwise does not give rise to any reasonable probability that the Defendant would be acquitted upon retrial, a cumulative analysis does not seem necessary. Unlike this case, the cases cited by Defendant involved favorable undisclosed evidence that the Court found had been actually suppressed. See Hildwin v. State, 141 So. 3d 1178, 1184 (Fla. 2014) (holding that a cumulative analysis was required to properly weigh newly discovered DNA evidence which entirely discredited scientific evidence which had been introduced at trial and demonstrated the DNA evidence belonged to the victim's boyfriend and not the defendant); see also Lightbourne

v. State, 742 So. 2d 238, 247 (Fla. 1999)("even if Carson's testimony does not establish a Brady violation, it nonetheless may qualify as newly discovered evidence that the trial court should evaluate, in light of the other evidence adduced since trial, to determine whether it would probably produce a different result."); Johnson v. State, 44 So. 3d 51, 53 (Fla. 2010), as revised on denial of reh'g (Sept. 2, 2010)(finding "the record here is so rife with evidence of previously undisclosed prosecutorial misconduct that we have no choice but to grant relief."). Even if Claim One (B) were timely, the Court notes that the cumulative effect of the weak impeachment evidence testified to at the evidentiary hearing, when considered with the totality of the evidence introduced at trial and at Dailey's prior postconviction evidentiary hearing, does not give rise to a reasonable probability that he would be acquitted upon a new trial.

Claim One (C) – Newly-Discovered Evidence that Witness Paul Skalnik is Dishonest

Defendant claims that Paul Skalnik, a jail inmate who testified against the Defendant at trial, testified dishonestly at trial and has a reputation for dishonesty. In support of his claim, Defendant raises several items of newly-discovered evidence, consisting of: 1) internal memos from Pinellas County Jail deputies indicating that Skalnik made false allegations against correctional officers while Skalnik was in the Pinellas County Jail, 2) a letter written by Skalnik's probation officer in Arizona, which describes Skalnik as manipulative, 3) notes from the State Attorney's file indicating that the State had not yet offered Skalnik a deal in exchange for his testimony against Defendant, to rebut Skalnik's trial testimony that he did not receive a deal 4) a criminal complaint charging Skalnik with a sexual offense against a minor, to rebut Skalnik's trial testimony as to his non-violent criminal history, and 5) information from Attorney Richard Watts, who represented Skalnik and would allegedly testify that, despite Skalnik's testimony that he did not receive a deal, Skalnik actually received preferential treatment from the State. Notably, counsel indicated at the case management conference Mr. Watts is a newly-discovered witness, to which the State objected because there Mr. Watts was not alleged as a newly-discovered witness in the motion and the lack of an affidavit from Mr. Watts prevents him from being treated as a newly-discovered witness.

In response, the State contends that Claim One (C) is untimely because the newly-discovered evidence regarding Skalnik's credibility could have been discovered earlier through due diligence. The State further argues that Claim One (C) is procedurally barred because Skalnik's credibility, including whether he was offered a deal by the State in exchange for his

testimony, has been subject to extensive postconviction litigation. (*See Exhibit E: pp. 39–41*).

The Court is persuaded by the State's argument and finds that Claim One (C), as alleged, is untimely. All of this information could have been discovered earlier using due diligence. The dates on the internal Pinellas County Sheriff Office memos range from 1987-1988, the document indicating that Skalnik's Arizona probation officer thought he is manipulative is dated 1984, Skalnik was charged with a sexual offense against a minor in 1982, the State's notes regarding its consideration of potential leniency on Skalnik appear to be dated 1987, and any actual preferential treatment Skalnik may have received from the State would have also been discoverable through due diligence around 1987. Therefore, Claim One (C) is dismissed.

To the extent that Defendant argues that the claim is timely under Rule 3.851(d)(2)(C) because his postconviction counsel was ineffective and neglectful for failing to raise the claim at the initial postconviction evidentiary hearing, the Court finds that Defendant is not entitled to relief. Rule 3.851(d)(2)(C) allows for the filing of an untimely *motion* for postconviction relief when counsel, through neglect, failed to file the motion, and does not create an exception for the filing of untimely *claims*. Additionally, allegations of ineffective assistance of postconviction counsel do not qualify as an exception to the time bar under Rule 3.851(d). See Howell v. State, 145 So. 3d 774, 775 (Fla. 2013) (holding that defendants may not evade the time bar established by Rule 3.851(d)(1) by alleging that postconviction counsel was ineffective for failing to raise any specific claim).

Claim One (D) – Newly-Discovered Evidence of Indian Rocks Beach Police Reports

Defendant alleges that an Indian Rocks Beach Police report from 1985 is newly discovered evidence that could not have previously been obtained through due diligence. Specifically, Defendant contends that the police report is likely to produce an acquittal upon retrial because the report reflects that Oza Shaw told detectives that Jack Pearcy came by the house where they were staying to pick up James Dailey, but he "didn't see the girl with them."

The State alleges that Claim One (D) is untimely because Defendant's prior postconviction counsel actually discovered the police report using due diligence and raised it as newly discovered evidence in Defendant's initial postconviction motion. Additionally, the State notes that Defendant made public records requests of numerous relevant law enforcement agencies and, in 1999, the Court found that the agencies had substantially complied with Defendant's public records requests.

This Court is persuaded by the State's argument and finds that Claim One (D) is untimely

without exception. The Indian Rocks Beach Police report, attached to Defendant's motion as Defendant's Exhibit K, reflects that it was created in 1985. The report could have been discovered via public records requests any time after its creation using due diligence and was, in fact, discovered by Defendant's prior postconviction counsel. Notably, the Indian Rocks Beach Police report was not raised as newly-discovered evidence, but was raised in the context of a Brady claim, which counsel abandoned at the evidentiary hearing on Defendant's initial postconviction motion. (*See Exhibit E: pp. 41–42*). Therefore, Claim One (D) is dismissed.

To the extent that Defendant argues that the claim is timely under Rule 3.851(d)(2)(C) because his postconviction counsel was ineffective and neglectful for failing to raise the claim at the initial postconviction evidentiary hearing, the Court finds that Defendant is not entitled to relief. Rule 3.851(d)(2)(C) allows for the filing of an untimely *motion* for postconviction relief when counsel, through neglect, failed to file the motion, and does not create an exception for the filing of untimely *claims*. Additionally, allegations of ineffective assistance of postconviction counsel do not qualify as an exception to the time bar under Rule 3.851(d). See Howell v. State, 145 So. 3d 774, 775 (Fla. 2013) (holding that defendants may not evade the time bar established by Rule 3.851(d)(1) by alleging that postconviction counsel was ineffective for failing to raise any specific claim).

Claim Two – Giglio Violations

Second, Defendant claims that the State committed two Giglio violations.[15] Specifically, Defendant alleges that the State failed to correct Paul Skalnik's false testimony at trial and, at Defendant's initial postconviction evidentiary hearing, improperly impeached witness Oza Shaw with his prior trial testimony, although Shaw's testimony at the evidentiary hearing is consistent with Oza Shaw's interview as recounted in the Indian Rocks Beach Police report.

At trial, Paul Skalnik testified as to the nature of his pending charges, four charges of grand theft by stating, "They were grand theft, counselor, not murder, not rape, no physical violence in my life." Defendant contends that Skalnik testified falsely by elaborating that he had no history of rape or physical violence in his life because Skalnik had been charged with lewd and lascivious

[15] Notably, the heading of Defendant's motion indicates that the State committed a Brady violation, but no Brady violations are alleged in the body of the motion. Based on the discussion at the case management conference, it seems that Defendant may have intended to allege that the State committed a Brady violation by withholding the Indian Rocks Beach Police report. However, Defendant raised and abandoned a substantially similar claim in 2005. (*See Exhibit E: pp. 41–42*).

battery on a minor. Defendant concludes that the State knew the testimony was false because the Pinellas County State Attorney filed the lewd and lascivious battery charge, and failed to correct Skalnik's false testimony.

At Defendant's initial postconviction evidentiary hearing, Oza Shaw testified that Jack Pearcy, Defendant, Gayle Bailey, and Shelly Boggio returned to the apartment, then Jack Pearcy and Shelly Boggio gave Mr. Shaw a ride to the telephone booth. Mr. Shaw returned home after the phone call and fell asleep. When he awoke, Jack Pearcy came home alone, picked up the Defendant, and the two left the house. On cross, the State impeached Mr. Shaw with his trial testimony, suggesting that Mr. Shaw's testimony that Pearcy returned home with the victim and then picked up Defendant was a recent fabrication. Defendant seems to contend that, because the Indian Rocks Beach Report contains a recitation that is similar to Mr. Shaw's testimony at the initial postconviction evidentiary hearing, the State improperly impeached Defendant's testimony to the point that the State committed a Giglio violation.

The State, in response, alleges that Claim Two is untimely, procedurally barred, and meritless. The State alleges that the Giglio claim regarding Skalnik's alleged false testimony could have been raised shortly after the 1987 trial because Skalnik's criminal charge, filed in 1982, was known or easily discoverable using due diligence. The State further alleges that there was, in fact, no Giglio violation concerning the testimony of Oza Shaw at the postconviction evidentiary hearing and that any claim of a Giglio violation concerning Mr. Shaw's testimony and the Indian Rocks Beach police report is time-barred because postconviction counsel knew of Mr. Shaw's testimony and the police report at the time of the initial postconviction evidentiary hearing.

This Court is persuaded by the State's argument and finds that Claim Two is untimely. The facts regarding Skalnik's criminal history, as well as Skalnik's reputation for dishonesty were either known at the time of trial or could have discovered easily afterward via public records requests. Additionally, Defendant and prior postconviction counsel knew of the Indian Rocks Beach Police report in 2005, when counsel abandoned a Brady claim related to the police report. Because prior postconviction counsel was present for Mr. Shaw's testimony at the 2005 evidentiary hearing on Defendant's initial postconviction motion, counsel could have raised any Giglio claims regarding the relationship between the report and Mr. Shaw's testimony either at the 2005 evidentiary hearing or shortly thereafter. (*See Exhibit E: pp. 41–45*). Therefore, Claim Two is dismissed.

To the extent that Defendant argues that the claim is timely under Rule 3.851(d)(2)(C) because his postconviction counsel was ineffective and neglectful for failing to raise the claim at the initial postconviction evidentiary hearing, the Court finds that Defendant is not entitled to relief. Rule 3.851(d)(2)(C) allows for the filing of an untimely *motion* for postconviction relief when counsel, through neglect, failed to file the motion, and does not create an exception for the filing of untimely *claims*. Additionally, allegations of ineffective assistance of postconviction counsel do not qualify as an exception to the time bar under Rule 3.851(d). See Howell v. State, 145 So. 3d 774, 775 (Fla. 2013) (holding that defendants may not evade the time bar established by Rule 3.851(d)(1) by alleging that postconviction counsel was ineffective for failing to raise any specific claim).

Claim Three – Actual Innocence

Third, Defendant alleges that the newly discovered evidence raised in Claims One and Two demonstrate that he is actually innocent. Defendant contends that, because he is innocent, his death sentence violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the Florida Constitution. Defendant further contends that his allegations of actual innocence are sufficient to cure the time bar faced by the instant motion, according to McQuiggin v. Perkins, 569 S.Ct. 1924, 1926–27 (2013) (holding, upon an untimely federal habeas petition, that "[a]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar...."). Defendant acknowledges that Florida law does not recognize free-standing claims of actual innocence. Defendant concludes, however, that the Florida case law which procedurally bars claims of actual innocence is wrongly decided. In response, the State contends that Claim Three is procedurally barred under Tompkins v. State, 994 So. 2d 1072, 1089 (Fla. 2008) (holding that actual innocence is a claim which is not recognized under Florida law).

Florida courts do not recognize free-standing claims of actual innocence. See id. Instead, Florida courts recognize factual innocence through review of the sufficiency of evidence on direct appeal or through more concrete postconviction claims such as newly-discovered evidence. See id.; see also Rutherford v. State, 940 So. 2d 1112, 1117 (Fla. 2006). As thoroughly explained elsewhere in this order, the Court has found Defendant's claims of newly-discovered evidence to be untimely or without merit. Additionally, the Court is not persuaded by the Defendant's argument that he is entitled to relief under McQuiggin. Contrary to Defendant's assertion,

McQuiggin did not establish a mechanism by which to recognize free-standing claims of actual innocence under Florida law, but instead extended an exception to the time bar for filing a federal habeas petition based on a newly-discovered witness affidavit, similar to the exception enumerated in Florida Rule of Criminal Procedure 3.851(d)(2)(A). Consequently, no legal grounds exist upon which to recognize this claim of actual innocence. Therefore, Claim Three is dismissed.

STATE'S MOTIONS TO STRIKE

Finally, this Court turns to the two outstanding motions which were filed after the evidentiary hearing. First, in its motion to strike the Defendant's motion for leave to file written closing arguments in excess of the page limitation, the State seeks to strike portions of Defendant's written closing argument. The State contends that Defendant improperly exceeded the page limitation set forth in Rule 3.851(f)(5)(E) and that portions of Defendant's closing argument constitute improper argument because they fall outside the scope of the evidentiary hearing. Specifically, the State contends that Defendant improperly argued that the Court should consider documents which were not judicially noticed and maintains that even some of the documents were judicially noticed should not be raised in a closing argument because they were not admitted as evidence and are otherwise inadmissible as evidence. In his response, the Defendant contends that the scope of his written closing argument is appropriate and necessary to fully preserve his claims.

The Court granted Defendant's motion for leave to exceed the page limitation in an order entered February 22, 2018, and it appears that the State did not receive the Court's order before filing its motion to strike. The order granting leave to exceed the page limitation did not address the State's objection to the content of the closing argument because the State's motion to strike was not filed until the next day. Nevertheless, the parties' difference of opinion as to what constitutes a proper closing argument within the scope of the evidentiary hearing essentially amounts to a difference of opinion as to what legal standards apply to the claims raised in the instant motion. Having already ruled on Defendant's second successive motion to vacate death sentence, the Court finds that the issue raised in the State's motion to strike is rendered moot. Therefore, the State's motion to strike portions of the Defendant's written closing argument is dismissed.

Second, the State filed a motion to strike Defendant's reply to the State's notice of

supplemental authority.[16] The State contends that the legal argument contained in Defendant's reply is prohibited by Florida Rule of Appellate Procedure 9.225 and Florida Dept. of Health & Rehab. Services v. Martin, 563 So. 2d 1124, 1125 (Fla. 1st DCA 1990) (holding that any editorial comments about opinions contained in notices of supplemental authority are subject to being stricken). Defendant did not file a reply to the State's motion to strike.

The more appropriate procedure by which to dispute a notice of supplemental authority is to file a notice of supplemental authority holding to the contrary. Notably, neither Sochor nor the Defendant's legal argument regarding Sochor have materially assisted the Court's analysis because Sochor cites to the existing law regarding admission of hearsay statements and does not establish any new legal principles regarding the admission of hearsay statements. Striking the Defendant's reply is an action which would not have furthered the Court's compelling interest of judicial efficiency. Having found that the Defendant is not entitled to relief, the State's motion to strike Defendant's reply to its notice of supplemental authority is dismissed as moot.

Accordingly, it is

[16] On March 1, 2018, the State filed Sochor v. State, No. SC17-929 (Fla. Mar. 1, 2018), as supplemental authority which is presumably relevant to the inadmissibility of Pearcy's affidavit. On March 2, 2018, Defendant filed a reply in which he contends that that opinion in Sochor is irrelevant to this Court's analysis because the facts in Sochor are distinguishable from those presented in the instant case.

ORDERED AND ADJUDGED that the Defendant's Second Successive Motion to Vacate Judgments of Conviction and Sentence is **HEREBY DENIED IN PART AND DISMISSED IN PART,** as set forth in the body of this order.

IT IS FURTHER ORDERED AND ADJUDGED that the State's Motion to Strike Portions of Defendant's Closing Argument, as well as the State's Motion to Strike Reply to State's Notice of Supplemental Authority, are **HEREBY DISMISSED** as moot.

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED, pursuant to Florida Rule of Criminal Procedure 3.851(f)(5)(F), to promptly serve a copy of this order, with a certificate of service, upon the State, Attorney General, and counsel for the Defendant.

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this 20th day of March, 2018. A true and correct copy of this order has been furnished to the parties listed below.

Frank Quesada, Circuit Judge

cc: Office of the State Attorney / ASAs Sara Macks, Kristi Aussner, James Hellickson, and Glenn Martin

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SUPREME COURT OF FLORIDA

JAMES MILTON DAILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Case No. SC18-557

DEATH WARRANT ISSUED

EXECUTION SCHEDULED FOR NOVEMBER 7, 2019 AT 6:00 PM

MOTION FOR REHEARING AND CLARIFICATION

Appellant James Milton Dailey, who is scheduled to be executed on November 7, 2019, moves for rehearing and clarification of this Court's October 3, 2019 opinion affirming the denial of his motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. *See* Fla. R. Initial Br. P. 9.300(a). For the reasons set forth below, rehearing of this appeal is necessary to prevent Mr. Dailey from being executed in violation of the United States Constitution and Florida law.[1]

[1] This Court's October 3, 2019, opinion makes no mention of the fact that on September 25, 2019, the Governor signed a warrant for Mr. Dailey's execution. At that time, this appeal had been submitted and pending for over a year. This Court's opinion did not even acknowledge the warrant, let alone explain how this appeal came to be decided just eight days after the warrant was signed, and without considering several of Mr. Dailey's arguments. In addition to addressing the federal constitutional issues described below, the Court should also clarify why this appeal was decided in a truncated fashion so soon after the warrant's signing, and why the warrant itself presaged the Court's opinion denying relief. *See* Death Warrant at 1 ("WHEREAS, it is anticipated that by the date set by this warrant, all postconviction motions and petitions filed by JAMES DAILEY will have been denied and affirmed on appeal . . . ."). These events are troubling as a matter of due process under the United States Constitution.

CHAMBERS v. MISSISSIPPI

First, rehearing is necessary because this Court's refusal to consider Jack Pearcy's 2017 confession—a sworn admission to being the sole perpetrator of the murder for which Mr. Dailey is set to be executed—was contrary to the United States Constitution in light of *Chambers v. Mississippi*, 410 U.S. 284 (1973). The Court's opinion is also inconsistent with its own prior applications of *Chambers* in *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015), and *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016). To the extent that the state-law factors this Court set forth in *Bearden* to guide its *Chambers* analyses frustrated the consideration of Pearcy's confession in Mr. Dailey's case, the Court should grant rehearing and hold that the *Bearden* factors must yield to the federal constitutional requirements of *Chambers*.

The Court should further clarify why its October 3rd opinion failed to acknowledge Mr. Dailey's additional *Chambers* arguments that (1) Pearcy's statements to Travis Smith, exculpating Mr. Dailey while in county jail pending trial, should have been permitted; and (2) Pearcy's multiple statements to Juan Banda, likewise exculpating Mr. Dailey, should have been permitted. *Compare* Initial Br. at 22-26 *with* Slip. Op. at 4-13; *see also* Fla. R. Initial Br. P. 9.300(a) (explaining that clarification is appropriate where significant arguments in the appeal are not expressly addressed in the Court's decision). The refusal to consider this evidence notwithstanding *Chambers* impermissibly frustrated Mr. Dailey's ability to present

compelling evidence of his actual innocence just weeks before his scheduled execution. This Court should grant rehearing and clarification to correct these errors.

I. Background

In this appeal, Mr. Dailey urged the Court to find codefendant Jack Pearcy's 2017 affidavit admissible under *Chambers v. Mississippi*, 410 U.S. 284 (1973). Initial Br. at 15-26. Relying on *Chambers*, Mr. Dailey argued that Pearcy's confession must be admitted if it "'bears sufficient indicia of reliability,'" regardless of whether it meets a mechanical "'checklist of four requirements'" that this Court has previously looked to in assessing a *Chambers* argument. Initial Br. at 18 (quoting *Bearden*, 161 So. 3d at 1265 n. 3.). Mr. Dailey separately urged that *Chambers* requires Pearcy's prior confessions (made twice to Juan Banda and once to Travis Smith) to be considered in assessing his claims of innocence. Initial Br. 22-26.

This Court refused to allow consideration of Pearcy's 2017 affidavit. In finding that *Chambers* was not violated by the circuit court's exclusion of the evidence, this Court applied the four-factor test recognized in *Bearden v. State* without conducting an overall reliability analysis. *Contra Bearden*, 161 So. 3d at 1265 n. 3 (cautioning that the four-factor test is not a mechanical checklist and the touchstone of a *Chambers* analysis is overall reliability). This Court acknowledged that the 2017 affidavit was corroborated by Pearcy's prior confessions to Juan Banda and Travis Smith, but held it inadmissible because it failed the other three *Bearden*

factors, concluding that the affidavit was too old, it was not against Pearcy's interest, and Pearcy later suggested that some parts of it were false, and was available to testify in order to clarify, but invoked his Fifth Amendment rights. Slip Op. at 7.

In mechanically applying its *Bearden* test to deny relief notwithstanding *Chambers*, this Court did not address Mr. Dailey's specific arguments I.A.2 and I.A.3, *see* Initial Br. 22-26, urging that the trial court erred under *Chambers*. The Court should grant rehearing and clarification in order to conduct a *Chambers* analysis that comports with federal constitutional requirements.

II. *Chambers* Requires Consideration of Pearcy's Confession as a Matter of Federal Constitutional Law

The United States Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), requires this Court to consider Pearcy's confession in assessing Mr. Dailey's claims of innocence. In *Chambers*, the Supreme Court recognized that the fundamental principles of due process under the Fourteenth Amendment require the admission of a confession of guilt by a third party, despite that admission being otherwise inadmissible under a state's evidence rules. In Mr. Dailey's case, however, this Court approved of the exclusion of a third-party confession of guilt to the very crime for which Mr. Dailey is scheduled to be executed in just a matter of weeks. This decision cannot stand under *Chambers* as a matter of federal constitutional law.

The *Chambers* doctrine is, above all else, about separating the innocent from the guilty. The fundamental standards of due process require that state courts admit

evidence of innocence when constitutional rights that affect the ascertainment of guilt are implicated. *United States v. North*, 910 F.2d 843, 907 (D.C. Cir. 1990). As one court put it, *Chambers* established "the rule that if the defendant tenders vital evidence the judge cannot refuse to admit it without giving a better reason that it is hearsay." *United States v. Hall*, 165 F.3d 1095, 1114 (7th Cir. 1999) (internal citations omitted). This is particularly true here because Mr. Dailey is facing imminent execution. Yet this Court has prevented Mr. Dailey from meaningfully challenging the State's case by dismissing Pearcy's confession as hearsay.

Rulemakers have broad latitude to establish rules excluding evidence from criminal trials. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). However that latitude is limited by a defendant's federal constitutional right to have a meaningful opportunity to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). This federal right is abridged when state evidence rules "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (internal quotations omitted). A state's evidence rules "may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302. Here, *Chambers* requires consideration of Pearcy's confession as a matter of federal constitutional law, despite any contrary suggestion by Florida's evidentiary rules.

III. This Court's *Bearden* Factors and Decision in *Aguirre-Jarquin* Also Require Consideration of Pearcy's Confession

Even if the United States Constitution did not independently require the Florida courts to consider Pearcy's confession (it does under *Chambers*, *see supra*), the four factors this Court has promulgated under state law for the analysis for third-party confessions, and the Court's application of those factors in *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016), require the same result.

This Court adopted a framework through which to analyze the admissibility of a third-party confession in *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015). In *Bearden*, this Court chose to use the factors that made the third-party admission in *Chambers* reliable as the hallmark for admissibility. Under this test, a third-party confession is admissible, despite being hearsay, if:

> (1) 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.

Id. at 1265. In doing so, however, this Court correctly noted that *Chambers* "does not necessarily establish an immutable checklist of four requirements. Instead, the primary consideration in determining admissibility is whether the statement bears sufficient indicia of *reliability*." *Id*. at n. 3 (internal citations omitted). *Chambers* did not create a checklist for third-party confessions that must be met in every single

case, but rather identified factors in the case at hand that made the confession in *Chambers* sufficiently reliable. *Chambers* thus identified the principle of due process that otherwise reliable confessions cannot be barred by state evidence rules. This Court merely decided to channel the inquiry into the reliability of third-party confessions through the four factors identified in *Bearden*.

Under a proper *Chambers* reliability analysis, like the one this Court applied in *Bearden* and *Aguirre-Jarquin*, Pearcy's affidavit should have been admitted because it is reliable and establishes Mr. Dailey's innocence. Whether assessed for reliability in general, or in reference to the four *Bearden* factors, the affidavit plainly "bears sufficient indicia of reliability" such that the trial court was wrong to refuse to consider it. *Bearden*, 161 So. 3d at 1265 n. 3. This Court should correct that error as a matter of federal constitutional law.

A. Jack Pearcy's Affidavit Is Reliable Under the *Bearden* Factors.

The record before this Court establishes the reliability of Jack Pearcy's 2017 affidavit. Pearcy's affidavit was corroborated by significant evidence that implicates him alone in the homicide; it represents the *fourth* time that Pearcy had exculpated Mr. Dailey from any involvement in S.B.'s death; it is sufficiently against Pearcy's interest; and, if so compelled, Pearcy can be made available to testify at a re-trial notwithstanding any future Fifth Amendment protestations on his end.

1. Pearcy's Affidavit is Corroborated by Physical and Circumstantial Evidence Showing that He Alone Killed S.B.

Pearcy's affidavit is reliable because it is corroborated by significant evidence tending to confirm its truth. In denying Mr. Dailey relief, this Court found that Pearcy's affidavit was "corroborated" by his prior confessions to Juan Banda and Travis Smith that absolved Mr. Dailey of any role in the murder. Slip. Op. at 7. But that understates the extent of the corroborating evidence. Under *Chambers*, "corroboration" is not limited to a declarant's prior consistent statements. Rather, a statement may be corroborated by any record evidence tending to show that the facts likely were as the statement says they were. *Bearden*, 161 So. 3d at 1266 ("Corroborative evidence is admissible 'to strengthen a witness' testimony by evidence of matters showing its consistency and reasonableness and tending to indicate that the facts probably were as stated by the witness.'") (quoting *Chaachou v. Chaachou*, 73 So. 2d 830, 837 (Fla.1954)); *see Chambers*, 410 U.S. at 300 (finding the confession "corroborated" by evidence including "the testimony of an eyewitness to the shooting" and "proof of [the declarant's] prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon"); *see also Aguirre-Jarquin*, 202 So. 3d at 793 (corroboration found in form of other crime scene evidence tending to undercut the defendant's guilt).

Jack Pearcy's affidavit details the sequence of events on the night of S.B.'s murder. R2 63-64. That narration is powerfully corroborated by other evidence of

what happened that night, by the multiplicity of Pearcy's confessions, and by the manner in which he reviewed and signed the current affidavit.

(i) Pearcy Was Alone with S.B. For a Significant Period of Time Near the Time of Her Death, While Mr. Dailey Was at Home.

At trial, Mr. Dailey's jury heard conflicting evidence as to whether Jack Pearcy was ever alone with S.B. during the early morning hours of her death. The current record, however, demonstrates beyond any doubt that Jack Pearcy was alone with S.B. for a long window of time in the early morning hours of her death, and that he was the last known person to be seen with her alive.

The trial evidence showed that, before midnight, Jack Pearcy, Gayle Bailey (his girlfriend), Dwaine "Oza" Shaw (his friend from Kansas), and Mr. Dailey spent time with S.B. and two other teenage girls. They went to bars, smoked marijuana at Pearcy's home, and generally stayed together as a group without any one person being alone with S.B. It was also undisputed that by midnight, S.B.'s friend and sister were dropped off and the remaining group (the four adults and S.B.) returned to Pearcy's home. At this point, the trial presented a crucial factual dispute: On the one hand, Gayle Bailey testified that, after coming out of the bathroom at home, she saw that Pearcy, Mr. Dailey, and S.B. were gone, while Oza Shaw was on the couch. TR1 8:958, 971-72, 977, 983-84. On the other hand, Oza Shaw testified that he left the house with S.B. and Jack Pearcy while Mr. Dailey stayed home, and that Pearcy and S.B. dropped Shaw off at a nearby phone booth to make two calls, then S.B. and

Jack Pearcy *went off alone*. TR1 8:997, 999, 1004-05, 1007. Shaw testified he was out for at least an hour, TR1 8:1005, at which point he walked home and fell asleep on the couch, TR1 4:998. At some later point in the early morning, Shaw and Gayle Bailey both testified that Pearcy and Mr. Dailey came into the house together, and that Mr. Dailey's pants were wet. TR 8:958-60, 982-83, 1006.

In reciting the facts on direct appeal, this Court apparently drew inaccurate inferences from Gayle Bailey's testimony, namely that S.B. left the house with both Pearcy and Mr. Dailey:

> The group went to a bar and then to Pearcy's house, where they met Gayle Bailey, Pearcy's girlfriend. Stacey and Stephanie returned home. [S.B.], Gayle and the men went to another bar and then returned to Pearcy's house about midnight. ***[S.B.] left in the car with Dailey and Pearcy***, and when the two men returned without Shelly several hours later Dailey was wearing only a pair of wet pants and was carrying a bundle.

Dailey v. State, 594 So. 2d 254, 255 (Fla. 1991) (emphasis added). But the volume of evidence revealed in collateral proceedings has eviscerated this version, to the point that even the State no longer argues that Mr. Dailey and Pearcy left together with S.B. around midnight. The jury heard none of this evidence.

Oza Shaw testified during a 2003 evidentiary hearing, as he did at trial, that Pearcy and S.B. left together but agreed to give him a ride to a phone booth. R2 417-18. Telephone records confirmed that a call was placed at 12:15 CDT a.m. to Olathe, Kansas, where Shaw's girlfriend lived, and lasted about 26 minutes. R2 419, 11712.

After he finished using the payphone, Shaw walked home and saw Gayle Bailey in the rocking chair. R2 420. Gayle complained about Pearcy leaving with S.B., and Shaw then fell asleep. R2 421. About another hour or hour-and-a-half later, Shaw saw Pearcy return home—*alone and without S.B.*—and walk straight to Mr. Dailey's room. R2 421. Shaw found it "weird" that Pearcy headed straight to Mr. Dailey's room and then left with Mr. Dailey without inviting Shaw. R2 421.

The State relentlessly cross-examined Shaw about why he had never testified to the key detail—to Pearcy returning home alone after being out with S.B.—at Mr. Dailey's trial. R2 424-30. In 2007, this Court found Shaw's additional detail to be a dubious "recantation." *Dailey v. State*, 965 So. 2d 38, 46 (Fla. 2007). But the "recantation" description proved to be incorrect. In fact, within two weeks of S.B.'s death, Shaw had told the Indian Rocks Beach Police this very chronology: that Pearcy left with S.B. and gave Shaw a ride to a phone booth, and Pearcy later returned home alone without S.B. R2 93-94. The existence of this report was apparently unknown to all lawyers during the course of the proceedings, and it is unclear why no attorney had ever discovered or utilized it until the current proceedings. *See* Slip Op. at 12.

Besides Oza Shaw, other witnesses confirm that S.B. was alone with Jack Pearcy in the early morning hours of May 6th, after everyone else in their group had retired for the night. Betty Mingus (Shaw's girlfriend from Kansas) explained that

she was on the phone with Shaw, who said that Pearcy "and a girl" were waiting for him and trying to get him off the phone. R2 11903. After hearing honking in the background, she noted Shaw saying: "oh, that's Jack and a girl waiting for me to get off the phone", at which point he told them to "go on without me", and so Pearcy and S.B. drove away. R2 11904.

Additionally, Deborah Lynn North—an acquaintance of S.B. who worked at Hank's Sea Breeze bar—saw S.B. sometime after midnight, R2 11710, entering her bar without shoes, which caused the manager to try to kick her out. R2 11712. S.B. explained she was only seeking help to get a car unstuck from the sand. R2 11712. Deborah North testified that S.B. was with one man, but the man never came inside and was always in the car. R2 11712-13. She saw that "the guy in car . . . he had a shovel," and he wanted Deborah North's friends to get into the car with him, but they refused. R2 11713. Deborah North never saw S.B. drink at the bar, R2 11713, and in total, S.B. spent no more than five minutes inside because she did not have shoes, R2 11714. S.B. appeared to be "out of it;" her hair was a mess and she was sweating. R2 11714. It took 30 to 45 minutes to get the car out of the sand. R2 11714-15. When the car was pushed out, Deborah North could see S.B. in the car alone with "one other gentleman who was driving." R2 11716.

In a sworn statement in 1993, Pearcy disavowed having initially implicated Mr. Dailey, explaining that he gave his statement, which was set up by his attorney

and the state attorney, when "Jim wasn't even in custody" and "they were going to charge me and I was just trying to get around it, that's all, lay the blame somewhere else." R2 9624.

(ii) Pearcy Demonstrated Consciousness of Guilt in the Morning after the Killing.

Jack Pearcy's affidavit is corroborated by his own actions, on the morning after the murder, that evince a consciousness of guilt. After S.B.'s death, Pearcy told everyone to pack because they were all leaving for Miami. TR1 8:979, 8:1000; R2 11379. Pearcy's first attorney testified at a deposition, after being authorized to waive privilege, that it was Pearcy's idea to do laundry in the morning and that it was also his idea to go to Miami. R2 9423. Oza Shaw testified that the Miami trip was completely unexpected. TR1 8:1000. Pearcy instructed Shaw—who was expecting his girlfriend to fly from Kansas into Tampa—to have her change the flight to Miami instead. TR1 8:1000-01; R2 9488.

When the group arrived at the motel in Miami, Mr. Dailey registered his room in his own name. TR1 7:913-14, 7:920. However, Pearcy and Gayle Bailey registered their room under an assumed name, John Yates (or Grates). TR1 7:920; R2 11155, 11524, 11787. When Shaw's girlfriend, Betty Mingus, arrived in Miami she reported that Pearcy was activing weird and nervous, as if he was afraid of something. TR1 3:313.

(iii) Forensic Evidence Is Consistent with Only One Individual Being Responsible for Killing S.B.

Police officers testified that S.B.'s body was found on the morning of May 6, 2017, in the water near Indian Rocks Beach. The medical examiner found drag marks indicating that the body was dragged by the feet, as if one person picked her up by the feet causing her shoulder and small of the back to drag on the ground. TR1 7:889-92. As she elaborated in her deposition testimony:

> There were multiple drag marks on her back and it appeared that she had been dragged on her back, at least over the rocks, presumably over the grass and the rocks to the water, and there was a path through the grass where it was pushed down that you could see what appeared to be the path through which she was dragged . . . looking at the drag marks I would say she was being dragged by the feet . . .

R2 11874-75; *see also* R2 11888 ("I would say she was being dragged by the feet because the small of her back, the marks were from the small of her back and buttock"); R2 10467-68, 11889 (concluding, at Jack Pearcy's trial, to reasonable degree of medical certainty that S.B. was dragged by her feet).

Had Mr. Dailey been at the scene when Pearcy murdered S.B., they could have both carried the body without dragging it. The drag marks suggest that, to the contrary, one perpetrator dragged S.B. to the water by her feet. Additionally, the medical examiner found no differences in the stab wounds[2] that would allow her to

[2] Pearcy had owned a roofing knife consistent with the stab wounds. R2 10437-38. Although Pearcy initially stated that the knife belonged to Mr. Dailey, his girlfriend Gayle Bailey explained that Pearcy kept his knife in a sheath in the car.

differentiate that two knives were used, unless the assailants were taking turns stabbing. R2 11886.

(iv) Pearcy Courted S.B. All Evening and Made His Girlfriend Irate About It.

Jack Pearcy picked up S.B. and the other teens because he had known S.B. and recognized her; the girls did not flag down the vehicle. TR1 7:907-08, R2 10349-50, R2 415. Pearcy knew S.B. because she and her father would sell him marijuana. TR1 8:974, R2 305. On a prior occasion, it was revealed that Pearcy tried visiting S.B. but was rebuffed by her father who told him that he should not be hanging out with 14-year-old girls. R2 11862-63.

On the evening before her death, it was apparent that S.B. was interested in Pearcy. R2 416. Not surprisingly, Gayle Bailey was upset when Pearcy brought over three girls to her house. TR1 8:967. Toward the end of the night, Bailey only went to Jerry's bar because she did not want Pearcy to be alone with S.B., and she was upset when Percy danced with S.B. TR1 8:967-68. In her deposition, Bailey explained that S.B. went behind her back to dance with Pearcy. R2 292. S.B. never danced with Mr. Dailey. TR1 8:957. Predictably, Bailey was also angry and

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R2 296-97. Pearcy also told detectives that the knife and its sheath were thrown in the Walsingham Reservoir, where the sheath was recovered. R2 11803, 11809-11. Though Pearcy claimed Mr. Dailey threw the knife and sheath, Detective Buchaus, who was present with Pearcy when Pearcy showed how the disposal supposedly occurred, testified that "from his location, from the way the knife was thrown, Pearcy could not have seen Dailey do it . . . it just wouldn't be right." R2 11804.

"stewed" when she realized that Pearcy left with a young girl after midnight. R2 421, 11382, TR1 8:976. Thus, as the State argued in Pearcy's own trial, it was he, not Mr. Dailey, who hat the motive to lure S.B. out alone for sex: "James Dailey had his own room. He had a door that shut. He could have brought that girl back to his own room. Then why in the world would he take her to some deserted point under a bridge?" R2 11582.

(v) Pearcy Has a History of Violence Against Women and Has Previously Been a Paid Hitman.

Jack Pearcy's affidavit is also confirmed by his lifetime of criminality. First, prior to S.B.'s murder, Pearcy had a significant history of violence, specifically, violence against women. *See generally* R2 9753-9892. Pearcy engaged in conduct such as escape from custody, R2 9757, physical assault, R2 9795, terroristic threats against a woman, R2 9802, and assault with a firearm, R2 9803. Additionally, a Kansas detective who interviewed Pearcy after S.B.'s murder and was familiar with his criminal history, R2 11652-53, testified that Pearcy had been arrested for sexually assaulting his former girlfriend, who was the same victim of both of Pearcy's terroristic threat charges, R2 11953, 11656-58.

Finally, Pearcy had also agreed to a murder-for-hire scheme that ensnared two codefendants and resulted in a capital murder conviction. Pearcy evaded a conviction when he became a State's witness against the man who hired him but was later convicted of killing the victim himself. *See State v. Stith*, 660 S.W.2d 419, 421-22

(Mo. Ct. Initial Br. 1983); *State v. Danforth,* 654 S.W.2d 912, 915-16 (Mo. Initial Br. W. Dist. 1983).

2. The Timing of the 2017 Affidavit Does Not Undermine Its Reliability

This Court found that Pearcy's affidavit is inadmissible under *Chambers* because it is too new. Slip Op. at 7 ("The first factor is not satisfied; the affidavit was executed more than thirty years after the murder, not shortly after the crime occurred."). But *Chambers* does not limit consideration to close-in-time confessions. In *Aguirre-Jarquin*, 202 So. 3d at 793, this Court rejected the requirement that a confession must occur shortly after the crime. In explaining why timing was not a problem, this Court observed that the declarant's confessions "were not made shortly after the crime" but nonetheless reliable and admissible under *Chambers* because "they were spontaneous and not coerced, and they were made to people [the declarant] knew. Further, three of the statements (to Bowman and the Laravusos) were made in close proximity to the postconviction DNA testing, which [the declarant] knew was being conducted." *Id*.

This Court should appraise the history of Pearcy's statements accordingly. As early as the mid-1980's, shortly after the crime occurred, Pearcy told Travis Smith that he "committed the crime himself and that he did it." R2 12099. Pearcy discussed the case with Smith while he worked in the law library and asked for Smith's input. He explained to Smith that investigators "think he [Mr. Dailey] was with me or

whatever" but that was not the case and that the charge is "his charge and his charge alone." R2 12099. Similarly, as detailed earlier, Pearcy also gave a sworn statement to Mr. Dailey's postconviction investigator in 1993, making it clear that Mr. Dailey was not involved and that S.B. was no longer with Pearcy when he returned to the house. In the mid-1990's and again in 2007, Pearcy told another inmate, Juan Banda, that Mr. Dailey is wrongly on death row and that he is innocent of this crime. R2 12119-122. Finally, in 2017, Pearcy voluntarily provided the current confession to a notary working for Mr. Dailey's legal team. R2 12153-59 (explaining how Pearcy carefully read over and signed his affidavit).

The record reveals that Pearcy talked about this case spontaneously with inmates and formally with legal professionals. Pearcy had absolved Mr. Dailey of all involvement on at least five separate occasions. All five of these confessions were voluntary and multiple were contemporaneous with either the murder trial proceedings or Mr. Dailey's current postconviction proceedings. This timing and pattern of the statements are thus as reliable, if not more so, than the timing of the statements in *Aguirre-Jarquin*, 202 So. 3d at 793.

3. The Assertions In Pearcy's Affidavit Were Against His Interest

This Court refused to consider Pearcy's affidavit because it was "not unquestionably against his interest," as Pearcy had already been "tried, convicted, and sentenced for [S.B.]'s death." Slip Op. at 7. But again, as with the issue of

timeliness, nowhere does *Chambers* or this Court's prior opinion in *Bearden* require that a statement always be "unquestionably against [the declarant's] interest." *Id*. To the contrary, *Bearden* cogently explained why a rigid "against interest" requirement would eviscerate the *Chambers* safety valve:

> Nor is the due process problem identified in *Chambers* resolved merely because Florida recognizes an exception to the hearsay rule for declarations against penal interest. If a confession by a third party is critical evidence that should have been admitted in evidence to protect the constitutional rights of the accused, the particular reason for excluding it under state law will make little difference. If the confession was excluded on the ground that it did not meet the requirements of the declaration against penal interest exception, the effect would be the same as if there were no exception at all.

Bearden, 161 So. 3d at 1265 (quoting *Curtis v. State*, 876 So.2d 13, 20–21 (Fla. 1st DCA 2004)).

This Court found Pearcy's affidavit to fail the Florida hearsay exception and fail *Chambers* for the same reason: Pearcy was already convicted of the same crime. *See* Slip Op. at 6 (applying section 90.804(2)(c)) and 7 (applying *Chambers*). This Court incorrectly applied the requirements for a hearsay statement against interest under section 90.804(2)(c), not as a third-party admission under *Chambers*. If it were true that an admission by a third party must always subject the third party to criminal liability, then there would be no need for *Chambers* because the statement would always come in under the state hearsay exception. *See Bearden*, 161 So. 3d at 1265 ("If the confession was excluded on the ground that it did not meet the requirements

of the declaration against penal interest exception, the effect would be the same as if there were no exception at all."). But *Chambers* is a safety valve for otherwise inadmissible hearsay. The entire reason for the *Chambers* doctrine is that due process requires a third party admission of guilt to be admitted, "the state's rules of evidence notwithstanding." *Id.* at 1264.

Nonetheless, a statement by any codefendant such as Pearcy is unquestionably against that codefendant's interest. For example, in this case, Pearcy's affidavit will follow him for the rest of his life, as does the confession of any codefendant. Pearcy will never be able to minimize his role—like he tried to do at the outset before Mr. Dailey was arrested—in any future clemency or parole hearing,[3] or in any state or federal collateral litigation. The State of Florida is armed with his affidavit, which it can use against Pearcy as an admission by a party-opponent. *See* 90.803(18)(a), Florida Statutes (2017). Because it is an admission, the affidavit can be used both to impeach Pearcy and as substantive evidence against him in a future proceeding.

Separately, to the extent that perceived self-interest is logically relevant to credibility for *Chambers* purposes, the record establishes that Pearcy was very concerned about impact of the confession on his own case. At the evidentiary hearing

[3] Pearcy was sentenced under an old sentencing scheme which make him parole eligible.

below, the assistant state attorney specifically advised that Pearcy should think twice before testifying in accordance with his affidavit:

> MR. MARTIN: Judge, I think in fairness to Mr. Pearcy, you need to explain to him and ask him about his Federal Court and make sure that he's exhausted all his State, exhausted his Federal, and then he's still eligible for parole. Any statement made by him in the course of today could be used against him at future parole hearings, and inquire whether he wants an attorney to discuss that and with all those in mind, do you wish to --

R2 12143. And the trial court complied, telling Pearcy about the liabilities that he may face by answering questions. Pearcy then refused to answer any questions about the affidavit's contents other than to confirm that his name and custody status were correct. R2 12144. In briefly explaining his refusal, Pearcy noted that he had met with an assistant state attorney and "pretty much all" of his close family prior to testifying. R2 12145-46. He elaborated:

> As I told you since you came back to see me after the affidavit, I spoke with all my family and they told me I needed to do what I thought was right, but that I needed to not make a rash decision since my parole just got denied for seven years and think about what I was doing. That's what they advised me.

R2 12146-47. Pearcy also acknowledged that his mother and stepfather were present in the audience.

This was not the first time that Pearcy invoked the Fifth Amendment when called to speak at a live court proceeding. When Mr. Dailey sought to question him during the evidentiary hearing in his first collateral proceeding, Pearcy too invoked

the Fifth Amendment, citing concerns about how it may affect his own case. PC ROA 3:118. And as far back as Mr. Dailey's trial, Pearcy too invoked the Fifth Amendment, although the trial court refused that invocation, found him in contempt, and sentenced him to a consecutive five months of imprisonment to run after his 25-years-to-life sentence. TR1 8:987-90. Accordingly, even if a typical life-sentenced prisoner might feel differently, the record makes clear that Pearcy was fearful repeating an admission to singlehandedly killing a fourteen-year-old girl and the State took the position below that it was against his interest to do so.

The very fact that Pearcy tried to invoke the Fifth Amendment, of itself, shows that the underlying issue he did not wish to address—that he alone killed S.B.—is true. *See*, *e.g.*, *Atlas v. Atlas*, 708 So. 2d 296, 299 (Fla. 4th Dist. Initial Br. 1998) (Pariente, J.) (when a party "invoke[s] the Fifth Amendment concerning . . . the content of his financial affidavit" the trial court can "properly draw[] an adverse inference from this invocation that would further support a finding that [the party] had the ability to pay"). As Justice Scalia has illustrated, in arguing that even a defendant's own silence may be used against him, common sense requires an adverse inference in this kind of situation: "If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear. Indeed, we have on other occasions recognized the significance of silence, saying that '[f]ailure to contest an assertion ... is considered evidence of acquiescence ... if

it would have been natural under the circumstances to object to the assertion in question.'" *Mitchell v. U.S.*, 526 U.S. 314, 332 (1999) (Scalia, J., dissenting) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976)). Thus, although the Fifth Amendment protects the invoking witness from an adverse inference *in his own proceedings,* such an inference may be drawn where that witness is not on trial, such as in collateral litigation of another prisoner's criminal case. *See Reasonover v. Washington*, 60 F. Supp. 2d 937, 960-61 (E.D. Mo. 1999) (explaining why drawing an adverse inference from a witness's Fifth Amendment invocation is permissible in a habeas evidentiary hearing).

4. Pearcy Did Not Disavow His Affidavit, and He Would be Available to Testify at a Retrial

This Court refused to consider Pearcy's affidavit because "questions about the truthfulness of the affidavit arose when Pearcy testified that its contents were false" and because he made himself "unavailable for cross-examination." Slip Op. at 8. The record of Pearcy's testimony shows that both of these points are incorrect.

Although Pearcy stated generally that some of the affidavit was false, when asked specifically *what* was false, Pearcy refused to answer and invoked the Fifth Amendment. Pearcy never denied, nor purported to deny, the paragraph in which he claims sole responsibility for S.B.'s death. And in any event, because he refused to answer specific questions, whatever general averment Pearcy made earlier cannot be considered. *See Victorino v. State*, 127 So. 3d 478, 488-89 (Fla. 2013) (internal

quotations omitted) (if a witness refuses to answer certain questions "the remedy is to strike the witness' testimony"); *Sule v. State*, 968 So. 2d 99, 105-06 (Fla. 4th DCA 2007) (holding that the trial court correctly excluded a witness's testimony because the witness sought to invoke his Fifth Amendment privilege on material issues that would have prevented full and fair cross-examination).

To the extent that Pearcy's availability has any relevance to a *Chambers* inquiry, he would be available to testify at a retrial. Although he stonewalled during the 2017 hearing due to his concerns about parole, the trial court still refused to let him actually invoke the Fifth Amendment. Thus if called in a re-trial, Pearcy would not be "unavailable." Just as in Mr. Dailey's original trial, the trial court will have at its disposal a wide array of contempt remedies, including additional consecutive jail time prior to his next parole availability, to ensure that Pearcy answers questions.

5. The Circumstances Under Which Pearcy Signed the 2017 Affidavit Speak to Its Reliability

Although not a factor specifically enumerated in *Bearden*, Pearcy's 2017 affidavit is corroborated by detailed testimony—which the State did not challenge—of the notary who was present when he signed it. Lisa Bort testified that she notarized Pearcy's affidavit and witnessed the entire exchange when Pearcy reviewed it. R2 12152-53. She testified that Pearcy went through the affidavit "line by line as he read through it. Then he flipped the page and went through it line by line." R2 12156. And it was Pearcy who asked for a pen when he finished reading it. R2 12156. Lisa

Bort testified that Pearcy used another piece of paper to guide him so he can read the affidavit one line at a time, and that he took his time. R2 12156-57. He did not appear hesitant or threatened, and he was not made any promises in exchange for his signature. R2 12158-59.

The State made no attempt to discredit Lisa Bort and never suggested that Pearcy might have been tricked or confused when signing the affidavit. Ms. Bort's testimony is thus powerful corroboration because, unlike typical hearsay declarations, the 2017 affidavit was read and signed in the presence of a professional witness, one whose license required her to ensure that the declarant had a sound mind and was not coerced. R2 12158.

B. Jack Pearcy's Affidavit Must Be Considered Under *Aguirre-Jarquin*

Under this Court's own precedent in *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016), Pearcy's affidavit satisfies the *Bearden* inquiry. In that case, this Court applied the same factors to find a third-party confession admissible. This Court noted that despite being made nearly ten years after the murder, the statements met the first *Bearden* prong because "they were spontaneous and not coerced," and were made around the time of postconviction proceedings. *Id*. at 793. The confessions met the second factor because they were corroborated by physical and circumstantial evidence in the case. *Id*. at 793-94. The third factor was met because the confessions were against the declarant's penal interest, despite the State officially taking the

position that it would never bring charges against the declarant, even if Aguirre-Jarquin's conviction was overturned. *Id*. at 794. The fourth factor was met because the declarant testified for the state during the original trial and would be available to testify at a future trial. *Id*.

Here, despite this Court conceding that the second *Bearden* factor was satisfied because the Pearcy affidavit was adequately corroborated, this Court stated that the affidavit failed the other three factors. This Court's mechanical application of the *Bearden* factors stands in notable contrast to how this Court applied them in *Aguirre-Jarquin*. The first factor was satisfied in *Aguirre-Jarquin* despite some of the confessions coming nearly a decade after the murder because some (but not all) of the confessions were made contemporaneously with postconviction DNA testing. The confessions also satisfied this factor because they were "spontaneous and not coerced, and they were made to people [the declarant] knew." Yet in this case, the 2017 affidavit was deemed too late, Slip Op. at 7, which ignores the fact that Pearcy had also confessed while in jail before trial, and in the 1990's and 2000's, which make his repeated exonerations of Mr. Dailey more timely than the statements in *Aguirre-Jarquin*.

In *Aguirre-Jarquin*, this Court found that the third *Bearden* factor was met because the confession was "plainly against the penal interest" of the declarant, *id*. at 794, even though the State took the position that the declarant was innocent and

would never be prosecuted for the confessed killings in the future. *See id*. at 793 n. 5 ("the postconviction record indicates that, if Aguirre receives a new trial, the State will not pursue charges against Samantha."). The declarant in *Aguirre-Jarquin* did not then subject herself to any actual criminal liability. This factor has a looser standard than Section 90.804(2)(c), and the *Bearden* test can be used to admit statements that do not subject the declarant to criminal liability, as long as they are self-incriminatory. Here, in contrast, Jack Pearcy has signed an affidavit that can be used against him for the remainder of his life sentence. Pearcy confessed that he alone is responsible for killing a 14-year-old, which is clearly self-incriminatory and not favorable to his parole prospects that he is keenly concerned about. The State of Florida will always be able to use Pearcy's affidavit as an admission by a party-opponent. *See* Section 90.803(18)(a). Pearcy will never be able to profess his innocence or minimize his role in the murder in any future clemency or parole hearing, state postconviction proceeding, or while seeking a federal remedy. Thus, any finding that the current affidavit is not against Pearcy's interest is contrary this Court's treatment of that factor in *Aguirre-Jarquin*.

Finally, the fourth *Bearden* factor in *Aguirre-Jarquin* was satisfied because the declarant had testified for the state during the defendant's original trial, and she would be available if a new trial was ordered. 202 So. 3d at 794 n. 5. This, again, is contrary to the Court's *Bearden* analysis in this case. This Court held that "Pearcy's

persistent invocation of the Fifth Amendment cause him to be unavailable for cross-examination." Slip Op. at 7-8. But this is simply not correct. Pearcy *was* available—he testified in the evidentiary hearing—and because Pearcy has already been convicted for the murder of S.B., the trial court agreed that he could not properly invoke the Fifth Amendment. Thus, at a retrial, Pearcy can be forced to testify to the contents of his affidavit and would not be able to claim a nonexistent Fifth Amendment right.

As applied in *Aguirre-Jarquin*, the four-factor *Bearden* test does not contain exacting standards. There were plenty of reasons to doubt the credibility of the declarant's confession. This Court noted that, despite the third-party confessions and DNA evidence, the third party did have an alibi for the night of the murders. 202 So. 3d at 795. Additionally, this Court noted the "extensive history of mental health problems" of the third party, which certainly supported the State's theory that the third party was "a troubled young woman with survivor's guilt over her mother and grandmother's murders, crimes to which she is prone to confessing when she is either upset or threatening others." *Id*. However, none of these concerns factored into this Court's *Bearden* analysis. That is because newly discovered evidence need only "give rise to a reasonable doubt" of the defendant's culpability. *Id*.

If this Court followed the factors in *Bearden* as they were laid out in the original opinion or as they were applied in *Aguirre-Jarquin*, Mr. Dailey is entitled

to admit the affidavit and have the trial court adjudicate his newly discovered evidence claim, which he would easily satisfy given the dearth of remaining evidence against him. This Court should therefore allow Mr. Dailey to present Pearcy's 2017 affidavit so he can receive a new trial at which a jury would be able to resolve evidentiary conflicts for themselves and appraise the true strength of the remaining evidence of his guilt.

IV. To the Extent That the *Bearden* Factors Frustrate the Consideration of Pearcy's Confession in Mr. Dailey's Case, Those State-Law Factors Must Yield to the Federal Constitutional Requirements of *Chambers*

As set forth above, the Pearcy confession in this case satisfies this Court's state-law *Bearden* factors and should have been considered under *Aguirre-Jarquin*. But even if that were not the case, the *Bearden* factors must yield to the United States Constitution, which requires consideration of the confession and substantive claim of innocence. *Cf. Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016).

Under *Chambers*, a state cannot bar exculpatory evidence that bears assurances of reliability through arbitrary evidence rules. To the extent that this Court refuses to admit the Pearcy affidavit under the *Bearden* test, the *Bearden* test itself is unconstitutional in this case. A criminal defendant has the constitutional right to have a meaningful opportunity to present a complete defense. *See Crane*, 476 U.S. at 690. This right is abridged when state evidence rules "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes

they are designed to serve." *Holmes*, 547 U.S. at 324 (internal citations omitted). When a state's evidence rules arbitrarily exclude a confession of guilt made to a third party, the rules "may not be applied mechanistically to defeat the ends of justice" and the evidence must be admitted. *Chambers*, 410 U.S. at 302. This Court's application of the *Bearden* test in this case was applied mechanistically, which, without rehearing, will result in the arbitrary exclusion of a confession that would prevent the imminent execution of an innocent man.

As this Court originally stated in *Bearden*, "The primary consideration in determining admissibility is whether the statement bears sufficient indicia of *reliability.*" *Id*. at 1265 n.3. However, this Court has abandoned a test concerned with reliability for a test that is arbitrary. Under the newly conceived *Bearden* test as applied in this case, a third-party confession is not admissible if was not against the interest of the person who made it to the exact same extent as under 90.804(2)(c). And despite the fact that Pearcy would be available for a future trial, this Court said he was unavailable because he improperly invoked his nonexistent Fifth Amendment right against self-incrimination. So either Pearcy was unavailable, but barred by 90.804(2)(c), or he was available but barred by the *Bearden* test because he has already been convicted. Additionally, this Court found the affidavit is inadmissible because it was not executed shortly after the crime was committed, despite the fact that this affidavit followed a long line of confessions—one of which was

contemporaneous with the crime—that Pearcy made spontaneously and without coercion. This kind of arbitrary bar to the admissibility of a confession of guilt is the exact situation that the *Chambers* doctrine exists to prevent.

A defendant's right to present a defense is violated when he is prohibited from putting on evidence by state evidence rules that are "arbitrary" or "disproportionate to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 308 (internal quotations omitted). The exclusion of evidence is unconstitutionally arbitrary or disproportionate when it infringes upon a weighty interest of the excused. *See id*. States certainly have a legitimate interest in ensuring that unreliable evidence is not presented to the trier of fact in a criminal trial. However, that interest cannot justify the exclusion of a confession in a case such as this where the defendant is facing an imminent execution despite reliable evidence of his innocence. The *Bearden* test, as applied in this case, is unconstitutional because it arbitrarily infringes upon Mr. Dailey's ability to put on a defense and establish his innocence.

Through this Court's application of its state-law *Bearden* test, Mr. Dailey has lost his federal constitutional right to have the opportunity to put on any meaningful defense. As the Supreme Court noted in *Crane*, this opportunity is an "empty one if the State were permitted to exclude competent, reliable evidence…when such evidence is central to the defendant's claim of innocence." 476 U.S. at 690–91. Because there is no valid justification to apply the *Bearden* test so mechanistically,

"exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Id*. (internal quotations omitted).

The Supreme Court has struck down similar state-law tests that failed to enforce federal substantive rights because they were unconstitutionally arbitrary. In *Moore v. Texas*, the Supreme Court struck down Texas's state-law test for determining which death-sentenced inmates qualify for relief as intellectually disabled, because "by design and operation, the *Briseno* factors create an unacceptable risk that persons with intellectual disability will be executed." 137 S. Ct. 1039, 1051 (2017) (internal quotations omitted). That was despite the fact that, similar to third-party confessions under *Chambers*, the Supreme Court gave states broad latitude to develop ways to enforce intellectual disability claims under *Atkins v. Virginia*, 536 U.S. 304 (2002). *See Moore*, 137 S. Ct. at 1052-53. Instead of focusing on relevant and reliable indicia of intellectual disability, Texas had unconstitutionally foreclosed its inquiry by focusing on arbitrary and irrelevant factors. The *Bearden* test is similarly unconstitutionally arbitrary because it creates an unacceptable risk that innocent persons will be executed.

This Court's requirement that for a confession to be admissible it must come "shortly after the crime occurred" draws an arbitrary line making the only innocent inmates who will be able to admit a third-party confession soon in time after the

crime to benefit from that confession. Under this new tightening of the *Bearden* test, the confessions in *Aguirre-Jarquin* would now be inadmissible because none came shortly after the murders. Indeed, some came nearly a decade later. Rather, the confessions were admissible because they were made contemporaneously with postconviction DNA testing. However in this case, the affidavit was held inadmissible despite the fact that Pearcy first confessed *before* Petitioner's trial and confessed multiple times over the next thirty years. If it is this Court's position that for the affidavit itself to be admissible it must have been executed contemporaneously with the crime, then no defendant will ever be able to admit a statement during postconviction because either it would not be newly discovered evidence or it would be time-barred under this Court's arbitrary *Bearden* test.

This Court's apparent requirement that the confession could not have been unquestionably against Pearcy's interest because he has already been convicted for the murder of S.B. arbitrarily and unconstitutionally bars an entire class of third-party confessions made by codefendants. *See Washington v. Texas*, 388 U.S. 14 (1967). This is despite the fact if a defendant is innocent, a codefendant—i.e. someone already found by a jury to have at least some level of involvement in the crime—is logically the most likely person to have committed the crime. The Supreme Court faced a similar arbitrary ban in which a defendant was precluded from calling as a witness a person who had been charged and previously convicted

of committing the same crime. *See id*. at 14. In holding this kind of total ban on codefendant testimony unconstitutional, the Supreme Court noted that a similar total ban at common law prompted the founders to specifically include the right of the accused to put on a defense "so that their own evidence, as well as the prosecution's, might be evaluated by the jury." *Id*. at 20.

This is particularly important because this kind of ban on codefendant testimony prevents the jury "from hearing any testimony…even if it were the only testimony available on a crucial issue." *Id*. at 21. In this case, the crucial issue is whether or not Appellant, who is facing an imminent execution, was even involved in the murder of S.B. Florida, through this mechanistic application of the *Bearden* test, cannot bar out of court codefendant confessions when they are already barred by 90.804(2)(c). As this Court has already noted, "If the confession was excluded on the ground that it did not meet the requirements of the declaration against penal interest exception, the effect would be the same as if there were no exception at all." *Bearden*, 161 So. 3d at 1265 (quoting *Curtis*, 876 So.2d at 20–21). Instead, *Chambers* must be a safety valve through which a reliable confession, arbitrarily banned by other state evidence rules, is admitted.

This Court's requirement that "if there is any question about the truthfulness of the out-of-court confession or statement, the declarant must be available for cross-examination" is also unconstitutionally arbitrary. The test bars all innocent

defendants from admitting a confession if the third party is unavailable—e.g. if they have died or unlike this case, the third party has retained their ability to invoke their Fifth Amendment right against self-incrimination at a new trial. It seems impossible under this test for Mr. Dailey to not need to show that the declarant is available for cross-examination because there is no conceivable situation in which the truthfulness of a confession would not be questionable when the declarant is confessing to a crime for which another person has already been convicted.

If this Court refuses to rehear and reapply the *Bearden* test as previously pronounced, this Court must abandon the *Bearden* test entirely because it is creating unconstitutionally arbitrary results, as exemplified by Mr. Dailey's case. The *Chambers* doctrine requires that state evidence rules cannot be arbitrarily applied to defeat the ends of justice. In order to comport with fundamental principles of due process, this Court must analyze third-party confessions through a lens of reliability, rather than an arbitrary four factor test.

V. Clarification is Necessary Because This Court Neglected to Even Rule on Mr. Dailey's Arguments that Pearcy's Confessions to Travis Smith and Juan Banda Should Have Been Considered Under *Chambers*

Clarification is further necessary because this Court's opinion does not rule on two of Mr. Dailey's arguments: that (1) Jack Pearcy's statements to Travis Smith, exculpating Mr. Dailey while in county jail pending trial, must be admitted under *Chambers*; and (2) Pearcy's multiple statements to Juan Banda, likewise exculpating

Mr. Dailey from the crime, must also be admitted under *Chambers*. *Compare* Initial Br. at 22-26 (raising two separate *Chambers* claims as to statements made to Banda and to Smith) *with* Slip. Op. at 4-13 (addressing only the *Chambers* claim pertaining to the 2017 affidavit, without acknowledging the other *Chambers* arguments as to statements to Banda and Smith).

Clarification is particularly important because this Court appeared to have considered and credited Juan Banda and Travis Smith for purposes of corroborating the 2017 affidavit, but nonetheless failed to acknowledge that Mr. Dailey sought to have these statements be considered in their own substantive right. *See* Fla. R. Initial Br. P. 9.300(a) (clarification is appropriate where significant arguments in the appeal are not expressly addressed in this Court's decision).

This Court should thus resolve the legal questions relating to how *Chambers* operates (*see* Parts II-III, *supra*), and apply that legal analysis to the admissibility of the statements made to Smith and Banda. This Court should find that Pearcy's statements are on the whole reliable given that they are supported by significant corroborating evidence, they were made spontaneously, they were against Pearcy's interest, and the witnesses to whom Pearcy confessed received nothing in return for coming forward with their testimony.

POSTCONVICTION COUNSEL'S INEFFECTIVENESS

In addition to the *Chambers* issues addressed above, this Court should grant rehearing and clarification regarding its suggestions in the October 3rd opinion that: (1) claims of ineffective assistance of state-appointed capital postconviction counsel are not cognizable under Florida law; and (2) the ineffectiveness of state-appointed capital postconviction counsel cannot even provide a basis to excuse state procedural bars to evidence of actual innocence. *See* Slip Op. at 9-13.

The Court should explain how these rulings in the October 3rd opinion are consistent with the United States Constitution, given that this Court has previously recognized that Florida's statutory scheme specifically affords capital defendants the right to effective postconviction counsel. *See Spalding v. Dugger*, 526 So. 2d 71, 72-73 (1988) ("We recognize that, under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by capital collateral representative in all collateral relief proceedings.").

Even if states are not constitutionally-required to provide postconviction counsel in the first place, once they do the state-created entitlement may not be arbitrarily denied. *See, e.g.*, *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972). The

United States Constitution requires states like Florida that have created a state statutory right to capital postconviction counsel to provide effective counsel.

At a minimum, that should also mean that, where state-appointed capital postconviction counsel performs ineffectively, state procedural bars must yield to the federal Constitution's prohibition against the arbitrary deprivation of state-created rights, especially when those bars prevent a death-sentenced individual from presenting evidence of actual innocence. The ineffectiveness of state-appointed capital postconviction counsel should at least excuse procedural bars in this Court.

This Court should reconsider its procedural dismissal of significant evidence of innocence that Mr. Dailey tried to present, including records and testimony from multiple individuals. *See* Slip Op. at 9-13. Because Florida law granted Mr. Dailey the right to effective postconviction counsel, he should not have been barred in this appeal from arguing the ineffectiveness of that counsel, either as an independent basis for relief, or as cause to excuse any procedural bars. This is especially so in a capital case where the evidence relates to actual innocence and the defendant faces imminent execution. The Court should clarify its October 3rd opinion on the issues as a matter of federal constitutional law.

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I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Christina Pacheco, Assistant Attorney General, capapp@myfloridalegal.com and christina.pacheco@myfloridalegal.com, on this 8th day of October 2019.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 18-557

JAMES MILTON DAILEY

Appellant

v.

STATE OF FLORIDA

Appellee

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

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STATEMENT OF THE CASE

This is an appeal of the circuit court's denial of James Dailey's successive motion for postconviction relief. The underlying successive motion for postconviction relief is primarily predicated on newly discovered evidence and two *Giglio*[1] violations. In particular, it is based on evidence and affidavits which impeach the testimony of several State witnesses during Mr. Dailey's original trial. The newly discovered evidence establishes that James Dailey is innocent of first degree murder. Dailey's co-defendant, Jack Pearcy, alone killed S.B.

Unlike James Dailey, Jack Pearcy was a man with a history of violence, particularly violence against women. R2 9753-9923. Pearcy knew the victim prior to the killing (she and her father regularly sold him marijuana). R2 305, 11862-63. Multiple witnesses testified that on the night in question, Pearcy was seen dancing and flirting with the victim. TR1 8:380-81; R2 11859. Pearcy could not take the victim home to have sex with her because he lived with his pregnant girlfriend, who was already, on that night, visibly angered by his flirtatious behavior. R2 293. He needed to take S.B. to a secluded location, and he did: a favorite fishing spot. R2 9314-15. It was this place where the victim's body was found. Pearcy had multiple possible incentives to murder the victim: either she resisted his advances or he wanted to silence her so he did not have to face the anger of his girlfriend, her father (who had

[1] *Giglio v. United States*, 405 U.S. 150 (1972).

already told him to stay away from her, R2 11863), or law enforcement. Pearcy was the one who owned a knife consistent with the wounds on the victim's body, and it was Pearcy who told police where the knife's sheath could be found. R2 11803, 11809-11. Pearcy's own friend, Oza Shaw, stated in his very first interview with police that Pearcy and the victim had gone off alone that night, *without* Dailey, and that Pearcy had returned home several hours later, *by himself*. R2 91-95. Deborah North, an acquaintance of the victim and employee of Hank's Seabreeze Bar, likewise testified that she had seen the victim with *only one man* at the bar shortly before the time of death. R2 11712. The medical examiner's testimony likewise suggested that only one person committed the crime. R2 11874-75. And the evidence established that, on the morning after the murder, it was Pearcy who insisted that he, his girlfriend, Dailey, and Shaw leave town (R211379); Pearcy who used an alias when registering at a motel, R2 11155, 11524, 11787) (while Dailey used his true name (TR1 3:292-93; 7:914; R2 10887)); Pearcy who bought tickets for a cruise to get out of the country (TR1 3:302-03); and Pearcy who was acting nervous and strange (TR1 3:313).

In contrast, there was no eyewitness, forensic, or circumstantial evidence implicating Dailey. Dailey was arrested only because Pearcy, in a series of self-serving statements, attempted to shift the blame for the crime from himself to the friend who had been with him and the victim much earlier in the night. TR1 3:331; R2 9625.

The murder was gruesome and the State was under intense pressure to obtain the death penalty against the two men it elected to charge. This pressure only intensified after Pearcy's jury recommended life, not death. But the State was aware that it did not have sufficient evidence to secure even a conviction against Dailey, let alone a death sentence. The week after Pearcy's jury dealt the State a devastating blow by recommending a life sentence, not death, the State made it known to Dailey's fellow inmates that it was looking for help.

During that week, Detective John Halliday came to the jail where Dailey was incarcerated, pulled every inmate from Dailey's pod, took each individually into a private room where a desk was covered with news articles about Dailey's case, and asked each if he had any information to share regarding James Dailey. R2 12056-57, 12066, 12094-96, 12106-07, 12163-65, 12196, 12198. Though the interrogation of these fifteen inmates yielded nothing, within a week two other inmates came forward claiming Dailey had made inculpatory statements to them. In exchange for their testimony – testimony critical to Dailey's conviction – they received consideration in their own cases from the State Attorney's Office by way of plea deals. TR1 8:1014, 9:1082; R2 9899-9955. A third informant came forward a little later, himself a notorious snitch with an established history of pathological deception. The prosecutor from Dailey's trial would later testify during postconviction that she would never use this witness again because she could not, in good faith, put him on the stand believing

that he would give truthful testimony. R2 10283. The testimony of these three men became the linchpin of the State's case, even though none of their statements possessed any independent indicia of reliability.

The most recent evidentiary hearing establishes conclusively that the testimony of these three men was fabricated. At the hearing, two witnesses with no motive to lie testified that Pearcy had told them each, independently and years apart, that he – Jack Pearcy – bore sole responsibility for the crime. R2 12099, 12118-19, 12121. The defense also introduced an affidavit signed by Pearcy in which he acknowledged that he had committed the murder alone. Had all of this evidence been presented at trial, a jury could not have found Dailey guilty beyond a reasonable doubt, much less recommended the ultimate sanction.

PRELIMINARY STATEMENT

Citations shall be as follows: The record on appeal from Dailey's first trial proceedings shall be referred to as "TR1" followed by the appropriate volume and page numbers. (volume:page). The record on appeal from Dailey's second trial proceedings shall be referred to as "TR2" followed by the appropriate volume and page numbers. (volume:page). All cites from the first postconviction record on appeal shall be referred to as "PC ROA" followed by the appropriate volume and page numbers. All cites from the second postconviction record on appeal, which is still pending before this Court in Case No. SC17-1073, shall be referred to as "R1"

followed by the appropriate page numbers. All cites from this record on appeal will be referred to as "R2" followed by the appropriate page number(s). All other references will be self-explanatory or otherwise explained herein. All emphases are supplied unless otherwise noted.

REQUEST FOR ORAL ARGUMENT

James Dailey has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims at issue and the stakes involved. James Dailey, through counsel, respectfully requests oral argument.

STANDARD OF REVIEW

"When the trial court rules on a newly discovered evidence claim after an evidentiary hearing, [this Court] review[s] 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). However, when the order on appeal contains no factual findings, including on the credibility of witnesses, this Court's review is *de novo*. *See Gino Vitiello, M.D., P.A. v. Genovese Joblove & Battista, P.A.*, 123 So. 3d 1185, 1187 (Fla. 4th DCA 2013); *Coultas v. State*, 955 So. 2d 64, 66 (Fla. 4th DCA 2007); *Osterback v. Agwunobi*, 873 So. 2d

437, 439 (Fla. 1st DCA 2004); *Niles v. State*, 120 So. 3d 658, 663 (Fla. 1st DCA 2013). The trial court's application of the law to the facts is reviewed *de novo*. *Green*, 975 So. 2d at 1100.

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Statement of the Case and of the Facts

Procedural History:

James Dailey was tried by a jury and found guilty of one count of first degree murder on June 27, 1987. By a vote of twelve to zero, a jury returned a recommendation of death. Dailey was sentenced to death on August 7, 1987. On November 14, 1991, this Court affirmed the conviction but vacated Dailey's death sentence, holding that the trial court improperly instructed the jury on and erroneously found two aggravating circumstances: (1) that the crime was "cold, calculated, and premeditated;" and (2) that the crime was committed to avoid arrest. *Dailey v. State*, 594 So. 2d 254, 259 (Fla. 1991). This Court held that neither aggravating circumstance applied to the case. *Id*. This Court further held that the trial court erred when it failed to assign any weight to numerous mitigating circumstances, and erroneously relied on evidence from the trial of Dailey's co-defendant which had *not* been introduced in any phase of Dailey's trial. *Id*. In addition to these errors, this Court identified six other errors, but deemed them harmless. *Id*.

On remand, the trial court, without empaneling a new jury, again sentenced Dailey to death. This Court affirmed. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995), *cert. denied*, 516 U.S. 1095 (1996).

On March 28, 1997, Dailey filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. The circuit court denied the motion after a limited

evidentiary hearing. Dailey appealed and filed a petition for state habeas relief in this Court. *Dailey v. State*, 965 So. 2d 38, 48-49 (Fla. 2007). This Court affirmed the denial of his 3.850 Motion and denied his state habeas petition. *Id*.

Dailey filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). R1 4-52. The circuit court denied Dailey's motion. R1 191-98. Dailey filed a timely appeal on June 7, 2017. R1 206-07. That appeal remains pending with this Court. *See Dailey v. State*, Case No. SC17-1073.

On June 21, 2017, Dailey filed a second successive motion to vacate his judgment and sentence based on newly discovered evidence of actual innocence. R2 12-36. That same day, Dailey filed a Motion to Relinquish Jurisdiction with this Court, which was granted on September 14, 2017. A case management conference was held on November 5, 2017. The lower court granted an evidentiary hearing on claims I(A) and I(B). R2 931-1024. The evidentiary hearing took place on January 3, 2018. A records hearing was held on January 18, 2018. A final order denying all claims was issued on March 20, 2018. R2 8872-9183.

Summary of Testimony from the January 2018 Evidentiary Hearing:

James Wright

Wright testified that he was incarcerated in the county jail with Dailey prior to Dailey's trial. R2 12055. Wright had trouble speaking at the evidentiary hearing and

had to whisper due to his tracheotomy. *Id*.

According to Wright, while he was in the county jail, a detective, whose name he could not recall, came to speak with Wright about Dailey's case and met with him in a room inside the jail. R2 12056. The detective brought newspaper articles about Dailey's case which he showed Wright during their meeting. R2 12056-57, 12066. Wright testified that he was "aware of the kind of case Mr. Dailey had" because he received the newspaper while in the jail and there was "extensive media coverage" of Dailey's case, and he told this to the detective. R2 12055-56, 12067.

The detective wanted to know if Dailey had been talking about his case or if he had admitted to "anything." R2 12057. Wright testified that Dailey never spoke about his case, except to say that he was innocent. *Id*. According to Wright, Dailey always denied any participation in the crime. *Id*.

Wright met with members of Dailey's current legal team on May 9, 2017. R2 12058. Based on that conversation, an affidavit was prepared and signed by Wright. R2 12058-59. Wright dictated the contents of the affidavit to defense counsel so she could prepare it in his presence. R2 12062-63, 12072. His affidavit was received into evidence as Defense Exhibit 1. R2 12060.

Wright did not testify at the prior postconviction hearing. R2 12069. Wright testified that he had never spoken to Andringa (trial counsel), Eric Pinkard (prior postconviction counsel), or David Gemmer (prior postconviction counsel). R2 12070-

72. He was never subpoenaed to testify in the 2003 postconviction hearing. R2 12071.

Travis Smith

Smith testified that he met Dailey when the two were incarcerated together in the county jail in the mid-1980s. R2 12076. Smith testified that there was "extensive coverage" of Dailey's case on television and in the newspapers. R2 12077. He recalled that the local news aired Dailey's case "quite a few times," showing photos of the crime scene, including pictures of Indian Rocks Beach, the water, and rocks. R2 12078, 12095-96.

Smith testified that he also knew Pablo DeJesus and James Leitner, two jailhouse informants who testified for the State against Dailey, from this same period in the county jail. R2 12078. DeJesus and Leitner worked in the law library in the county jail, assisting other inmates with legal research. R2 12080. Smith witnessed Dailey go into the law library several times, but never saw Dailey discuss his case with DeJesus or Leitner, or anyone else. R2 12081. According to Smith, it was common knowledge in the jail that it was unsafe to share the details of one's case because other inmates were constantly seeking information to "try to help themselves" – including DeJesus and Leitner. *Id*. Inmates did this because, at that time, the State Attorney's Office "used to offer funds and stuff for people to offer information about another person's case. It was common practice back in those days." R2 12088.

Smith did, however, observe DeJesus and Leitner discussing Dailey's case. R2

12082, 12087. Smith stated that DeJesus and Leitner "were trying to collaborate a story together as to what they were going to say when they talked to the State Attorney." R2 12093. Smith reiterated that he never observed Dailey speaking to either DeJesus or Leitner. R2 12088-89.

Smith testified that he knew DeJesus and Leitner's story that Dailey confessed to them was not true. R2 12093. "[It] was a plot that they had to try to get their sentence reduced. And the State Attorney reduced their sentence as a result of them, you know, fabricating their story." *Id*.

During this same period, while Smith was at the county jail, Smith testified that two police officers pulled him from his cell, took him into a separate room, and attempted to interview him about Dailey's case. R2 12094-96. Smith refused to answer their questions. R2 12094. The officers had newspaper articles with them about Dailey's case and showed these articles to Smith. R2 12095-96.

Smith also met Jack Pearcy while at the county jail. R2 12096-97. Pearcy knew Smith because Smith had worked in the law library. R2 12099. Pearcy told Smith that he was Dailey's co-defendant. *Id*. Pearcy told Smith that "he committed the crime himself and that he did it." *Id*. Pearcy said "that was his charge and his charge alone." *Id*.

Michael Sorrentino

Michael Sorrentino is an electrician. R2 12103. He testified that he was

incarcerated at the county jail between 1985 and 1987, and that for part of that time he was housed in the same pod as Dailey. *Id*. According to Sorrentino, he and Dailey interacted on a daily basis during the six to eight months that they were housed together, but during this time Dailey never spoke about his case to Sorrentino, and Sorrentino never witnessed Dailey speak about his case with anyone else. R2 12103-05, 12110.

Sorrentino testified that there were televisions in the pod that Sorrentino and Dailey shared, that they were sometimes tuned to the news, and that Dailey's case was featured on the television news and in the newspaper. R2 12105-06.

Sorrentino testified that, during this time period, a detective came to the jail and brought the inmates out of the pod one by one. R2 12106. The detective brought Sorrentino into a conference room containing a desk covered in at least six to eight newspaper articles about Dailey's case. *Id*. The detective then asked Sorrentino if "Jim ever talk [sic] about his case" to which Sorrentino responded, "No." R2 12107.

Sorrentino testified that this interaction – looking at all of the newspaper articles and being asked if Dailey talked about his case – made Sorrentino uneasy: "It just seemed not correct." *Id*. Accordingly, he told the investigator, "I really hope you guys aren't doing something like this with my case," R2 12108 (proffer), meaning, he hoped that investigators were not "bringing people in and hav[ing] them look at newspaper articles with details about the case" (*id.*), because "[c]learly there were

newspaper articles in front of me, had I wanted to say something or fabricate something all the tools were there to give them whatever they might be looking for." R2 12109 (proffer).

Sorrentino was contacted by current defense counsel in May 2017. *Id*. Prior to that time, no one had contacted him on Dailey's behalf. R2 12110-11. Sorrentino was not aware that he had been listed as a defense witness in 2003. R2 12111. Sorrentino was never contacted by any lawyer in 2003 about Dailey's case. *Id*. Current defense counsel was the first attorney to contact Sorrentino about Dailey's case. *Id*. Sorrentino testified that had an attorney contacted him before that, Sorrentino would have spoken about the case. *Id*.

Juan Banda

Banda testified that he first met Jack Pearcy in 1985 at the Pinellas County Jail, and then encountered him again at Union Correctional Institution ("UCI") in the early 1990s. R2 12117-18. Banda testified that when he spoke to Pearcy at UCI, sometime between 1992 and 1996, Pearcy told him that "Mr. Dailey was innocent of the crime that he was sentenced to death row for." R2 12118-19.

Banda testified that he did not see Pearcy again until 2007, when the two encountered each other in the law library at Jackson Correctional Institution. R2 12119-20. Pearcy came into the law library, where Banda was working, looking for material on re-entry. R2 12120. During their conversation, Banda asked about Dailey.

Id. Pearcy said Dailey was still on death row. R2 12121. Banda asked how that could be since Dailey was innocent. *Id*. Pearcy repeated once more that Dailey was innocent of the crime for which he had been sentenced to death. *Id*.

Banda has not spoken to Jack Pearcy since the conversation at Jackson Correctional Institution in 2007. *Id*. Banda did not communicate with Pearcy while they were at the county jail prior to the evidentiary hearing in 2018. *Id*.

No one from Dailey's defense team ever spoke to Banda prior to the summer of 2017. R2 12121.

Jack Pearcy

Jack Pearcy is Dailey's co-defendant. R2 12130. He currently resides at Sumter Institution. R2 12129. At the evidentiary hearing, Pearcy admitted signing an affidavit (Defense Exhibit 5), acknowledged that he signed under penalty of perjury, and identified his signature on the affidavit itself. R2 12130-31. The affidavit states, in part, that "James Dailey was not present when [S.B.] was killed. I alone am responsible for [S.B.'s] death." R2 63-64.

When Pearcy was asked if the statements in the affidavit are true, he responded, "No." R2 12137. When asked to identify which statements were not true, Pearcy stated, "I'm not sure. There's quite a few lines on there." *Id*. After being directed by the court to read the affidavit, Pearcy stated "I agree with [lines] 1 and 2, and I take the Fifth Amendment from that point forward." R2 12139. Counsel then went line by

line, asking if each statement was true, but Pearcy's only response, repeated again and again, was, "Fifth Amendment." R2 12140-41. The lower court informed Pearcy that he could not invoke the Fifth Amendment privilege against self-incrimination, since he already had been convicted of the crime described in the affidavit, and ordered Pearcy to answer counsel's questions. R2 12141-45. Pearcy nevertheless refused to answer. R2 12145.

On cross examination by the State, Pearcy admitted that he signed Defense Exhibit No. 5 on April 20, 2017. R2 12148. The affidavit was provided to Pearcy. R2 12149. The day he signed the affidavit was the first time he met with a female lawyer, but Pearcy previously had met with other defense team members. *Id*.

On redirect, Pearcy testified that since signing the affidavit, he has spoken to the State and members of his family, including his mother, stepfather, son, daughter-in-law, sister, and niece. R2 12145-46. His mother and stepfather were present at the hearing. *Id.*

Lisa Bort

Ms. Bort is an attorney with the Capital Collateral Regional Counsel – Middle Region. R2 12153-54. She is also a notary. R2 12154. Ms. Bort accompanied attorney Chelsea Shirley to Sumter Correctional Institution in her capacity as a notary. *Id*. There was no one else present during the visit with Pearcy. R2 12154.

During the visit, Pearcy asked counsel if she had anything for him to sign. R2

12156. Counsel handed Pearcy the affidavit (Defense Exhibit No. 5) and Pearcy read each page, taking his time, and using a piece of paper to cover the lines below so he could read one line at a time. R2 12156-57. He did not ask any questions while reading and made no changes. *Id*. Once Pearcy finished reading the affidavit, he asked for a pen. *Id*. Pearcy was not tearful and did not appear hesitant. R2 12158.

Ms. Bort testified that she is legally prohibited from notarizing a document signed by an individual who has been threatened or is under obvious duress, or by an individual who is obviously mentally unstable or does not appear to understand its contents. R2 12158. By signing and notarizing Defense Exhibit No. 5, Ms. Bort attested that she did not have any such concerns with Pearcy. *Id*.

Neither Ms. Bort nor Ms. Shirley threatened Pearcy, nor did they promise him anything in exchange for his signature. R2 12159.

Testimony of State's Witness: *John Halliday*

From 1976 to 1987, Halliday worked at the Pinellas County Sheriff's Office, where he served as the lead detective in the investigation of S.B.'s murder. R2 12162-63. The Medical Examiner's Office contacted him and asked him to assist the Indian Rocks Beach Police Department at the crime scene. *Id*. He was involved in the arrests of Dailey and Pearcy. *Id*.

Halliday testified that, in connection with the murder investigation, he had gone to the Pinellas County Jail to interview inmates. R2 12163-64. The interviews took place

in a room inside the jail. R2 12164. The inmates were brought in "singularly in a room by themselves with another detective." R2 12165. Halliday talked to a number of inmates about this case. *Id*.

On direct examination by the State, Halliday acknowledged, without hesitation, that he spoke with "inmates Travis Smith, Michael Sorrentino, Alexander Walker and James B. Wright." R2 12165, 12167-71. When questioned about each interview, as well as its location, Halliday likewise responded without hesitation. R2 12167-71. Halliday denied bringing newspapers into any of the interviews. R2 12167. The only detail that Halliday was unable to recall, on direct examination, was which detective was in the room with him for each of these interviews. *Id*.

On cross examination by defense counsel, Halliday's memory appeared to fail. He could not recall the number of people at the crime scene, even after being shown the police report he authored, which individually listed each person present. R2 12174.

Halliday conceded that Pearcy was convicted on November 23, 1986, and that the State had sought the death penalty, but that the jury had recommended a life sentence on November 25, 1986. R2 12180-81.

According to Halliday, he could not recall if any jailhouse witnesses[2] had come

[2] During the hearing, the court inquired into the use of the term "informant" as opposed to "witness." Dailey takes the position that the inmates in this case, James Leitner, Pablo DeJesus, and Paul Skalnik, were "textbook" jailhouse informants. *See, e.g.*, Fla. R. Crim. P. 3.220; *In re Amend. To Rule of Crim. Proc. 3.220*, 140 So. 3d 538, 539 (Fla. 2014) ("[R]ule 3.220 should be amended to include more detailed disclosure

forward in James Dailey's case prior to December 1986. R2 12182. Halliday's trial testimony from Dailey's case was read into the record, confirming that no witnesses came forward in Dailey's case until December 1986. R2 12189. The lower court took judicial notice of that testimony. R2 12190.

Ultimately, with the lower court's intervention,[3] Halliday also acknowledged that his visit to the Pinellas County Jail, the visit central to the evidentiary hearing, took place on December 4, 1986, just days after Jack Pearcy's jury recommended a life sentence. R2 12190-91, 12194.

Halliday was asked if he had gone to the jail to find witnesses. R2 12195. He stated, "That's an investigation." *Id*. He was then asked if he pulled fifteen people out of the pod. *Id*. He answered, "I don't have a specific recollection of it." *Id*. Halliday acknowledged to previously testifying that he interviewed fifteen inmates – after being confronted with that testimony. R2 12196, 12198. Halliday also acknowledged previously testifying that some inmates had refused to speak with him, again after his

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requirements with respect to informant witnesses, because informant witnesses are not currently specifically treated under the rule and they constitute the basis for many wrongful convictions."); *Guzman v. State*, 868 So. 2d 498 (Fla. 2003). *See also* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev 645 (2004); *Incentivized Informants*, Innocence Project (last visited Feb. 2018) https://www.innocenceproject.org/causes/incentivized-informants/.

[3] Court: The attorney is telling you there's a document that says it's 12/4/86. Do you have any reason to question the date?
Witness: No, I do not, Your Honor.
R2 12194.

prior testimony was read aloud. R2 12200. Although Halliday pulled nearly every inmate in Dailey's pod, not one reported that Dailey had made any statements about his case. R2 12207-08.

When Halliday was asked whether his visit to the jail "made it a well-known fact that he was looking for witnesses," he responded "I don't know whether it was a well-known fact or not." R2 12200. Halliday's trial testimony (TR1 9:618) was read into the record:

> Q: If you were going to a cell, pull people out of the pod, that's a well-known fact you were looking for witnesses against James Dailey.
> A: At that time, yes.

R2 12200.

According to Halliday, he could not so much as recall a witness by the name of DeJesus and did not know whether or not he testified against Dailey. R2 12215. Halliday claimed to remember "the name" Paul Skalnik but could not remember if Skalnik told him he met Dailey. R2 12222-23. Halliday denied knowing Skalnik well but remembered he was "a jailhouse inmate." *Id*. Halliday admitted that he worked with Skalnik on other cases, and mentioned, *sua sponte*, that Skalnik was an ex-police officer. R2 12224.

SUMMARY OF ARGUMENT

For more than thirty years, Dailey consistently has maintained his innocence. The State's case against Dailey included no physical evidence or eyewitness testimony. It

relied instead on the testimony of three jailhouse informants. Pursuant to *Jones v. State*, 709 So. 2d 512 (Fla. 1998) (*Jones III*), this Court must imagine a new trial in which Dailey might be convicted beyond a reasonable doubt based on the testimony of these informants, now that their credibility has been thoroughly discredited – so much so that the prosecutor *who tried this case* has admitted she has no good faith basis to believe that one could testify truthfully at all. When the unreliable jailhouse informant testimony is weighed against the hair evidence found in S.B.'s hand excluding Dailey, the exculpatory affidavit of Jack Pearcy that he alone killed S.B., Pearcy's confessions to Travis Smith and Juan Banda that Dailey is "innocent," Oza Shaw's corroborating testimony that Pearcy alone left with S.B. after dropping Shaw off at the phone booth – testimony corroborated by telephone records, Betty Mingus's testimony, and IRBP police reports – and Deborah North's testimony that she saw S.B. alone with only one man, not two, near the crime scene, no good faith basis exists to contend that an acquittal is not probable. The lower court erred in concluding otherwise.

ARGUMENT

ARGUMENT I: The lower court erred in denying Claim I of Dailey's successive motion that newly discovered testimonial evidence proves Dailey's actual innocence.

Under Florida and federal law, there are two requirements for relief based on newly discovered evidence. First, the asserted facts must have been unknown by the trial

court, the party, or counsel at the time of the trial, and it must appear that the defendant or his counsel could not have learned them by the use of diligence. Second, the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *See Jones III*, 709 So. 2d at 521. The *Jones* standard also applies to the question of whether a life or death sentence should have been imposed. *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992). *See also Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (*Jones I*).

When considering newly discovered evidence, courts "must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial." *Jones III*, 709 So. 2d at 522. Courts must "conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case' . . . a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal." *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014) (internal citations omitted). *See also Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999) ("In this case the trial court concluded that [a witness's] recanted testimony would not probably produce a different result on retrial. In making this determination, the trial court did not consider [another witness's] testimony, which it had concluded was procedurally

barred, and did not consider [the testimony of a third witness] from a prior proceeding. *The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision*.").

Newly discovered evidence also satisfies the second prong of the *Jones* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996) (*Jones II*). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones I*, 591 So. 2d at 915.

The Due Process Clause and the Eighth Amendment to the United States Constitution provide that when relevant evidence that would produce an acquittal has not been presented because it could not have been discovered, a capital defendant has a right to a new trial. Dailey identified four areas of newly discovered evidence. The lower court erred in failing to consider the totality of the evidence when evaluating Dailey's newly discovered evidence claim. It likewise erred in denying each subclaim and the claim as a whole.

A. The lower court erred in denying Claim I(A) that newly discovered evidence proves Jack Pearcy alone murdered S.B.

1. Jack Pearcy's affidavit is admissible evidence.

In denying this claim, the lower court held that Pearcy's affidavit does not qualify as a third party admission of guilt and is inadmissible hearsay which does not fall

under any exception. R2 8879-80. This is error and subject to *de novo* review. *Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014); *Powell v. State*, 99 So. 3d 570, 573 (Fla. 1st DCA 2012).

a. Jack Pearcy's affidavit is a third-party admission of guilt.

Jack Pearcy's affidavit constitutes a third-party admission of guilt under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006). In his affidavit, Pearcy testified, "James Dailey was not present when S.B. was killed. I alone am responsible for S.B.'s death." R2 9599-9600. This is an unambiguous admission of guilt.

All of the evidence suggests that Pearcy knowingly, willingly, and voluntarily signed the affidavit. The notary testified that Pearcy read each page of the affidavit, took his time, and used a piece of paper to cover the lines below so he could read each page one line at time. R2 12156-58. Pearcy did not ask any questions while reading the affidavit, and did not ask to make any changes. R2 12157. Once Pearcy finished reading the affidavit, he asked for a pen. *Id*. Pearcy was not under duress and appeared to understand the contents of the affidavit. R2 12158.

Neither the notary nor defense counsel threatened or coerced Pearcy to sign the affidavit, nor did they promise him anything in exchange for his signature. R2 12159. Any suggestion that Pearcy, who is thirty years older and four inches taller than both attorneys, was somehow intimidated or coerced, does not merit this Court's

consideration.[4]

The lower court misapplied the test in *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015) in concluding that Pearcy's affidavit is not admissible under *Chambers*. R2 8881. The court considered four factors: (1) whether the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) whether the confession or statement is corroborated by some other evidence in the case; (3) whether the confession or statement was self-incriminatory and unquestionably against interest; and (4) whether, in the event there is any question about the truthfulness of the out-of-court confession or statement, the declarant is available for cross-examination. *Id*. However, as this Court has made clear, there is no "immutable checklist of four requirements. Instead, the primary consideration in determining admissibility is whether the statement bears sufficient indicia of reliability." *Bearden*, 161 So. 3d at 1265, n.3.

The veracity and reliability of Pearcy's affidavit was corroborated by two additional witnesses: Travis Smith and Juan Banda. The consistency of these prior statements – made spontaneously to different individuals, over many years – is additional evidence that the contents of the affidavit are not a newly invented version of events, created under duress, but rather the truth. In the affidavit, Pearcy takes full

[4] Ms. Bort testified that she is thirty years old and five-feet, three inches tall, and Ms. Shirley is twenty-eight years old and five-feet, four inches tall. R2 12158-59. In contrast, Pearcy is sixty-two years old and five-feet, eight inches tall. R2 12129-30.

responsibility for the murder, adding that James Dailey *was not present* when S.B. was killed. Similarly, in the mid-1980s, shortly after the crime occurred, Pearcy told Travis Smith, that he "committed the crime himself," and that the charge was "his charge and his alone." R2 12099. In Pearcy's first statement to Juan Banda, made in the early 1990s, Pearcy said that Dailey "was innocent of the charge he had been committed to death row for." R2 12119. In his second statement to Banda, made in 2007, Pearcy again said that Dailey was innocent. R2 12121. All of these statements stand for one basic claim: Pearcy is guilty and Dailey is not. "The State's proof at trial excluded the theory that [anyone besides Dailey and Pearcy participated in, or witnessed, the killing of S.B]. To the extent that [Pearcy's] sworn confession tended to incriminate him, it tended also to exculpate [Dailey.]." *Chambers*, 410 U.S. at 297. Lastly, as discussed below, Pearcy's affidavit was self-incriminatory and against his interest.

As a result, there was sufficient evidence to conclude that Pearcy's affidavit bears sufficient indicia of reliability to be admitted as evidence. The lower court erred in excluding Pearcy's affidavit as a third-party admission of guilt. Excluding Pearcy's affidavit also violates Dailey's right to due process. *See Bearden*, 161 So. 3d at 1264 ("[I]n *Chambers*, the United States Supreme Court concluded that the exclusion of hearsay regarding a third party's confessions to a crime violated the defendant's constitutional right to due process – the state's rules of evidence notwithstanding.").

b. Jack Pearcy's affidavit is a declaration against penal interest.

Second, Pearcy's affidavit is admissible as a declaration against penal interest. In order to satisfy this hearsay exception, the declarant must be unavailable as a witness. Since Pearcy invoked his Fifth Amendment right to remain silent (R2 12140-41), and refused to testify despite repeated orders by the lower court (R2 12141-45), he is unavailable as a witness. *See Garcia v. State*, 816 So. 2d 554, 564 (Fla. 2002) (co-defendant who invoked his Fifth Amendment right at defendant's subsequent trial was unavailable); *see also* Section 90.804(1)(b), Florida Statutes (stating that a declarant is unavailable as a witness if the declarant, "[p]ersists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.").

Pearcy's statements are also clearly "contrary to the declarant's pecuniary or proprietary interest or [tend] to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true." § 90.804(2)(c), Fla. Stat. (2017). Pearcy's admission that he alone committed the crime puts him in jeopardy of a perjury charge since it flatly contradicts prior sworn statements. *See* R2 9301. The State conceded as much when: (1) prior to the evidentiary hearing, the State requested Pearcy be appointed counsel to advise him as to the consequences of his testimony, a request which the lower court denied; and (2) during the evidentiary hearing, the State renewed this request, which the court again

denied. R2 12143. The lower court erred in concluding that Pearcy's affidavit is not contrary to his interests and does not expose Pearcy to any liability. R2 8880. *See also* § 837.021(2), Fla. Stat. (2017) ("Whoever, in one or more official proceedings that relate to the prosecution of a capital felony, willfully makes two or more material statements under oath which contradict each other, commits a felony of the second degree.").

Furthermore, the lower court erred in concluding that Pearcy's "potential for a perjury charge" (R2 8880) is not so significant that Pearcy would not have made the statement if it were not true. All of the evidence points to the contrary. Pearcy is eligible for parole. R2 12150. The State strongly implied before and during the evidentiary hearing that perjury charges would be forthcoming if Pearcy testified consistently with the contents of his affidavit that he alone killed S.B., and the State twice requested that Pearcy be provided independent counsel to explain this to him. Had Pearcy testified consistently with the contents of the affidavit and the State charged Pearcy with perjury in a capital case, any chance at parole would be eviscerated. The lower court's conclusion that this punishment is "not significant" lacks merit. As the United States Supreme Court made clear "life without parole . . . deprives the convict of the most basic liberties without giving hope of restoration." *Graham v. Florida*, 560 U.S. 48, 69-70 (2010). This sentence "means 'denial of hope.'" *Id*. at 70 (internal citations omitted).

Thus, Jack Pearcy's affidavit is admissible as a third-party admission of guilt under *Chambers v. Mississippi*, and is also admissible as a statement against penal interest. The lower court erred in concluding to the contrary.

2. The lower court erred in finding Travis Smith's testimony inadmissible.

The lower court held that Travis Smith's testimony is inadmissible hearsay. R2 8881. The lower court made no credibility findings.

Smith testified that he met Jack Pearcy while incarcerated at the county jail, where Pearcy told him he was Dailey's co-defendant and that "he committed the crime himself and that he did it." R2 12096-97, 12099. Pearcy said "that was his charge and his charge alone." R2 12099. These statements constitute third party admissions of guilt. Therefore, under *Chambers* and this Court's precedent, Smith's testimony is admissible as substantive evidence.

In *Chambers*, the United States Supreme Court held that a trial court erred by excluding, on hearsay grounds, the testimony of three witnesses that another person had admitted to committing the murder for which the defendant was convicted. 410 U.S. at 301-02. This Court subsequently held that a trial court erred when it excluded a witness's five out-of-court confessions to four different people because those statements were admissible as substantive evidence under *Chambers*. *Aguirre-Jarquin v. State*, 202 So. 3d 785, 793-94 (Fla. 2016). All four witnesses were allowed to testify to the out-of-court statements. *Id*. at 792. This Court found their testimony

admissible and considered it as substantive evidence when analyzing Aguirre-Jarquin's newly discovered evidence claim. *Id*. at 794.

Smith's testimony also bears on the veracity of Pearcy's newly discovered affidavit. The lower court therefore erred in failing to consider it when evaluating the weight of the other newly discovered evidence. Irrespective of whether Smith's testimony is procedurally barred, this Court has held "in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial … a trial court *must even consider* testimony that was previously excluded as *procedurally barred* or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). The lower court should have treated Smith's testimony as admissible evidence and evaluated it when considering Dailey's newly discovered evidence claim, and in failing to do so, erred.

3. The lower court erred in finding Juan Banda's testimony and affidavit inadmissible.

The lower court held that Juan Banda's testimony that Pearcy told him Dailey is innocent is inadmissible hearsay. R2 8881. This was error. *Chambers* leaves no room for doubt that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. Likewise, in *Holmes*, 547 U.S. at 331, the United States Supreme Court held that the state's rules of evidence violated the "criminal

defendant's right to have 'a meaningful opportunity to present a complete defense.'" (internal citation omitted). In *Holmes*, the defendant's efforts to introduce the testimony of several witnesses that another man, Jimmy White, had either acknowledged the defendant was "innocent" *or* had actually admitted to committing the crime were initially denied based on the state's evidence code. *Id*. at 323. The Supreme Court held that due process required that the testimony be admitted.

This Court has embraced this important principle, repeatedly holding that Florida's evidence code cannot be used to bar evidence of third-party guilt. *See, e.g.*, *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015) and *Aguirre-Jarquin v. State*, 202 So. 3d 785 (Fla. 2016). This Court has likewise held that third-party confessions are "properly considered in analyzing the cumulative effect of the newly discovered evidence." *Aguirre-Jarquin*, 202 So. 3d at 794.

The State's theory of the crime has always been that Dailey and Pearcy killed S.B. At no time has the State ever alleged that another person aided, abetted, or participated in the death of S.B. Therefore, Pearcy's admissions to two different people that Dailey is completely innocent of this crime necessarily implicates Pearcy. As a result, Pearcy's statements to Banda that Dailey is innocent constitute third-party admissions of guilt and are precisely the type of testimony that the United States Supreme Court has held cannot be excluded based on a state's rules of evidence. Dailey's right to present a meaningful and complete defense must not unreasonably be restricted by the

evidence code – particularly in a capital case where he has always maintained his innocence.

The State also raised a hearsay objection to Banda's affidavit. R2 12123. Because Banda's affidavit constitutes evidence of third-party guilt, it cannot be excluded as hearsay under *Chambers* and *Holmes*.

Lastly, assuming *arguendo* that Banda's testimony is not evidence of third-party guilt, Pearcy's statement to Banda is admissible as a declaration against penal interest. In order to satisfy this hearsay exception, the declarant (in this case, Jack Pearcy) must be unavailable as a witness. As described *supra*, see pp 8-9, 20, Pearcy's relentless invocation of his Fifth Amendment privilege at the evidentiary hearing, despite repeated court orders to answer (R2 12139-40), rendered him unavailable. *See Garcia v. State*, 816 So. 2d 554, 564 (Fla. 2002); *see also* § 90.804(1)(b), Florida Statutes.

Pearcy's statements are also clearly statements against interest. § 90.80(2)(c), Fla. Stat. (2017). Pearcy's admission that Dailey is innocent puts him in jeopardy of a perjury charge since it is contrary to other statements he has made under oath. *See* R2 9301. The State itself conceded the potential for liability when, in advance of the hearing and during the evidentiary hearing, the State requested that Pearcy be specially appointed counsel to advise him concerning the potential consequences of his testimony, and renewed this request during the evidentiary hearing. R2 12143. *See also supra* Claim A(1) at 20-21. Pearcy's acknowledgment of Dailey's innocence

amounts to an admission that Pearcy alone committed the crime, and as such is against Pearcy's interest.

As a result, Banda's testimony is separately admissible as a hearsay exception because Pearcy's admissions constitute statements against interest. The lower court erred in excluding this evidence.

Conclusion

The lower court erred in concluding that Dailey "failed to provide any admissible evidence to prove his claim" that Pearcy is solely responsible for S.B.'s death. R2 8882. Dailey introduced four separate substantive items of evidence to prove this claim – Jack Pearcy's affidavit, Travis Smith's testimony, Juan Banda's testimony, and Banda's affidavit. The lower court's conclusion is error and subject to *de novo* review. *See Browne v. State*, 132 So. 3d 312, 316 (Fla. 4th DCA 2014) and *Powell v. State*, 99 So. 3d 570, 573 (Fla. 1st DCA 2012).

B. The lower court erred in denying Claim I(B) that newly discovered evidence impeaches the informant testimony at Dailey's capital trial and proves that the State actively sought out snitches to testify against Dailey at trial.

1. James Wright & Michael Sorrentino's testimony is admissible.

The lower court found that James Wright and Michael Sorrentino were not newly discovered witnesses because they were known to prior postconviction counsel. R2 8883-84.

To the extent that the facts and information contained in Wright and Sorrentino's

testimony could have been discovered by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). Dailey could not have asserted ineffective assistance of postconviction counsel as "cause" for his failure to diligently develop his procedurally barred claims or his failure to file a timely appeal previously because he was represented by the same attorney in prior state and federal postconviction appeals. This is the type of fundamental injustice that the *Martinez* Court found compelling enough to recognize as an exception excusing a procedural default. *Martinez*, 566 U.S. at 9. *See also McQuiggin v. Perkins*, 569 U.S. 383 (2013).

Even assuming Wright and Sorrentino's testimony is procedurally barred, the lower court was still required to consider it when evaluating the weight of the other newly discovered evidence. As this Court has made clear, "in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial … a trial court *must even consider* testimony that was previously excluded as *procedurally barred* or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). Since Wright and Sorrentino's testimony is directly relevant to Dailey's newly discovered evidence claim, and also necessary to evaluate whether a new trial would probably result in acquittal, the lower court should have accepted it

as evidence.

Second, the lower court erroneously found that even if Wright and Sorrentino's testimony was newly discovered, their testimony was not relevant to "any material issue at trial because neither man testified that they saw any snitches who testified in this trial be called into the interview room." R2 8885. This finding is not supported by competent substantial evidence. The purpose of Wright and Sorrentino's testimony was to reveal the gravely unreliable nature of the jailhouse informant testimony introduced at Dailey's trial.

In the thirteen months between Dailey's arrest and Pearcy's conviction, not a single inmate came forward with information implicating Dailey in S.B.'s murder. TR1 9:1191. It was only after Pearcy was given a life sentence (not the death penalty urged by the State), and after Detective Halliday interviewed at least 15 inmates at the jail, specifically to "find witnesses against [Dailey]," (TR1 9:1191), that Leitner and DeJesus suddenly emerged with information allegedly implicating the one defendant against whom the State still had a chance of achieving a death sentence in this notorious case.

James Wright, Travis Smith, and Michael Sorrentino all testified that when they were questioned about Dailey's case, they were shown newspaper articles regarding Dailey's case (R2 12056-57, 12094-95, 12106-07), and that they were already familiar with the circumstances surrounding Dailey's case because it had been covered

extensively in the media. (R2 12056, 12065, 12077, 12095-96, 12105-06). Michael Sorrentino specifically noted, "had I wanted to say something or fabricate something all the tools were there to give them whatever they might be looking for." R2 12109, proffer. Smith testified that everyone knew that the State Attorney's Office "used to offer funds and stuff for people to offer information about another person's case. It was common practice back in those days." R2 12088. Witnesses Wright, Smith, and Sorrentino had absolutely nothing to gain by testifying on behalf of Dailey and were extremely credible in their reporting of the events from the jail.

By pulling everyone from the pod and making it a well-known fact that he was looking for witnesses against James Dailey, Halliday in effect chummed the waters of the Pinellas County Jail. He then got exactly what he wanted, informants who "rush[ed] to testify … like sharks to blood."[5]

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[5] H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System,* 32 Colo. Law. 11, 21 (2003) ("Jailhouse informants comprise the most deceitful and deceptive groups of witnesses known to frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they will seek favors from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually their presence as witnesses signals the end of any hope of providing a fair trial.") (internal citations omitted). *See also* Rep't of the 1989-1990 Los Angeles Grand Jury at 10-12, 31 ("The myriad benefits and favored treatment which are potentially available to informants are compelling incentives for them to offer testimony and also a strong motivation to fabricate, when necessary, in order to provide such testimony. . . . The more sophisticated may attribute their willingness to testify . . . to other motives, such as their repugnance

DeJesus and Leitner were critical state witnesses at Dailey's trial. Because there was absolutely no physical evidence connecting Dailey to the crime scene, and because not a single witness could place Dailey alone with S.B. (or alone with S.B. and Pearcy) on the night in question, DeJesus and Leitner's claims that Dailey had confessed to them were essential to a conviction. DeJesus alleged that Dailey had spoken with him about his case in the law library and said he was "the one that killed the girl. I'm the one that did it." TR1 9:1095. Leitner similarly testified that he had spoken with Dailey in the law library and that Dailey allegedly said he was the "one that did it." TR1 8:1066.

Dailey has categorically denied making these statements to DeJesus and Leitner. PC ROA 3:326-27.

The testimony of James Wright, Travis Smith, and Michael Sorrentino established that, following Halliday's visit to the jail, there was reason for inmates to believe that they could obtain some benefit by testifying against James Dailey. By Halliday's own admission at Dailey's trial, his visit to the jail made it a well-known fact that he was looking for informants to testify against Dailey.[6] It was common knowledge at the

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toward the particular crime charged . . . . Nevertheless, in the vast majority of cases it is a benefit, real or perceived, . . . that motivates the cooperation. . . . [I]nformants … have demonstrated [an] astonishing ability to discover information about crime in order to concoct a confession by another inmate.").

[6] At Dailey's capital trial, Halliday testified:

> Q: If you were going to a cell, pull people out of the pod, that's a well-known fact you were looking for witnesses against James Dailey.

time that the State would offer deals in exchange for testimony. R2 12088. DeJesus and Leitner apparently saw an opportunity to help themselves, at Dailey's expense. And sure enough, both DeJesus and Leitner testified that they first obtained incriminating statements from Dailey in December – the very same month that Halliday made it known that he was looking for informants. This was also after DeJesus and Leitner had already spoken to Jack Pearcy about the case. TR1 8:1017-19 & 9:1085-86.

Wright and Sorrentino's testimony is material because it establishes that the testimony of DeJesus and Leitner is utterly unreliable. The evidence demonstrates that law enforcement went to extraordinary lengths to enlist the assistance of jailhouse informants in this case. As Halliday himself previously acknowledged, nearly every person in the jail, even in an ordinary case, has a "motive to try to get out or lessen their sentence or do whatever. And I'm sure there are people that do that by reading the newspaper, saying they talked to someone and that is what they had to say." R2 9742. This was all the more true in Dailey's case, where inmates, having caught word that the State was desperate for help, could easily "refresh" their recollections regarding what Dailey "told" them from media sources like newspapers such as the ones Wright, Smith, and Sorrentino testified Halliday spread out before them.

A: At that time, yes.
TR1 9:1194.

The testimony of DeJesus and Leitner, which was central to the State's case against Dailey, when considered in light of Wright and Sorrentino's testimony, is unworthy of belief. Wright and Sorrentino's testimony so "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 678 So. 2d at 315.

Third, the lower court failed to make any findings regarding whether Sorrentino's testimony was admissible evidence. At the evidentiary hearing, defense counsel proffered that Sorrentino told the detective, "I really hope you guys aren't doing something like this with my case," (R2 12108, proffer), meaning, he hoped that police were not, "bringing people in and hav[ing] them look at newspaper articles with details about the case." *Id*. Sorrentino explained that "[c]learly there were newspaper articles in front of me, had I wanted to say something or fabricate something all the tools were there to give them whatever they might be looking for." R2 12109, proffer.

This testimony is admissible evidence. A lay witness may testify about what he perceived in the form of an inference and opinion when:

> (1) the witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and (2) the opinions and inferences do not require a special knowledge, skill, experience, or training.

§ 90.701(1), Fla. Stat. (2017). "Section 90.701(1) recognizes that the use of opinion and inference is necessary and helpful when the witness cannot otherwise

communicate accurately and fully what he or she perceived." 1 Erhardt's Florida Evidence 797 (2017). Additionally, Section 90.803(3), Florida Statutes, excludes from hearsay:

> a statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to: prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.

The declarant's availability is immaterial under this provision. § 90.803, Fla. Stat. (2017).

Sorrentino's testimony is therefore admissible both as lay witness opinion and as a statement of then-existing mental, emotional, or physical condition. There was no way for Sorrentino to communicate how he felt and what he perceived other than by giving his opinion. Second, the statement that he hoped officers were not doing the same thing in his case, and his testimony that anyone could fabricate a story against Dailey based upon the newspaper articles provided by the detectives, was a statement pertinent to his then-existing state of mind, namely his belief that detectives were looking for inmates to testify falsely against Dailey. Whether or not the detectives were actively, improperly soliciting testimony against Dailey, however unreliable, by showing them newspaper articles, is an essential issue that this Court must decide. The Florida Supreme Court has held that the law provides an "exception for evidence of the state of mind of the maker of the statements when such state of mind is relevant

to an issue at trial." *Brooks v. State*, 787 So. 2d 765, 770 (Fla. 2001).

As a result, this Court should accept the proffer regarding Sorrentino as evidence because it constitutes an admissible lay witness opinion and satisfies the hearsay exception permitting testimony regarding then-existing state of mind.

2. The lower court erred in concluding "that there is no reasonable probability" that Wright and Sorrentino's testimony would produce an acquittal.

The lower court misapprehended, and incorrectly applied, the *Jones* standard, concluding that Wright and Sorrentino's testimony is "weak such that there is no reasonable probability that it would produce an acquittal upon retrial" without weighing the totality of the evidence in Dailey's case. R2 8885. The court erred in weighing Wright and Sorrentino's evidence in a vacuum.

Jones requires that the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *Jones I*, 591 So. 2d at 915. In conducting this analysis, courts "must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial." *Jones III*, 709 So. 2d at 522. "The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision." *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999).

The lower court did not conduct the required cumulative analysis. Instead, it

reviewed Wright and Sorrentino's testimony in isolation, completely apart from the other corroborating evidence, and concluded that it would not produce an acquittal at retrial. This is error and subject to *de novo* review by this Court.

3. Travis Smith's testimony is admissible evidence.

The lower court failed to make any findings regarding Travis Smith's testimony as it relates to Claim I(B). Smith testified that while he was at the county jail, at least two police officers pulled him from his cell, interviewed him about Dailey's case, and showed him newspaper articles regarding the case. R2 12094-96. The inevitable conclusion from this testimony is that the officers were seeking inmates to testify against Dailey, even if that meant providing those inmates with the details required to make such testimony convincing.

Additionally, Smith testified that he knew Pablo DeJesus and James Leitner, but that he never witnessed Dailey discuss his case with either of the two. R2 12078-79, 12081. Smith testified that he did observe DeJesus and Leitner discussing Dailey's case: "They were trying to collaborate a story together as to what they were going to say when they talked to the State Attorney." R2 12087, 12093. Smith's eyewitness account supports the conclusion that DeJesus and Leitner's testimony – testimony critical to Dailey's conviction – was fabricated for the purpose of receiving consideration in their own cases, which the State Attorney's Office later provided by way of plea deals. TR1 8:1014; 9:1082.

Smith testified that the local news aired stories about Dailey's case "quite a few times," even showing pictures of Indian Rocks Beach, the water, and rocks. R2 12078, 12095-96. Clearly, the three jailhouse informants could have obtained the details of the crime from newspapers or television; Dailey was not the only possible source of this information.[7] Smith's testimony powerfully undermines the jailhouse informant testimony central to Dailey's conviction and as such is critical to Dailey's newly discovered evidence claim. *See* R2 19.

The lower court erred in failing to address Smith's testimony as it relates to the informant testimony at trial. His testimony was newly discovered and the lower court was required to weigh and evaluate it under the *Jones* standard. Since the record is devoid of any factual or legal findings regarding Smith's testimony, the lower court decision cannot be based on competent and substantial evidence.

The State filed a motion in limine to exclude the testimony of Travis Smith on December 29, 2017. R2 8035. The State urged that the lower court had only granted an evidentiary hearing as to the affidavits of Michael Sorrentino and James Wright for Claim I(B) and that Smith's testimony was not relevant to Claim I(A). *Id.* The State made the same argument at the evidentiary hearing. R2 12049-50. However, Smith

[7] "No prosecution should occur based solely upon uncorroborated jailhouse informant testimony." *Achieving Justice: Freeing the Innocent, Convicting the Guilty - Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 Sw. U. L. Rev. 763, 916 (2008).

was properly and timely disclosed as a witness to the State in July 2017, along with an affidavit of his proposed testimony. R2 891-98. The substance of Smith's testimony was also argued at the case management conference, specifically regarding Claim I(B). R2 11981-82. The State was therefore on notice as to the substance and relevance of Smith's testimony for at least six months.

At the evidentiary hearing, the State also objected to Smith's testimony on the grounds that it was not newly discovered evidence. R2 12073. To the extent that the facts and information contained in Smith's testimony could have been discovered by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). Irrespective of whether Smith's testimony is procedurally barred, it must be considered when evaluating the weight of the other newly discovered evidence. *See* full discussion *supra* at page 26-27. Since Smith's testimony is directly relevant to Dailey's newly discovered evidence claim, and must be considered in determining whether a new trial probably would result in an acquittal, Smith's testimony should have been admitted as evidence. The lower court's failure to address his testimony was error.

C. The lower court erred in denying an evidentiary hearing on Claim I(C) that newly discovered evidence demonstrates that despite his testimony to the contrary, Paul Skalnik received a deal, and his reputation in the community discredits his testimony.

The lower court concluded that evidence related to Paul Skalnik's plea deal and

his reputation for dishonesty "could have been discovered earlier using due diligence." R2 8887. The lower court incorrectly held that the State objected to attorney Richard Watts's testimony because the "lack of an affidavit from Mr. Watts prevents him from being treated as a newly discovered witness." R2 8886.

First, the State objected to the defense arguing the substance of Watts's testimony at the case management conference because, allegedly, the substance of his testimony was not included in the successive postconviction motion – not because there was no affidavit filed. R2 11987. As pointed out by defense counsel, the substance of Watts's testimony was in fact discussed in Dailey's successive motion. R2 11988. The State then conceded its error. *Id*. Nothing in the rules of criminal procedure requires that an affidavit be filed with a newly discovered evidence claim. *See* Florida Rule of Criminal Procedure 3.851(e)(2)(c).

Further, as argued at the case management conference, Richard Watts is a newly discovered witness and was unknown to Dailey or his counsel prior to 2017. R2 11990. The lower court erred in prohibiting Dailey from calling him as a witness at the evidentiary hearing.

Second, to the extent that the facts and information regarding Skalnik's plea deal and reputation for dishonesty could have been discovered earlier by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569

U.S. 413 (2013). *See also McQuiggin v. Perkins*, 569 U.S. 383 (2013). Even assuming the evidence is procedurally barred, the lower court was still required to consider it when evaluating the weight of the other newly discovered evidence. *See* full discussion *supra* at page 26-27. The evidence related to Skalnik's plea deal and reputation for dishonesty is directly relevant to Claim I(B), and this evidence is necessary in order to evaluate whether a new trial probably would result in an acquittal.

Lastly, because the lower court denied an evidentiary hearing on Claim I(C), this Court must accept as true the defendant's factual allegations, to the extent they are not refuted by the record. *Nordelo v. State*, 93 So. 3d 178, 186 (Fla. 2012). The factual allegations regarding Skalnik's reputation for dishonesty, both within the Pinellas County Jail and the Arizona Department of Corrections, the undisclosed and lenient plea deals he received in exchange for his trial testimony, along with the testimony of attorney Richard Watts, must therefore be accepted as true. This is precisely the kind of evidence this Court has found relevant to the assessment of jailhouse informant testimony, in light of the fact that "informant witnesses . . . constitute the basis for many wrongful convictions." *In re Amend. To Rule of Crim. Proc. 3.220*, 140 So. 3d 538, 539 (Fla. 2014). This evidence should have been considered in weighing the probability of an acquittal with respect to other newly discovered evidence. The lower court erred in failing to consider it. "A postconviction court must even consider

testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal." *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014). *See also Swafford v. State*, 125 So. 3d 760, 776 (Fla. 2013). In this capital case, where the defendant has always maintained his innocence, the refusal to consider evidence powerfully undermining the jailhouse informant testimony essential to his conviction and death sentence, cannot withstand scrutiny.

D. The lower court erred in denying an evidentiary hearing on Claim I(D) that newly discovered evidence proves Dailey was not with Pearcy when S.B. was killed.

Current postconviction counsel uncovered numerous police reports authored by Detective Terry Buchaus of the Indian Rocks Beach Police ("IRBP"), who co-investigated the death of S.B. with the Pinellas County Sheriff's Office. According to the IRBP reports, Oza Shaw told the investigating officers that Pearcy, Dailey, Gayle Bailey, and S.B. returned to the apartment after going out. Pearcy and S.B. then gave Shaw a ride to a telephone booth; Dailey was not with them. When Shaw returned home, Gayle was in the living room. Shaw fell asleep but was awakened when Pearcy returned home, alone, *without S.B.* Pearcy went into Dailey's room and the two then left the house. This contemporaneous version of events badly undermines the State's theory of the case and was never heard by Dailey's jury.

The lower court erroneously concluded that these police reports were previously

raised "in the context of a *Brady*[8] claim, which counsel abandoned at the evidentiary hearing on Defendant's initial postconviction motion." R2 8888. This is flatly incorrect and belied by the record.

Dailey's initial successive motion included a *different Brady* claim regarding the State's failure to turn over *handwritten notes* taken by IRBP Detective *Charles Flesher*. PC ROA 1:60-62. Those notes pertain to witness interviews from Hank's Seabreeze Bar. *Id*. at 60. In contrast, the substance of this claim involves *typed police reports* written by *Detective Terry Buchaus*, who was the lead investigator in Dailey's case. The two claims (typed Buchaus reports/handwritten Fletcher notes) are entirely distinct. In conflating them to deny an evidentiary hearing, the lower court clearly erred.

To the extent that these police reports could have been discovered previously by prior postconviction counsel, prior postconviction counsel was ineffective and Dailey is entitled to relief under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013). Regardless of whether this evidence is procedurally barred, it is still relevant when evaluating the weight of the other newly discovered evidence in this case.

E. The lower court erred in failing to conduct a cumulative analysis of Dailey's newly discovered evidence of innocence claim.

[8] *Brady v. Maryland*, 373 U.S. 83 (1963).

The lower court erred by concluding that "a cumulative analysis does not seem necessary" after evaluating only Claims I(A) and (B). First, the lower court was required to conduct an analysis after evaluating *all* of the newly discovered evidence – including subparts (C) and (D) – not just the first two subclaims. Second, in determining whether the newly discovered evidence compels a new trial, the lower court was required to "consider all newly discovered evidence which would be admissible," "evaluat[ing] the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones III*, 709 So. 2d at 521 (citations omitted); *Swafford*, 125 So. 3d at 775-76. The lower court was also required to conduct a cumulative analysis of all the evidence from both the trial and prior postconviction proceedings so as to consider the "total picture" including "all the circumstances of the case." *Swafford* at 776 (citations omitted); *see also Hildwin v. State*, 141 So. 3d at 1184. All of the facts and circumstances of the case include evidence that was previously excluded as procedurally barred. *Id*.

Had the lower court looked at the total picture of Dailey's case, including the exculpatory testimony of Jack Pearcy, Travis Smith, and Juan Banda, taken together with the exculpatory hair evidence, it would have found that it differs dramatically from the picture presented to Dailey's jury in 1987. When the raft of exculpatory evidence is considered alongside the evidence that the jailhouse informant testimony in Dailey's case – the only actual evidence of guilt – was profoundly unreliable, there

is unquestionably a probability of acquittal under the *Jones* and *Swafford* standards. The lower court's failure to consider the totality of the evidence was error. A full assessment of the totality of the evidence follows.

Jack Pearcy's Admissions

Jack Pearcy's affidavit, coupled with the exculpatory testimony of Travis Smith and Juan Banda establishes, in and of itself, reasonable doubt.

Jack Pearcy killing S.B. alone also fits with a review of the evidence. First, prior to S.B.'s murder, Pearcy had a significant history of violence, specifically, violence against women. R2 9753-9923. Pearcy's Kansas criminal court file includes arrests for battery, terroristic threats, rape and assault. Detective Joseph Pruett, a detective in Olathe, Kansas who interviewed Pearcy following S.B.'s murder, and who was very familiar with his criminal history, R2 11652-53, testified that Pearcy previously was arrested for sexually assaulting his former girlfriend, the same victim of both of Pearcy's terroristic threat charges. *Id*. at 11953, 11656-58. Furthermore, prior to S.B.'s murder, Pearcy had been indicted in another capital case, this one involving a Missouri murder-for-hire case; Pearcy evaded prosecution by becoming a State's witness against the man who hired him. *See State v. Stith*, 660 S.W.2d 419 (Mo. Ct. App. 1983) and *State v. Danforth*, 654 S.W.2d 912 (Mo. Ct. App. 1983).

Second, the victim and Pearcy knew each other prior to the night of the murder. R2 11862-63. Pearcy acknowledged that he had known S.B. for a couple of months

and had been to her house before. *Id*. at 11863; State's Exhibit No. 2 at 31:10-23. S.B.'s father had warned Pearcy that Pearcy was too old to be hanging around his daughter. R2 11863. Gayle Bailey, Pearcy's girlfriend, testified that she and Pearcy had known S.B. because S.B. and her father had sold them marijuana. R2 305 ("that was where we got our smoke from, was from [S.B.] and her father"). Indeed, at Pearcy's trial, the State emphasized during its closing argument that Pearcy had known S.B. prior to the murder, and that was the reason she trusted him enough to get in the car in the first place. R2 11505. The evidence also establishes that it was Pearcy who was hitting on S.B. and her sister all night – not Dailey. R2 11859.

Third, it was Jack Pearcy who had the means, motive, and opportunity to kill S.B. He was the one familiar with the secluded location where S.B. was killed; he used to fish there. R2 9314-15. Pearcy even drew a diagram of the location for the State Attorney during his sworn statement which prosecutors attached as Exhibit No. 1. Pearcy also owned a roofing knife consistent with the stab wounds. R2 10437-38. Gayle Bailey testified in her deposition that Pearcy kept this knife in a sheath in the car. R2 296-97. Pearcy told detectives that the knife, along with its sheath, had been thrown in the Walsingham Reservoir, where the sheath was ultimately recovered. R2 11803, 11809-11. Though Pearcy claimed that it was Dailey who threw the knife and sheath into the reservoir, Detective Buchaus, who was present with Pearcy at the reservoir when Pearcy showed law enforcement how the disposal of the weapon

supposedly occurred, testified that "from his location, from the way the knife was thrown, Pearcy could not have seen Dailey do it . . . it just wouldn't be right." *Id.* at 11804. In other words, Pearcy owned the knife, had access to it in the car he was driving *with S.B.* on the night in question, and was the only one who knew what happened to the knife following the murder. Pearcy's story about how Dailey supposedly disposed of it, moreover, was deemed not credible by law enforcement. R2 11804.

Pearcy also had a motive to kill S.B. while he was alone with her. All of the evidence suggests that Pearcy wanted to have sex with S.B. and murdered her in a rage because she either resisted his advances or because he did not want to face the consequences of having sex with a fourteen-year-old: the legal implications; the fury of his pregnant, jealous girlfriend; the anger of S.B.'s father, who had already warned him to stay away from his daughter.

On the night of the murder, Pearcy brought three underage females, including S.B., to the home he shared with his pregnant girlfriend (Gayle Bailey) and smoked marijuana with them. TR1 8:955. Pearcy then took S.B. to a bar – instructing Gayle to loan S.B. her Kansas I.D. so S.B. would be allowed into the bar (TR1 8:967) – then danced with S.B. in front of Gayle. TR1 8:380-81. This series of events made Gayle irate (R2 293), giving Pearcy a clear reason to take S.B. someplace other than his home to satisfy his sexual urges. The State itself made this argument in its sentencing

memorandum[9] in Pearcy's case:

> [N]o evidence exists that Pearcy was not the main actor in this child's brutal murder. In fact evidence was brought out that Pearcy could not have brought the victim home for a sexual purpose as his pregnant girlfriend, Gail [sic] Bailey, shared his bedroom. Dailley [sic] however had his own room in the house and no reason to take the victim to a deserted inlet for sex.

R2 10298. The State repeated this argument at the guilt phase of Pearcy's capital trial:

> James Dailey had his own room. He had a door that shut. He could have brought that girl back to his own room. Then why in the world would he take her to some deserted point under a bridge?

R2 11582. As the State urged Pearcy's jury, it was Pearcy, and Pearcy alone, who had reason to take her to an isolated spot to have his way with her.

Finally, Jack Pearcy had the opportunity to murder S.B.; two separate witnesses testified to seeing Pearcy alone with S.B. on the night of the murder. Oza Shaw's original statement to law enforcement was unambiguous: James Dailey did *not* leave the house with Pearcy and S.B. According to the IRBP reports, Oza Shaw stated that Pearcy and S.B. gave Shaw a ride to the telephone booth to call his girlfriend and wife in Kansas. Shaw definitively stated that Dailey was not with them. Halliday also confirmed that Shaw said only Pearcy and S.B. went down to the phone booth with him. TR1 3:320. This testimony is further corroborated by the Southwestern Bell

[9] Counsel for Dailey is forced to rely on the sentencing memorandum because Pearcy's penalty phase hearing was never transcribed. Dailey has never had an opportunity to review it – despite the fact that there is evidence that the State urged inconsistent theories regarding participation, motive, and culpability when it urged Pearcy's jury to recommend death.

Telephone records, which confirm a call was placed at 12:15 a.m. from St. Petersburg, Florida to Olathe, Kansas on May 6, 1985 – the night S.B. was killed. *See* R2 10290. Betty Mingus, Shaw's girlfriend, also corroborated this phone conversation in her deposition. R2 11904. She testified that while speaking to Shaw on the phone, she heard honking. *Id*. Mingus asked what the noise was and Shaw responded that it was "Jack and a girl waiting for me to get off the phone." *Id*. She heard Shaw tell them to "go on" without him while he finished his conversation with Mingus. *Id*. Shaw then walked home.

Deborah Lynn North, an employee of Hank's Seabreeze Bar and an acquaintance of S.B., similarly placed S.B. alone with Pearcy that night. North testified that sometime after midnight (presumably after dropping Shaw off at the telephone booth), S.B. entered Hank's looking for someone to help get her car out of the sand. R2 11712. North followed S.B. outside and saw the car stuck in the sand. *Id*. North testified that S.B. was with one man, not two. *Id*.

Pearcy's own sworn statement, made shortly after the crime, confirms that he was the man with S.B. *See* R2 9301. Pearcy testified that he and S.B. went – *without* Dailey – to "some bar called Hank's" and "the car was stuck when we went back out." *Id*. R2 9312-13. *See also* State's Exhibit No. 2 at 36:50-39:00. He said that it was hard for him to get the car out by himself, and he tried to get some help but people laughed at him. R2 11146. Pearcy later confirmed this sequence of events in another sworn

statement in 1993, noting that he was alone with S.B. for approximately one and a half hours. R2 9621.

Furthermore, in Shaw's initial statement to police – on May 22, 1985, just seventeen days after the murder, when events were freshest in Shaw's mind – he stated that, after speaking on the phone to his girlfriend and then his wife, he returned to the house where he "layed [sic] back on the couch and talked to Gayle." R2 91-95. Shaw stated that "sometime between, Jack [Pearcy] came back to the house and picked up Jimmy [Dailey], but [Shaw] didn't see the girl with them." R2 94. In a sworn statement Pearcy made in 1993, he confirmed Shaw's version of events, saying he returned to the house an hour to ninety minutes after departing with S.B. and Shaw (and depositing Shaw at the telephone booth), that "*[S.B.] was no longer with me*," and that he went into Dailey's bedroom, woke him up, and asked him to go with him to "smoke a couple of joints, drink a beer or something." R2 9621-22. The obvious implication is that S.B. was already dead.

Thus, all of the evidence indicates that Pearcy drove S.B. to numerous bars before taking her to his favorite secluded fishing spot where he ultimately killed her with his roofing knife. Had Dailey wanted to have sex with this intoxicated victim, as the State itself repeatedly reminded jurors in its case against Jack Pearcy, he easily could have taken her into his private bedroom and closed the door, since she was already in the house. Nor does it make sense that Pearcy would have driven back home from Hank's

to pick up Dailey before driving back to the beach to have sex with S.B., when Pearcy was already alone with her. What does make sense is that Pearcy intentionally left without Dailey because he wanted to have sex with S.B. out of sight from his irate, pregnant girlfriend, and that he then murdered her either because she resisted him or because he did not want anyone (Gayle, S.B.'s father, law enforcement) to learn of the encounter.

A single perpetrator also fits with the evidence at the crime scene, namely that S.B.'s body showed signs of being dragged. R2 11874-75. In her deposition, the medical examiner testified:

> There were multiple drag marks on her back and it appeared that she had been dragged on her back, at least over the rocks, presumably over the grass and the rocks to the water, and there was a path through the grass where it was pushed down that you could see what appeared to be the path through which she was dragged . . . looking at the drag marks I would say she was being dragged by the feet . . .

Id. at 11874-75; 11888. Had both Dailey and Pearcy participated in the murder, they could have carried the body without dragging it. The drag marks suggest that, to the contrary, one perpetrator dragged S.B. to the water by her feet.

Finally, Pearcy's actions after the murder, together with his statement to law enforcement, demonstrate consciousness of guilt. After the murder, Pearcy told everyone to pack because they were all leaving for Miami. R2 11379. Pearcy registered at a motel under a false name – John Yates. R2 11155, 11524, 11787. Dailey registered under his true name. TR1 3:292-93 & 7:914; R2 10887. While in Miami,

Pearcy and Gayle bought tickets to the Bahamas on the Steamship Travel Company. TR1 3:302-03.

Betty Mingus stayed with Gayle Bailey and Pearcy for a short time in Miami. TR1 3:313. She reported that Pearcy "seemed weird" and that "Jack seemed to be real afraid of something. He seemed to be very nervous." *Id*.

After his arrest, Pearcy was given a polygraph examination by the Pinellas County Sheriff's Office. TR1 3:331. During the polygraph, Pearcy claimed that he had little to no role in the killing of S.B. TR1 8:331-32. The results of the polygraph showed deception. *Id*. When confronted with the results, Pearcy asked for an attorney or a priest. TR1 8:335. Pearcy also admitted to disposing of the shoes he had worn on the night of the murder – in Colorado – prior to being arrested. TR1 3:312; R2 11137, 11156.

This evidence corroborates Dailey's version of events from that night. Dailey testified at a prior postconviction evidentiary hearing on March 19, 2003. PC ROA 3:297-333. Dailey testified he was living with Jack Pearcy and Gayle Bailey in Seminole, FL in May 1985. *Id*. at 297-99. Pearcy and Gayle shared a room, and Dailey had his own bedroom. *Id*. at 299. Shaw was staying with them. *Id*. Dailey, Pearcy, Gayle, and S.B. went to a bar. *Id*. at 304-05. Pearcy danced with S.B., which infuriated Gayle. *Id*. at 305. Afterwards, they went home. *Id*. at 306. Gayle went into the bathroom, and Pearcy, S.B. and Shaw left to take Shaw to the phone booth. *Id*. Dailey

went into his room. *Id*. Dailey was later awakened by Pearcy who told Dailey to get dressed because he needed to talk to him. *Id*. at 307. Pearcy and Dailey drove to the Bellaire Causeway and pulled off on the lagoon side of the bridge. *Id*. at 308. Once there, Pearcy told Dailey that Gayle wanted Dailey gone so she could turn his bedroom into a nursery for the baby. *Id*. at 308-09. During the conversation, the two drank beer and played Frisbee. *Id*. At one point, the Frisbee went into the water and Dailey went out to get it. *Id.* Pearcy confirmed that he returned home alone, picked up Dailey, drove to the Bellaire Causeway to play Frisbee with Dailey, and that Dailey went into the water to retrieve the Frisbee. R2 9624.

This explains why Gayle and Shaw noticed Dailey's pants were wet. TR1 8:960, 998. Though neither Gayle nor Shaw specifically noticed whether Pearcy's clothes were wet, this is reasonable because Pearcy was wearing a black shirt and black pants. R2 11376. In contrast, Dailey had on jeans. TR1 8:960. Pearcy's all-black outfit would likewise explain why no one noticed whether or not Pearcy had any blood on him or on his clothes.

Pearcy's initial statements to law enforcement, in which he claimed that Dailey was responsible for S.B.'s death, were nothing more than self-serving explanations and ill-disguised attempts to shift the blame from himself to Dailey. *See, e.g.*, TR1 3:331 (Halliday testified that Pearcy's statements basically consisted of "putting if off on Dailey."). In his 1993 sworn statement, Pearcy admitted when he told the police

that S.B. was in the car when he returned to the house to pick up Dailey, that it was nothing more than:

> self-serving statement(s) to exonerate myself … At that time, Jim wasn't even in custody. I was in custody and they were going to charge me and I was just trying to get around it, that's all, lay the blame somewhere else.

R2 9625.

This Court must consider the newly discovered evidence of Pearcy's affidavit and his confessions to Juan Banda and Travis Smith, taken together with the evidence discussed above and the other evidence that would be admissible at a retrial, in analyzing the probability of a present-day conviction and death sentence by a unanimous jury. The State did not have a scintilla of physical evidence implicating Dailey. In fact, the only physical evidence – the hair found in the victim's hand – conclusively *excluded* Dailey. Taken together, the confession of Jack Pearcy, coupled with the exculpatory testimony of Travis Smith, Juan Banda, Oza Shaw, Betty Mingus, and Deborah North, would almost certainly produce an acquittal on retrial. All of this testimony supports the proposition that Dailey is innocent.

Unreliable Jailhouse Informant Testimony

Though Dailey was arrested in November 1986, no one came forward with information against him until December 1987. Not coincidentally, the sudden emergence of jailhouse informants was preceded by Halliday's interrogation of all the inmates who shared Dailey's pod. The timing of the interviews – one week after the

State failed to secure the death penalty against Jack Pearcy – coupled with the fact that Halliday improperly and conspicuously displayed, to his interview subjects, news articles regarding Dailey's case (R2 12056-57, 12066, 12095-96, 12106), made it abundantly clear that the State would be highly receptive to any inmate who wanted to come forward with "information" helpful to the State. The strong implication was that the State would not interrogate too deeply the source of the supposed "information" (as Michael Sorrentino testified, "had I wanted to . . . fabricate something all the tools were right there to give them whatever they might be looking for"). R2 12109 (proffer).

Within a few days of Halliday's visit to the jail, DeJesus and Leitner came forward saying that Dailey had confessed to them, their stories vague enough that they could not be corroborated. Nevertheless, at Dailey's trial, DeJesus and Leitner were held up as models of moral authority by the State and later rewarded with lenient sentences for their own pending crimes. TR1 8:1014; TR1 9:1082; R2 9899-9955.

In the absence of any physical or forensic evidence implicating Dailey, Leitner and DeJesus's testimony was critical but completely untrustworthy. First, the testimony of Sorrentino, Wright, and Smith established that the details of Dailey's case were widely known throughout the jail due to the extensive media coverage surrounding it. R2 12056, 12065, 12077, 12095-96, 12105-06. Second, the fact that Halliday directly exposed inmates to news articles about the murder, as attested to by Sorrentino,

Wright, and Smith, meant that inmates had additional opportunity to learn details of the crime. R2 12056-57, 12094-96, 12106-07. Third, Leitner and DeJesus both had a motive to lie: they were hoping for leniency in their own cases, which they received. Fourth, Leitner and DeJesus's claims had no independent indicia of reliability. And, finally, fifth, Travis Smith, who, thirty years after Dailey's trial had absolutely no incentive to lie about the events surrounding it, testified that he personally witnessed DeJesus and Leitner collaborating to invent a narrative that would help the State with Dailey's case – and concomitantly benefit themselves. R2 12082, 12087, 12093.

John Halliday's testimony on this issue at the recent evidentiary hearing is not credible. At the hearing, Halliday was able to recall details of this long-ago case on direct examination. However, on cross examination by defense counsel, Halliday's ability to recall facts about the case suddenly seemed substantially impaired. Moreover, his memory was incapable of being refreshed, even as to core facts about the investigation, and even when presented with documents he had authored setting forth those facts.[10] His selective memory undermines his entire recent testimony, and,

[10] The second question Halliday was asked by defense counsel was whether "there were nearly a dozen people [at the scene] by the time [he] arrived." R2 12172. Halliday indicated that he could not recall. After being shown a copy of his police report, which listed twelve individuals present, Halliday testified that, "[i]t looks like six people that are police." *Id*. Even after the court intervened, Halliday resisted giving a direct response to this straightforward question:

> The Court: Detective, just read over your police report, and then after the question that's been asked, does that assist you in refreshing your recollection.
> The Witness: Yes. It looks like six people that are the police.

in particular, renders not credible his testimony that he did not bring newspaper articles to the jail or show them to inmates.

On direct examination, when Halliday was asked whether he had interviewed inmates at the Pinellas County Jail during the course of his investigation of James Dailey, he responded that he had. R2 12164. He was able to recall specifically where he had interviewed these inmates (in the Detention Investigation Unit), and able to describe, in detail, where this room was located in the jail. *Id*. He also specifically recalled speaking individually to inmates Travis Smith, James Wright, and Michael Sorrentino, individuals he met a single time some thirty years ago. R2 12166. He was able to recall that when he interviewed each of these inmates, he did not bring any newspapers with him or show any of them any articles. R2 12168-70. When questioned on direct examination, at no time did Halliday indicate that he could not recall, or reference the length of time between the investigation and the present-day hearing.

However, when cross examination began, Halliday's demeanor and ability to recall

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The Court: So the answer is it does help you refresh your recollection?
The Witness: Yes.
The Court: All right.
By [counsel for Dailey]:
Q: Your recollection is refreshed, and you would agree with me there were nearly a dozen people there in total.
A: Yeah, but not police.
R2 12174.

shifted abruptly. He claimed not to be able to recall whether any jailhouse inmates had come forward with information about Dailey prior to his December 4, 1986, visit to the jail, saying defensively "[i]t [has] been 30 years." R2 12182, 12184.[11] Though Halliday was able to recall, on direct examination, that he had interviewed Smith, Wright, and Sorrentino specifically, on cross examination, he could not recall how many inmates he had interviewed in total. R2 12195 ("I don't have a specific recollection of it"). When shown his previous testimony stating he had interviewed fifteen inmates, Halliday responded grudgingly, "If the paperwork says I did, I did." R2 12198. Rather than respond directly to defense counsel's questions about the nature of these interviews, Halliday attempted to deflect, taking issue with the phrasing of defense counsel's questions. R2 12201 ("I didn't *pull* anybody out of a pod . . . People were brought to me"). Halliday claimed not to recall whether any of the inmates he interviewed made any statements incriminating Dailey. R2 12202 ("I

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[11] In Halliday's trial testimony in this matter, he stated:

Q: Now as – nothing had come forward until late 1986, is that correct?
A: Yes.
Q: From the time of Dailey's arrest in November of 1985, until the end of December of 1986, 13 months later; is that correct?
A: Are we talking no one came forward? I don't quite understand.
Q: You had been over to the jail to go through the jail to try to find witnesses against him?
A: Yes, I did.
Q: And there were none, were they?
A: No.

TR1 9:1191.

don't recall that at this time."). When presented with his pre-trial deposition, in which he testified that *none* of the inmates he interviewed had implicated Dailey, Halliday again responded with reluctance, "[I]f it's in the testimony, I assume I said it." R2 12208.

Halliday also denied knowing the State's star witness Paul Skalnik well, and only after being pressed by defense counsel acknowledged having worked with him on other cases. R2 12223-24. Halliday denied being familiar with Skalnik's criminal history, (R2 12224) ("Not fully, no. I don't recall"), though the record shows that he had, in the past, forcefully advocated for Skalnik's release with the Florida Parole and Probation Commission, both in writing and by way of telephone calls.[12]

Curiously, the *only* facts about the case that Halliday seemed capable of remembering clearly were the interviews of James Wright, Travis Smith, Michael Sorrentino, and Travis Walker, individuals he met a single time some thirty years ago. Halliday's seemingly selective memory significantly undermines his credibility, and

[12] In November 1984, Halliday wrote the Florida Parole Commission seeking Skalnik's release from Arizona custody. *See* R2 84-87 ("*I have never done this for an inmate during my ten (10) years in law enforcement*. . . . It is at this time I feel he is truly sincere in that he has learned his lesson. Nonetheless he has spent quite a considerable time in prison for the nonviolent crime committed."). Halliday also called the Florida Parole Commission asking for Skalnik to be released. *Id*. ("Mr. Halliday would like the Commission to know the subject has been of great assistance to the Sheriff's Office in that he testified in 33 felony cases and as a result of his testimony 5 people were sent to death row. He wanted the Commission to know of his interest in the subject and should they have any questions, please call him.").

this Court should not give credence to his assertion that he did not, in fact, bring or show newspaper articles regarding the Dailey case to inmates during the course of his investigation.

Paul Skalnik was the third jailhouse informant called by the State to testify at Dailey's capital trial. TR1 9:1107-28, 1145-64. Skalnik's testimony was both devastating and inflammatory: he testified that Dailey had told him "the young girl kept staring at him, screaming and would not die." *Id*. at 1115-16.

The timing of Dailey's alleged confession to Paul Skalnik, coupled with the recent testimony of James Wright, Travis Smith, and Michael Sorrentino, completely undermines its credibility. Skalnik testified that, prior to ever speaking to Dailey, he had reached out to Detective Halliday in order to offer information against Jack Pearcy. TR1 9:1112, 1146. Halliday told Skalnik his information against Pearcy was "of no use" because Pearcy had already been convicted. *Id*. at 1190. However, as Wright, Smith, Sorrentino, and even Halliday testified, it was a "well-known fact" that, after Pearcy's conviction and sentencing, Halliday was still looking for testimony against Dailey. *Id*. at 618. It was only *after* Halliday had told Skalnik that his information against Pearcy was worthless, and *after* Halliday had pulled more than a dozen inmates from Dailey's pod, openly seeking information against him, that Dailey allegedly confessed to Skalnik – perfect timing.

The supposed circumstances surrounding Dailey's alleged confession to Skalnik

also undermine its credibility. Skalnik claimed Dailey made incriminating statements while standing at the bars of his cell, as Skalnik passed by on his way to recreation. *Id*. at 1115. *See also* R2 8208. It strains credulity to think that Dailey would casually mention phrases like "the young girl kept staring at [me], screaming and would not die"[13] in the course of a fleeting, public interaction with an inmate with whom Dailey was barely familiar. Additionally, Skalnik himself acknowledged that he was in an isolation cell. *Id*. at 1115. Dailey testified at his postconviction proceeding that he was aware Skalnik was in isolation, that he knew inmates were not supposed to talk to inmates in isolation, and that he was further aware that Skalnik was an ex-police officer and "a snitch." PC ROA 3:324-25. In other words, Skalnik was the *last* person Dailey would to speak about his case. Finally, Dailey testified that by the time Skalnik claimed this supposed confession was made (April or May 1987), Dailey was already aware that James Leitner and Pablo DeJesus were testifying against him. Given that Dailey knew that two inmates already claimed to have evidence against him, it is even more improbable that Dailey would have had any kind of conversation about his case with an inmate with whom he had no relationship – and of whose reputation he was aware, particularly the drive-by confession described by Skalnik.

Skalnik has made a career out of conning vulnerable victims and has been

[13] Skalnik testified that these were indeed the words Dailey used during one of their brief interactions. TR1 9:1115.

convicted at least twenty-five times of crimes of dishonesty. Skalnik's adult history of one scam after the next started in 1976 with his first conviction of grand larceny by fraud and obtaining property by worthless check.[14] Over the course of the past forty years, Skalnik has pled guilty to count after count of grand larceny,[15] misdemeanor theft,[16] forgery,[17] and passing bad checks.[18] In addition, he has been charged with bigamy,[19] and convicted of the unauthorized practice of law.[20] He also pled guilty to multiple counts of violation of probation,[21] bail jumping,[22] failure to appear,[23] possession of a firearm as a felon,[24] and failure to register as a sex offender.[25] As these convictions show, he consistently relied on dissembling and deception for his own ends, and his word that he would appear in court when called, or adhere to the terms of his probation, like his word that he was single or a lawyer or had a one-of-a-kind business opportunity, was meaningless.

Skalnik's propensity to seek out and exploit vulnerable victims extended beyond

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[14] *See* R2 10017.
[15] *See* R2 10017-21; 9955-10016; 10229-59.
[16] *See* R2 10022-32; 10220-28; 10229-59.
[17] *See* R2 10229-259.
[18] *See* R2 10017-21 and 10229-59.
[19] *See* R2 10033-10219.
[20] *See* R2 10229-59.
[21] *See* R2 9955-10016.
[22] *See* R2 10220-28.
[23] *See* R2 9955-10016.
[24] *See* R2 10260-67.
[25] *See* R2 10229-59; 10260-67.

financial cons to the sexual assault of children. In 1982, he was charged with lewd and lascivious conduct with a child under 14 in Pinellas County, Florida. *See* R2 89-90. In 1991, he pled nolo contendere to a charge of child sexual assault. *See* R2 10033-10219.

Skalnik's extensive criminal history demonstrates that he is driven by the desire for self-aggrandizement, self-enrichment, and self-satisfaction, no matter who is victimized in the process. This pattern of behavior was clearly replicated during his time in jail, when he was willing to say anything against anyone – regardless of the truth of the matter – if he believed so doing would benefit himself.

Multiple corrections staff who encountered Skalnik over the course of his incarceration found him to be treacherous, vindictive, and conniving. One official, Lieutenant McInnes, wrote in a 1988 memo that Skalnik "had given false statements about some of the corrections staff to have them removed on the wing he was housed on just because these officers did not cater to his desires." *See* R2 72-76. Skalnik's complaints were found to have "no substance." *Id*. Following an investigation, the Arizona Offender Administration Service concluded that "any officer who tries to be firm and enforce the rules with Skalnik becomes an object or person for him to inform on with these false allegations," adding that, "[this] report should . . . reveal [Skalnik's] manipulative methods." R2 78-79.

Skalnik's behavior while incarcerated precisely mirrored his behavior when not

incarcerated: he was willing to say anything, regardless of the truth of the matter, and regardless of whom it might harm, if he believed that doing so would benefit him. This consistent, documented pattern of behavior strongly supports the conclusion that Skalnik's testimony against Dailey is false, and reflects his willingness to say whatever he thought the State wanted to hear if he believed he would be rewarded for it, particularly in a case like Dailey's, where the State made it clear it was very ready to listen.

At Dailey's trial, Skalnik testified he had two grand theft charges and a violation of parole charge pending. *Id*. at 1107. Skalnik already had five or six felony convictions in Florida alone. TR1 9:1107, 1121. In an attempt to minimize his criminal history at Dailey's trial, Skalnik told the jury, in response to the question "How bad were your charges?." "They were grand theft, counselor, not murder, not rape, no physical violence in my life." TR1 9:1158. Both Skalnik and the State were conspicuously silent regarding the 1982 charge brought against Skalnik for lewd and lascivious conduct involving a 12-year-old victim, a charge dismissed over the course of his cooperation with Pinellas prosecutors. This omission was necessary to the State's strategy, which was to convince the jury that Skalnik, DeJesus, and Leitner – all of whom were facing serious charges – would be willing to testify against Dailey because they considered themselves "morally better." TR1 10:1277-78. Had Dailey's jurors learned the true extent of Skalnik's pathological deception and criminal

exploitation of vulnerable victims, it is difficult to imagine them crediting his blockbuster testimony.

Following his testimony in Dailey's trial, Skalnik pled guilty to his pending charges: four counts of grand theft and two counts of failure to appear. R2 9955-10016. Although Skalnik testified at Dailey's trial that "I got no deal and didn't ask for a deal" in exchange for his testimony (TR1 9:1159), the State agreed to five years imprisonment on each count, to run concurrently rather than consecutively, with no habitual felony offender status or other sentencing enhancements. Additionally, the State agreed to Skalnik's request to serve his time in Texas, where he was immediately paroled and released from custody, and never served his five-year sentence.

In his 1984 letter to the Florida Parole and Probation Commission, Detective Halliday stated that Skalnik had testified in excess of thirty (30) criminal trials, resulting in at least six inmates receiving the death penalty by 1984. R2 84-87. At Dailey's trial, Skalnik claimed that he only testified in six to eight criminal trials. TR1 9:1108. In either case, there is no question but that Skalnik was all too familiar with the system and the benefits he could receive in exchange for his testimony. His testimony to the contrary at Dailey's trial significantly, and improperly, bolstered his credibility.

Beverly Andrews Andringa was the prosecutor at the original trials of both James Dailey and Jack Pearcy. R2 10270-72. At Dailey's postconviction hearing in 2003,

Ms. Andringa testified that she would never use Skalnik as a witness again because she could not, in good faith, put him on the stand believing that he would give truthful testimony. R2 10283. This testimony, from an individual with a strong incentive to argue in favor of the credibility of her key witness, must be given strong consideration by this Court.

Of the three informants, Skalnik is the only one who provided testimony with any sort of "details." As a result, the most damaging testimony against Dailey was also by far the least reliable. James Dailey's jury never learned this, and this Court held it was error. *Dailey v. State*, 594 So. 2d 254, 256 n.2 (Fla. 1991). Instead, jurors listened as Skalnik testified that he was altogether unaware that inmates could even receive deals for coming forward with information against their fellow inmates.[26] The former police officer and longtime informant's feigned naiveté is belied by his remarkable record of cooperation, a record the State was well aware of when it elicited this testimony. This Court must consider all of this evidence, along with the fact that Dailey's original jury never heard it before reaching its verdict, when determining the probability of acquittal at retrial. No capital murder conviction should depend on Paul Skalnik's testimony.

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[26] Defense Counsel: "[I]t's pretty common knowledge over in Pinellas County Jail, that if you testify you get a deal?"
Skalnik: "I am an example to prove that's not common knowledge. I am sorry. I differ with you."
TR1 9:1158-59.

Taken together, the newly discovered evidence, coupled with all of the evidence which could be introduced at a new trial, discussed above, proves that Dailey is actually innocent. The new evidence, along with the other evidence developed on postconviction review, the weight of the newly discovered evidence, the evidence introduced at the trial, and all evidence which could be introduced at a new trial establishes reasonable doubt upon reasonable doubt upon reasonable doubt as to Dailey's guilt. This Court must also consider that it found numerous errors in Dailey's original trial. *See Dailey v. State*, 594 So. 2d 254 (Fla. 1991). Although it deemed the errors "harmless" at that time, *id*. at 258, there is no possibility that these errors, considered together with the powerful evidence of Dailey's innocence, could be deemed harmless today. The lack of evidence against Dailey, along with the overwhelming evidence of Pearcy's sole responsibility for this crime, make it, at a minimum, probable that Dailey would be acquitted and/or, at the very least, given a life sentence.

James Dailey is innocent. Jack Pearcy confessed to being solely responsible for S.B.'s death. New evidence completely discredits the jailhouse informant testimony: James Wright, Travis Smith, and Michael Sorrentino all testified that the State was so motivated in this case to find people willing to testify from the jail, that they not only pulled everyone out of the pod, but also brought newspaper articles about the crime and put them before them. Their testimony, the testimony of Banda and Smith

regarding Pearcy's admission of sole responsibility for the crime, Pearcy's affidavit, and all of the evidence presented at the hearings on the Initial Successive Motion in 2003-2004, establishes that Dailey probably would be acquitted at a retrial. No reasonable jury could find guilt beyond a reasonable doubt or unanimously vote to impose a sentence of death. It is a violation of due process and every other protection provided to the innocent in the state and federal constitutions to impose a death sentence based on this uniquely unreliable jailhouse informant testimony.

In the end, in a circumstantial case such as this one, the State will bear a particularly high burden of proof at any new trial – *i.e.* that all of the facts "must be inconsistent with innocence" and must "lead to a reasonable and moral certainty that [Dailey] and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence." *Dausch v. State*, 141 So. 3d 513, 517 (Fla. 2014) (internal citations omitted); *Ballard v. State*, 923 So. 2d 475, 486 (Fla. 2006) (evidence must exclude "all other inferences" than guilt).

ARGUMENT II: The Lower Court Erred In Denying Dailey's Claim That The State Violated The Constitutional Requirements Of *Brady v. Maryland* And *Giglio v. United States* And Its Progeny, Thus Denying Dailey His Right To Due Process And A Fair Trial Under The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution.

The State violated Dailey's due process rights under *Giglio v. United States*, 405 U.S. 150 (1972), by presenting false evidence at Dailey's original trial and

postconviction evidentiary hearing. The Supreme Court has held that both the withholding of exculpatory evidence from a criminal defendant by a prosecutor and the knowing use of false testimony violate the Due Process Clause of the Fourteenth Amendment. *See Brady v. Maryland*, 373 U.S. 83, 86 (1963) and *Giglio*, 405 U.S. at 153-55.

The lower court concluded that this claim was untimely and dismissed it. The court found that the facts regarding Skalnik's criminal history and his reputation for dishonesty were either known at the time of trial or could have been discovered easily afterward via public records requests. R2 8889. The court also held that the IRBP reports were known to Dailey because prior counsel abandoned a *Brady* claim related to these reports. *Id*. These holdings are unfounded.

The first *Giglio* violation occurred during Dailey's trial when Paul Skalnik significantly understated his criminal history under oath. *See* R2 8186-94. The State failed to correct his testimony. In particular, neither Skalnik nor the State mentioned Skalnik's charge of lewd and lascivious conduct on a child under 14 years of age, even though the same state attorney's office filed those charges against Skalnik.

The State later compounded this error by arguing during closing that the "three prisoners that were brought on from the Pinellas County Jail are thieves and drug dealers," urging the jury to credit their testimony because "there is a hierarchy over in that jail just like in life," where crimes against children are worse than "buying stolen

cars"[27] or "sale and possession of cocaine." TR1 10:1277-78. Arguing that Skalnik's crimes were limited to non-violent property offenses, while simultaneously suggesting that the victims of his crimes were not children, amounted to outright deception by the State. R2 88-90. The State capitalized on this deception by urging the lay jury to credit Skalnik's testimony, assuring jurors that Skalnik's criminal history ranked him somewhere higher on the jail hierarchy, and that his testimony was therefore worthier of belief. Dailey's jurors never learned that the source of the trial's most sensational evidence was not only a con man but a pedophile, a fact that, by the State's own logic, would rank him at the bottom of any jailhouse moral hierarchy.

The second *Giglio* violation occurred during the testimony of Oza Shaw at Dailey's postconviction evidentiary hearing in 2003. At this hearing, Shaw testified that on the night in question, Jack Pearcy and S.B., without James Dailey, had given him a ride to the telephone booth. (PC ROA 3:339-40). Shaw testified that when he returned home after making his phone call, Gayle Bailey was in the living room. PC ROA 3:343. Shaw testified that he fell asleep but then awoke when Pearcy returned home, alone, *without S.B. Id*. According to Shaw, Pearcy went into Dailey's room and the two left the house. *Id*.

---

[27] Even the suggestion that Skalnik's crimes were limited to buying stolen cars was deceptive. This Court explicitly held that it was error for the trial court to prevent Dailey's defense counsel from going into the specifics of Skalnik's pending charges, "which were admissible to show possible bias." *Dailey v. State*, 594 So. 2d 254, 256 (Fla. 1991).

During cross examination, the State appeared to impeach Shaw, suggesting that Shaw's testimony regarding Pearcy's returning home alone without S.B. and picking up Dailey, was a recent fabrication. PC ROA 3:345-52. However, in Shaw's *initial* interview, conducted just three weeks after the murder, Shaw provided an identical version of events. R2 91-95, 332-38. From the very beginning of the case, the State had access to the IRBP reports which contained this account.

The testimony elicited by the State on cross examination, which created the impression that Shaw had recently fabricated his testimony of Pearcy returning alone to the house, was false; the prosecutor knew the testimony he was eliciting was false; and the statement was material to Dailey's guilt. By misrepresenting Shaw's original statement to law enforcement and implying that his testimony was fabricated for the purpose of the evidentiary hearing, the State misrepresented material facts to the court and committed a *Giglio* violation.

The extraordinary prejudice resulting from the State's conduct is evidenced by the circuit court's order denying Dailey's initial motion to vacate. The court held, "Mr. Shaw's new testimony is of questionable value . . . it would seem most likely that his memory in the time closer to the actual events would be more reliable than nearly twenty years later." PC ROA 2:179-80. This easily satisfies the materiality prong because the false testimony elicited by the State unquestionably altered the judgment of the finder of fact, though Shaw's testimony at the evidentiary hearing did in fact

more accurately reflect what he originally told law enforcement than his original trial testimony.

The lower court's reliance on the State's claim that these violations are untimely is error. *See Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("'the 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. A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.") (internal citations omitted). A claim alleging the denial of Dailey's substantive due process rights – like a *Giglio* violation – may be raised at any time, including for the first time in a motion for postconviction relief. *Johnson v. State*, 128 So. 3d 155, 157 (Fla. 2nd DCA 2013). *See also Hughes v. State*, 22 So. 3d 132, 136 (Fla. 2d DCA 2009) (quoting *Haliburton v. State*, 7 So. 3d 601, 605-06 (Fla. 4th DCA 2009)).

> Moreover, the supreme court has held that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair…[for it] involve[s] a corruption of the truth-seeking function of the trial process"… The State's use of perjured testimony to secure a conviction could amount to the denial of a defendant's substantive due process rights.

Johnson, 128 So. 3d at 156-57 (internal citations omitted). Since this claim alleges a violation of Dailey's substantive due process rights that would otherwise be cognizable under Fl. R. Crim. P. 3.851, the lower court was required to consider the claim on its merits.

Finally, the State's and lower court's repeated reliance on the prior *Brady* claim raised in earlier postconviction motions is simply incorrect. Dailey's initial successive motion contained a *Brady* claim regarding the State's failure to turn over handwritten notes taken by IRBP Detective Charles Flesher. PC ROA 1:60-62. In contrast, the substance of *this* claim involves typed police reports written by Detective Terry Buchaus. The witness interviews from Hank's Seabreeze Bar do not appear anywhere in the IRBP reports referenced in this claim. This is a distinct claim and the lower court's repeated failure to recognize this is error.

ARGUMENT III: The lower court erred in denying Dailey's request to judicially notice certain records in violation of Section 90.202, Florida Statutes.

On January 18, 2018, the lower court held a hearing following the defense's request to take judicial notice of relevant records. R2 12257. In an order dated January 19, 2018, the court granted the request in part and denied it in part. R2 8115-21. Specifically, the lower court denied the defense's request to take judicial notice of: Jack Pearcy's Kansas and Colorado court files; Pablo DeJesus' Pinellas County court files; James Leitner's Pinellas County and Colorado court files; Paul Skalnik's court files; and Beverly Andrews Andringa's deposition. R2 8117. This was error.

First, all of the listed records are items which are proper for judicial notice. *See* § 90.202(6), Fla. Stat. (2017). The next issue, then, is whether these records are admissible. Under the Florida evidence code, prior criminal convictions are admissible as impeachment evidence. § 90.610, Fla. Stat. (2017). The prior criminal

convictions of Pearcy, DeJesus, Leitner, and Skalnik are relevant and admissible evidence which could be introduced at a new trial. The lower court was required to weigh this evidence when considering the cumulative effect of the newly discovered evidence in this case. "[T]he postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence *that could be introduced at a new trial*…" *Hildwin v. State*, 141 So. 3d 1178, 1187 (Fla. 2014). "The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision." *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999).

Second, because the lower court must consider testimony that was "presented in another postconviction proceeding in determining if there is a probability of an acquittal," *Hildwin*, 141 So. 3d at 1184, it should have considered the 2003 deposition of Beverly Andrews Andringa, the prosecutor at the trials of both James Dailey and Jack Pearcy. Andringa's deposition is directly relevant to Dailey's claim regarding the unreliability of the critical testimony of state witness Paul Skalnik. Andringa testified that she would never use Skalnik as a witness again, because she could not in good faith put him on the stand believing that he would give truthful testimony. R2 10283. This testimony, given by an officer of the court responsible for Dailey's conviction and death sentence, is remarkably damaging to the State's case. Given that Paul Skalnik provided the most dramatic, inflammatory testimony in a case where there

was absolutely no physical or forensic evidence (apart from evidence *excluding* Dailey), the discrediting of this testimony, by itself, establishes reasonable doubt.

Since all of the above records are properly subject to judicial notice, relevant and admissible, the lower court should have taken judicial notice of them and considered them as evidence when analyzing the cumulative effect of all of the evidence under *Jones v. State*, 709 So. 2d 512 (Fla. 1998). The court's failure to do so was error.

ARGUMENT IV: Sentencing To Death And Executing Someone Who Is Actually Innocent Violates The Fifth, Eighth, And Fourteenth Amendments To The United States Constitution And The Corresponding Provisions Of The Florida Constitution.

The Eighth Amendment prohibits cruel and unusual punishment. In a concurring opinion, Justice O'Connor concluded that "executing the innocent is inconsistent with the Constitution," "contrary to the contemporary standards of decency," "shocking to the conscience," and "offensive to a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, and Kennedy, J.J., concurring) (internal quotations and citations omitted). Justice O'Connor concluded that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id*. In light of the compelling evidence of Dailey's innocence, allowing Dailey to be sentenced to death and executed would violate his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Florida Constitution also provides Dailey with the right to be free from cruel

and unusual punishment. The Florida Constitution specifically provides that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution." Art I, §17, Fla. Const.

Dailey recognizes that this Court has rejected the claim that Florida's failure to recognize a freestanding actual innocence claim violates the Eighth Amendment. *Tompkins v. State*, 994 So. 2d. 1072, 1089 (Fla. 2008) (citing *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006)). However, Dailey maintains that these cases were wrongly decided and violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Eighth Amendment has been construed by the United States Supreme Court to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time. . . . Standards of decency have evolved since 1980. They will never stop doing so." *Graham v.*

Florida, 560 U.S. 48, 85 (2010) (Stevens, J., concurring).

In *Baze v. Rees*, 553 U.S. 35 (2008), Justice Stevens explained that one of his greatest concerns about the continuing constitutionality of the death penalty was the possibility of executing an innocent person.

> Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses . . . The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive.

Id. at 85-86 (Stevens, J., concurring) (internal citations omitted).

Because Dailey is actually innocent, permitting his death sentence to stand and allowing his execution to go forward would be fundamentally at odds with the "evolving standards of decency that mark the progress of a maturing society." While not conceding that Dailey had a constitutionally fair trial with constitutionally effective counsel, even if he had, upholding his death sentence and executing him would violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Dailey relief on his successive motion. This Court should order that his conviction be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Christina Pacheco, Assistant Attorney General, capapp@myfloridalegal.com and christina.pacheco@myfloridalegal.com, on this 11th day of June, 2018.

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I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100 and 9.210**.**

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IN THE SUPREME COURT OF FLORIDA

JAMES MILTON DAILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-557
L.T. Number 1985-CF-007084

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on direct appeal will be referred to as "DAR V_/_" followed by the appropriate volume number and page number; the record of the initial postconviction proceedings will be referred to as "PCR V_/_" with the appropriate volume and page number; and the instant record for the second, successive postconviction motion is not indexed by volume numbers, therefore it shall be referred to as "2PCR p. _" with the indicated page number.

STATEMENT OF THE CASE AND FACTS

This case involves an appeal from a second, successive motion for postconviction relief. Appellant, James Dailey, was convicted of first-degree murder of fourteen-year-old victim, S.B., in 1985. *Dailey v. State*, 594 So. 2d 254, 255 (Fla. 1991). Facts at trial established that Dailey along with codefendant, Jack Pearcy, and their friend Dwaine "Oza" Shaw picked up S.B., her twin sister, and their friend when they were hitchhiking. *Id.* The group went to a bar and later returned to Pearcy's house. *Id.* At some point S.B. went back out with other members of the group, and Dailey and Pearcy eventually returned home without S.B. in the early hours of the morning. *Id.* Dailey's

pants were wet and he was carrying something in his arms. *Id.* Later that morning, Dailey and Pearcy visited a self-service laundry and made plans to leave town. *Id.* at 256. That same morning, S.B.'s nude body was found floating in the water near Indian Rocks Beach. She had been stabbed, strangled, and drowned. *Id.*

The jury found Dailey guilty of first-degree murder and unanimously recommended death. *Dailey*, 594 So. 2d at 256. The trial court sentenced Dailey to death; however, on appeal this Court found that an error had occurred in the sentencing procedure. Therefore, this Court affirmed Dailey's conviction, but reversed the sentence and remanded the case for resentencing. *Id.* at 259. Rehearing was denied March 19, 1992. *Dailey v. State*, 594 So. 2d 254 (Fla. 1991), *opinion corrected on denial of reh'g* (Mar. 19, 1991).

Upon the case being remanded, Dailey was resentenced before the trial judge. *Dailey v. State*, 659 So. 2d 246, 247 (Fla. 1995). Dailey again appealed his sentence, challenging various issues related to his resentencing without an entirely new penalty-phase jury, and Dailey also challenged the finding and weighing of mitigating circumstances along with the trial judge's refusal to disqualify himself. *Id.* at 248. This Court

found no error and affirmed his sentence of death. *Id.* at 248. The mandate was issued May 25, 1995. Dailey filed a petition for writ of certiorari, which was denied January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

Dailey subsequently filed a motion for postconviction relief, which was denied after an evidentiary hearing. *Dailey v. State*, 965 So. 2d 38 (Fla. 2007). Dailey's motion included ineffective assistance of counsel/prosecutorial misconduct claims concerning Dailey's presumption of innocence, improper vouching for the credibility of witness Paul Skalnik, and an alleged misstatement of fact regarding when Shaw went to use the phone on the night of the murder. *Id.* at 43. Dailey also raised newly discovered evidence claims regarding Skalnik, Pearcy, and Shaw. *Id.* at 45-46. In addition, Dailey alleged that his counsel was ineffective for failing to use phone records to impeach Gayle Bailey, failing to cross-examine Skalnik about the circumstances surrounding his criminal charges, failing to use newspaper articles to impeach Skalnik's testimony, and failing to call Dailey to testify. *Id.* at 46-47. Dailey appealed the denial of relief, and this Court affirmed the court's denial of Dailey's postconviction claims.

Next, Dailey filed a petition for writ of habeas corpus

pursuant to 28 U.S.C. § 2254, in United States District Court, Middle District of Florida. *Dailey v. Sec'y, Florida Dept. of Corr.*, 2008 WL 4470016, at *1 (M.D. Fla. Sept. 30, 2008). The Department of Corrections filed a motion to dismiss the petition. The court dismissed numerous grounds and gave the parties the opportunity to address the merits of other grounds. *Id.* The court ultimately denied Dailey's remaining claims. *Dailey v. Sec'y, Florida Dept. of Corr.*, 2011 WL 1230812, at *32 (M.D. Fla. Apr. 1, 2011), *amended in part, vacated in part*, 2012 WL 1069224 (M.D. Fla. Mar. 29, 2012).

Dailey also filed a successive motion for postconviction relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). The postconviction court entered an order summarily denying relief, and this Court affirmed. *Dailey v. State*, 2018 WL 3120807 (Fla. June 26, 2018).

The instant case involves Dailey's second, successive motion for postconviction relief, which alleged the following:

> I. Newly discovered testimonial evidence proves that Dailey is actually innocent.
>
> > IA. The affidavit of Jack Pearcy proves that Dailey is innocent.
> >
> > IB. Affidavits of James Wright and Michael Sorrentino constitute new evidence undermining the reliability and validity of the "snitch testimony" at Dailey's trial.

IC. Newly discovered evidence demonstrates that Paul Skalnik received a deal for this testimony.

ID. Newly discovered Indian Rocks Beach reports prove that Dailey was not with Pearcy when the victim was killed.

Claim II. The State violated *Giglio v. United States*, 405 U.S. 150 (1972), by failing to correct the false testimony of Paul Skalnik during trial through its impeachment of Oza Shaw.

Claim III. Sentencing to death and executing someone who is actually innocent violates the United States and Florida Constitutions.

The trial court granted an evidentiary hearing on Claims IA and IB. Despite the State's numerous objections to the witnesses and their testimony during the evidentiary hearing, the following witnesses testified for Dailey: Travis Smith, James Wright, Michael Sorrentino, Jack Pearcy, and Lisa Bort. The State called Detective John Halliday. The testimony of the witnesses is summarized below.

Travis Smith

Travis Smith was incarcerated with Dailey back in the 1980s. (2PCR p. 12076). Smith remembered seeing Dailey's case on the news and in the newspapers while he was in jail. (2PCR p. 12077). Smith testified that he never observed Dailey speaking with Pablo Dejesus or James Leitner. (2PCR pp. 12088-89). Over the State's objection, Smith testified that Leitner and Dejesus

were trying to collaborate a story as to what they would say when they talked to a state attorney. (2PCR p. 12093). Smith was questioned by the police about Dailey when he was in county jail, but he refused to answer any questions. (2PCR p. 12094). Smith stated that the police had newspaper clippings, and the story was covered on the news while he was with the police. (2PCR pp. 12095-96). Smith stated, "They showed me a couple papers which, like I said, I wasn't too interested in because I really didn't enjoy speaking with them." (2PCR p. 12096). Over the State's objection, Smith was permitted to testify that Pearcy told him that he was a codefendant and "he committed the crime himself." (2PCR p. 12099).

Smith admitted that he talked with Dailey's defense team before Dailey's trial and after his trial as well. (2PCR p. 12100).

James Wright

James Wright testified that he met Dailey around 1985 or 1986 in the county jail. (2PCR p. 12055). Wright knew about Dailey's case because he received and read the newspaper while in jail. (2PCR p. 12056). According to Wright, a detective came to the jail to speak with him about Dailey, and the detective had a newspaper article about Dailey's case. (2PCR p. 12056).

The detective wanted to know if Dailey had been talking about his case. (2PCR p. 12057). Wright acknowledged that although no one from Dailey's trial team came to the jail to speak with him about the case, he was listed as a defense witness for Dailey's previous postconviction case and he spoke with someone about the case in 2003. (2PCR pp. 12068-69).

Michael Sorrentino

Michael Sorrentino knew Dailey from his incarceration in Pinellas County Jail from 1985-1987. (2PCR p. 12103). He was in the same pod with Dailey for six to eight months, and he regularly interacted with Dailey. (2PCR pp. 12103-04). There were TVs in the pod, and occasionally Dailey's case would be talked about on the news. (2PCR p. 12105). According to Sorrentino, Dailey's case was also discussed in the newspaper. (2PCR p. 12106).

Sorrentino testified that one day he was brought into a conference room in the jail by an investigator, and there were newspaper articles "over the table." (2PCR pp. 12106-07). He was asked "Did Jim ever talk about his case?" (2PCR p. 12107). He replied, "No." (2PCR p. 12107). He was then returned to his cell. (2PCR p. 12110). Sorrentino stated that prior to Dailey's current collateral counsel speaking to him, no attorney had ever

contacted him about Dailey's case. (2PCR p. 12111).

Juan Banda

When Dailey called Juan Banda to testify, the State objected to his testimony based on it being impermissible hearsay. (2PCR pp. 12113-14). The court stated that it would overrule the objection to the extent that "I'll hear it and I'll deal with it." (2PCR p. 12115). The State also objected because Pearcy had not yet been called as a witness, and the State believed it would be improper to try to get Pearcy's hearsay statements admitted through Banda when they did not know whether Pearcy was going to refuse to testify or whether he would admit or deny that his affidavit was true. (2PCR p. 12115).

The prosecutor explained, "Until we figure out whether or not […] the claim regarding Mr. Pe[a]rcy being solely responsible is ripe, all these witnesses are not relevant. I don't see why we're putting on these witnesses without knowing what Mr. Pe[a]rcy is going to testify to, because I assure you, Judge, […] we do not know." (2PCR pp. 12115-16). While the Court tended to agree with the prosecutor, it decided to "hear it anyway." (2PCR p. 12116).

Banda subsequently testified that he met Jack Pearcy in 1985 in the Pinellas County Jail. (2PCR p. 12117). He also saw

him at Union Correctional Facility. (2PCR p. 12118). Over the State's objection, the court permitted Banda to testify that Pearcy told him that Dailey was innocent. (2PCR p. 12117). The court found that the statement was "clearly hearsay," but it allowed it for "purposes of this hearing" and clarified that it would reserve ruling on it until the statement was made "relevant." (2PCR p. 12119).

Banda again testified that Pearcy stated that Dailey was innocent of the crime that involved his sentence of death. (2PCR p. 12119). The statement was made at some point from 1992-1996. (2PCR p. 12119). Banda stated that in 2007 he saw Pearcy again and asked when Dailey's parole hearing was. (2PCR p. 12120). (V1/82). Pearcy told Banda that Dailey was still on death row, and Banda asked, "How is that possible?" "You told me that he was innocent." (2PCR pp. 12120-21). Banda testified that Ms. Shirely was the first person who came to see him about Dailey's case. (2PCR p. 12121).

On cross-examination, Banda admitted that Pearcy never told him that he was solely responsible for the death of the victim S.B. (2PCR p. 12124). According to Banda, Pearcy never admitted his guilt to him. (2PCR p. 12125).

Jack Pearcy

Pearcy testified that he was sixty-two years old and resided at Sumter Institution. (2PCR p. 12129). He was convicted of felonies, but he was not sure how many. (2PCR pp. 12129-30). Pearcy knew Dailey, although he was unable to identify him in court. (2PCR p. 12130). Pearcy testified that he signed an affidavit in the case. (2PCR p. 12130). The court denied the request to admit Pearcy's affidavit as evidence but permitted it to be included as a proffer so that it could be reviewed on appeal by this Court. (2PCR p. 12133).

While Pearcy agreed that he signed the affidavit in the case, he testified that the statements were not true. (2PCR p. 12137). Upon being asked which statements were not true, he replied "I'm not sure. There's quite a few lines on there." (2PCR p. 12137). Pearcy explained that the part of the affidavit listing his name and the fact that he was sentenced to life in prison was true, but Pearcy refused to answer any questions about the truth of the remainder of the lines in the affidavit. (2PCR pp. 12139-40).

Pearcy testified that he had spoken with most of his close family and someone from the State since he signed his affidavit. (2PCR p. 12145). During a proffer, Pearcy explained that Ms.

Shirley had visited him after he had signed the affidavit, and he had advised her that he had spoken with his family and they told him that he needed to do what was right and not make a rash decision (about whether he should testify at Dailey's evidentiary hearing). (2PCR pp. 12146-47).

After direct examination, the trial court stated to Dailey's attorney, "Counsel, I find it's a rather unique situation. You had filed an affidavit and using that as a basis to seek some legal remedy, then you present the very affiant who refuses to acknowledge the truthfulness of every meaningful assertion in that affidavit." (2PCR p. 12147).

On cross-examination, Pearcy admitted that he did not furnish Dailey's counsel with the information contained in the affidavit. (2PCR p. 12149). Instead, counsel provided him with an affidavit that had already been drafted, and he signed it. (2PCR p. 12149). Pearcy indicated that he was not sure exactly how he came about signing the affidavit, but he remembered it may have been laying on a desk while Dailey's counsel was talking to him, and he asked if that was something she wanted him to sign. (2PCR p. 12152). That was the first time he had met Dailey's current counsel, but he had been visited by other people from capital collateral regional counsel before. (2PCR p.

12149). Dailey's counsel visited Pearcy right after he had his parole hearing. (2PCR p. 12150). Prior to coming to the courtroom for Dailey's evidentiary hearing, Pearcy had warned Dailey's counsel that he would not be testifying. (2PCR p. 12149)

Lisa Bort

Lisa Bort, an attorney for capital collateral regional counsel and a notary, accompanied Dailey's counsel, Ms. Shirley, during her visit with Pearcy. (2PCR pp. 12153-54). Bort testified that during the visit, Pearcy asked if there was anything for him to sign. (2PCR p. 12156). Ms. Shirley then handed him the affidavit, he read it, and he asked for a pen to sign it. (2PCR p. 12157). Pearcy had no questions and did not ask to make changes. (2PCR p. 12157).

John Halliday

John Halliday (hereinafter referred to as "Detective Halliday") was working as a special agent with the National Insurance Crime Bureau. (2PCR p. 12162). Prior to that, he was a law enforcement officer for twenty-eight years. (2PCR p. 12162). V2/37). He worked at Florida Department of Law Enforcement in the public corruption unit, as well as in the violent crimes unit. (2PCR p. 12162). He also worked at the Pinellas County

Sheriff's Office from 1976 through 1987, and he was a homicide detective for seven years. (2PCR p. 12163). He was the lead detective of the murder involving the victim in this case, S.B., and he was involved with the arrests of Dailey and Pearcy. (2PCR p. 12163).

During Detective Halliday's investigation, he went to Pinellas County Jail to interview inmates. (2PCR p. 12164). (V2/39). He took inmates individually to a room in the Detective Investigation Unit of the jail to speak with them while another investigator was present. (2PCR p. 12165). He talked with many different inmates, including Smith, Sorrentino, and Wright. (2PCR p. 12165). Detective Halliday never took newspapers into the interview room with him, and there were not newspaper articles already in the room. (2PCR pp. 12167-69). He had never shown newspaper articles to any inmates about a case. (2PCR p. 12170).

After the evidentiary hearing, the trial court denied relief on all of Dailey's claims. As to claim IA, the court found that Pearcy's affidavit was inadmissible hearsay. The court concluded, "Although Mr. Pearcy's affidavit formed the basis for Defendant's allegation of newly discovered evidence, Defendant failed to provide any admissible evidence to prove his

claim." (2PCR p. 8882). The court noted that it had granted an evidentiary hearing on claim IB "out of an abundance of caution" but after "carefully considering the issue" after the evidentiary hearing, the court ultimately found the claim "untimely or otherwise procedurally barred." (2PCR p. 8883). The court also found claims IC and ID untimely. (2PCR p. 8887). The court found Dailey's *Giglio* claims untimely (2PCR p. 8888), and it rejected Dailey's claim of actual innocence. (2PCR p. 8890).

This appeal follows.

SUMMARY OF THE ARGUMENT

IA: The trial court properly denied Dailey's "newly discovered evidence" claim after having an evidentiary hearing regarding codefendant Jack Pearcy allegedly accepting sole responsibility of the murder of S.B. Pearcy did not want to provide any meaningful testimony during the evidentiary hearing, and while he had signed an affidavit, he stated at the evidentiary hearing that most of the contents of the affidavit were not true. Dailey argues that the trial court should have admitted the affidavit into evidence; nevertheless, the trial court properly excluded the affidavit because it was inadmissible hearsay and did not constitute a third-party admission of guilt or a statement against interest. The court also properly excluded inadmissible

hearsay statements from Juan Banda and Travis Smith about what Pearcy allegedly told them while they were incarcerated together.

IB. The trial court properly dismissed this claim as untimely when it was based on events that occurred in the 1980s according to Michael Sorrentino, James Wright, and Travis Smith; and Dailey has known for many years that Sorrentino, Wright, and Smith had this information. Significantly, Sorrentino and Wright were part of Dailey's 1999 postconviction claim in which he alleged that his trial counsel was ineffective for not calling Sorrentino and Wright to testify during trial about being shown newspaper articles by Detective Halliday. In the instant case, Dailey surprisingly claims that newly discovered evidence shows that Sorrentino and Wright were shown newspaper articles by Detective Halliday. Dailey also alleges that Travis Smith reportedly being shown newspaper articles constitutes newly discovered evidence even though Smith was part of Dailey's prior postconviction claim, and Smith has talked with Dailey's trial attorneys and his previous postconviction attorneys. Because this claim is clearly untimely and it does not at all constitute

newly discovered evidence, the trial court properly dismissed this claim.[1]

IC. The lower court appropriately dismissed this "newly discovered evidence" claim as untimely when it was based on information from the 1980s reputedly showing that Paul Skalnik was dishonest. Additionally, Skalnik's reputation and whether he received a deal in exchange for his testimony was litigated in Dailey's initial postconviction motion.

ID. The trial court properly dismissed Dailey's untimely claim about Indian Rocks Beach police reports from 1985, which he claims are newly discovered.

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[1] To be clear, the trial court initially held an evidentiary hearing on this claim in "an abundance of caution." (2PCR p. 8883). It also allowed the witnesses to testify despite the State's objections, but it determined that it would defer ruling until after the hearing. The court preferred that the parties' closing arguments address the substance of the objections and whether the evidence should be considered. The court ultimately determined that the evidence Dailey claimed was newly discovered, does not qualify as an exception to the timeliness requirements of a postconviction motion. (2PCR p. 8884).

IE. The lower court had no cumulative review to conduct because each individual newly discovered claim was without merit. As this Court has acknowledged, when individual claims are without merit, the cumulative error claim must fail. *Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2008).

II: The trial court properly rejected Dailey's claims pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), as untimely when they were based on testimony from Dailey's 2003 evidentiary hearing. Even if the claim had been timely raised, the records conclusively refuted Dailey's contention that *Giglio* errors occurred.

III. The trial court did not err in denying part of Dailey's request for judicial notice. While Dailey's request was phrased as one for judicial notice, he intended to use the documents as evidence to strengthen his case. Dailey failed to go through the proper channels of seeking to admit the documents as evidence, and instead he mistakenly believed he was entitled to the wholesale admission of irrelevant documents riddled with hearsay merely because the documents were within a file that could be judicially noticed.

IV. This Court does not recognize freestanding claims of actual innocence. Therefore, the lower court's denial of this claim requires affirmance.

ARGUMENT

ISSUE I

NONE OF THE EVIDENCE PURPORTED TO BE NEWLY DISCOVERED EVIDENCE IS ACTUALLY NEW; NONE OF THE EVIDENCE SHOWS THAT DAILEY IS INNOCENT; AND THE ENTIRE CLAIM IS PROCEDURALLY BARRED.

In his first issue, Dailey raises various challenges based on alleged "newly discovered evidence." Because these claims are being raised in a second, successive postconviction motion, the motion must meet the requirements for being considered timely filed. A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to meet the time limitation exceptions. Fla. R. Crim. P. 3.851(e)(2).

Pursuant to rule 3.851 (d), of the Florida Rules of Criminal Procedure, a motion to vacate judgment of conviction and sentence of death must be filed within the one year of the judgment and sentence becoming final. When a motion is filed past that time-period, as it has been in this case, the only way for a motion to be considered timely is if any one of the following exceptions is properly alleged in the motion:

(A) the facts on which the claim is predicated were unknown to Dailey or his 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 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). Dailey's motion relies upon the exception under (A) for timeliness.

In order to obtain a new trial based on a newly discovered evidence claim, Dailey must not only show that the evidence was not known by him, his counsel, or the trial court at the time of trial and it could not have been known by the use of due diligence, Dailey must also show that the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones II* test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones II*, 709 So. 2d at 526 (*quoting Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)). Even when a

defendant's evidence meets the threshold requirement by qualifying as newly discovered, no relief is warranted if the evidence would not be admissible at trial. *Sims v. State*, 754 So. 2d 657, 660 (Fla. 2000).

Moreover, a court's decision whether to grant an evidentiary hearing on postconviction motion is based on written materials before the court; thus, its ruling is tantamount to a pure question of law that subject to de novo review. *Henyard v. State*, 992 So. 2d 120, 132 (Fla. 2008). A successive postconviction motion may be denied without an evidentiary hearing if the records of the case conclusively show that the movant is entitled to no relief. Fla. R. Crim. P. 3.851(f)(5)(B).

On the other hand, when trial courts rule on a newly discovered evidence claim after an evidentiary hearing, appellate courts review the trial court's findings on questions of fact, the credibility of witnesses, and the weight of the evidence for competent, substantial evidence. *Melendez v. State*, 718 So. 2d 746, 747-48 (Fla. 1998). The trial court's application of the law to the facts is reviewed de novo. *Hendrix v. State*, 908 So. 2d 412, 423 (Fla. 2005).

As will be shown below, none of the evidence that Dailey

claims is newly discovered meets the requirements of *Jones II*. Additionally, much of the evidence that Dailey claims is newly discovered has been untimely raised in his second, successive motion and constitutes inadmissible evidence.

IA. NONE OF THE EVIDENCE RELATING TO CODEFENDANT JACK PEARCY CONSTITUTED NEWLY DISCOVERED EVIDENCE.

Jack Pearcy's Affidavit Was Neither a Third-Party Admission Nor a Statement Against Interest.

In Dailey's first newly discovered evidence claim, he alleges that codefendant Jack Pearcy accepts sole responsibility for the murder, thereby proving Dailey's innocence. Dailey attached an affidavit from Pearcy to his postconviction motion, and Dailey's motion alleged that Pearcy was available to testify at an evidentiary hearing. (2PCR p. 18).

Initially, this Court should know that Dailey filed a postconviction motion in 1999, alleging that Pearcy made a statement exculpating Dailey from the murder. (PCR V1/66). An evidentiary hearing was granted, and Pearcy refused to testify. The trial court did not admit Pearcy's statement into evidence, and it ultimately denied relief. This Court affirmed the trial court's ruling, noting that "at no point in the statement does Pearcy admit to the murder of [S.B.] or the commission of any other crime. Pearcy has had numerous opportunities to testify on

Dailey's behalf, and he has repeatedly declined to do so." *Dailey v. State*, 965 So. 2d 38, 46 (Fla. 2007).

Now, in Dailey's most recent newly discovered evidence claim, his attorneys drafted an affidavit for Pearcy accepting "sole responsibility" for the murder of S.B., and his attorneys got Pearcy to sign the affidavit. (2PCR p. 12149). The lower court granted an evidentiary hearing so Pearcy could testify, but Pearcy refused to provide any meaningful testimony during the hearing. (2PCR pp. 12137-40). Pearcy also indicated that most of the contents of the affidavit were not true. (2PCR 12137). The trial court found Pearcy's affidavit inadmissible.

Dailey now challenges the trial court's refusal to admit the affidavit as evidence. Dailey specifically argues that Pearcy's affidavit constitutes a third-party admission of guilt under *Chambers v. Mississipi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006). In *Chambers*, "the United States Supreme Court held that in some circumstances, due process requires the bending of technical rules of evidence regarding confessions by third parties." *Marek v. State*, 14 So. 3d 985, 995 (Fla. 2009).

In analyzing whether Pearcy's affidavit was admissible evidence, the lower court specifically reviewed the following

four factors set forth in *Chambers* and reiterated by this Court in *Bearden v. State*, 161 So. 3d 1257, 1264-65 (Fla. 2015): (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the statement is corroborated by some other evidence in the case; (3) the statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of-court statement, the declarant must be available for cross-examination.

The court found that Peacy's affidavit failed all four factors. "First, the affidavit is not a spontaneous statement because Pearcy made the statement approximately thirty years after the offense." (2PCR p. 8881). "Second, the affidavit is not corroborated by other significant evidence." (2PCR p. 8881). The court noted that Pearcy testified during the hearing that portions of the affidavit were not true, which discredited his own statements in the affidavit. (2PCR p. 8881). The court also indicated that while Ms. Bort's testimony established that Pearcy knowingly and voluntarily signed the affidavit, it did not corroborate the facts contained within the affidavit. (2PCR p. 8881). "Third the affidavit is not unquestionable against Pearcy's interests" when he has already been tried, convicted,

and sentenced to life in prison for S.B.'s murder. (2PCR p. 8881). "Fourth, the facts and circumstances of this case prompt this Court to highly question the veracity of the statement, and Pearcy's refusal to testify as to any meaningful assertion in the affidavit demonstrate that he is unavailable for cross-examination as to the truthfulness of the affidavit." (2PCR pp. 8881-82). The court, therefore, concluded that Pearcy's affidavit was inadmissible as a third-party admission.

Dailey argues that the lower court somehow erred in evaluating the *Chambers* factors. Dailey notes that this Court has made clear that the primary consideration in determining admissibility is whether the statement bears sufficient indicia of reliability. Initial Brief at 18. The State agrees that the reliability of the statement at issue is a key consideration. As this Court has plainly acknowledged, *Chambers* only provides for the admission of hearsay when it "bears indicia of reliability." *Marek*, 14 So. 3d at 995; *see also Grim v. State*, 841 So. 2d 455 (Fla. 2003).

The lower court correctly applied *Chambers* and properly considered the reliability of Pearcy's affidavit. Pearcy's affidavit was clearly not reliable—even Pearcy admitted as much. Further, in *Holmes v. South Carolina*, 547 U.S. at 327, which

Dailey also relies upon, the defendant was able to proffer evidence at a pretrial hearing that, if believed, strongly supported a verdict of not guilty. *Holmes*, 547 U.S. at 330. Here, however, Dailey was unable to proffer any such evidence because Pearcy never admitted responsibility for S.B.'s murder during the evidentiary hearing. Dailey has failed to show that the trial court erred in finding Pearcy's affidavit did not qualify as admissible evidence under the third-party admission exception to hearsay.

Dailey next argues that the affidavit was admissible as a statement against interest. In order to be a statement against interest, it must subject the declarant to liability at the time of its making so that a person in the declarant's position would not have made the statement unless he believed it to be true. § 90.804 (2)(c), Fla. Stat. (2018). In addition, a statement exposing the declarant to criminal liability that is offered to exculpate the accused is inadmissible unless corroborating circumstances show the trustworthiness of the statement. § 90.804 (2)(c), Fla. Stat. (2018).

While the trial court found that Pearcy's unwillingness to testify made him unavailable, the court determined that Pearcy's statements in the affidavit were not contrary to his interests

and did not expose him to liability given that he had already been convicted and sentenced for the murder. (2PCR p. 8880). Dailey has failed to show that the trial court erred. Pearcy's statement in his affidavit that he was responsible for S.B.'s murder cannot be considered against his interest when he has already been convicted and is serving a life sentence for S.B's murder. *See Marek v. State*, 14 So. 3d 985, 995 (Fla. 2009) (statement against interest not satisfied when, at the time of making the statements, the declarant was serving a life sentence and could not be retried for the crime after confessing).

Appellee further takes issue with Dailey's assertion that the State conceded that Pearcy's statement subjected him to a perjury charge. Initial Brief at 20-21. The record certainly does not reflect that the State's request for Pearcy to be appointed counsel had anything to do with a perjury charge. Instead, the State expressed a concern about the possibility that Pearcy's testimony could be used against him at a future parole hearing, and it wanted to ensure that Pearcy adequately understood the potential consequences of his testimony. (2PCR p. 12143). Contrary to what Dailey now asserts in his brief, the State never "strongly implied" that perjury charges would be

forthcoming. Initial Brief at 21. The State has never charged Pearcy with perjury.

Nevertheless, Dailey asserts that the potential for Pearcy to be charged with perjury rendered the statements in his affidavit against his interest, but that argument is altogether meritless. For a perjury conviction, Pearcy had to make a false statement, which he did not believe to be true, under oath in an official proceeding, and the statement had to be in regard to a material matter or relating to the prosecution of a capital felony. § 837.02 (1),(2), Fla. Stat. (2018). Any assertion that Pearcy's affidavit subjected him to a perjury charge is unfounded because the statements in the affidavit were not made in an official proceeding. Therefore, Pearcy could not have committed perjury by signing the affidavit.

While Pearcy has made various statements in the past, none of them have been under oath in an official proceeding, and Pearcy refused to answer most of the questions during the 2018 evidentiary hearing that supposedly subjected him to perjury. Furthermore, Pearcy was willing to say at the evidentiary hearing that the statements in his affidavit were not true. Dailey has not shown that the potential for a perjury charge

rendered Pearcy's statements in his affidavit against his interest.

As the trial court correctly noted, "Pearcy's nonchalant demeanor at the evidentiary hearing, admission that portions of his affidavit are not true statements, and refusal to testify after being compelled to do so indicate that Pearcy is not genuinely concerned about exposing himself to minor criminal liability related to his testimony." (2PCR p. 8880). Competent, substantial evidence supports the trial court's ruling on this claim.

Dailey has failed to show that the court erred in refusing to admit Pearcy's affidavit into evidence. *See Robinson v. State*, 707 So. 2d 688, 691 (Fla. 1998) ("In the end, therefore, Fields' unauthenticated, untested affidavit proffered by Robinson is nothing more than hearsay, *i.e.*, an out-of-court statement offered to prove the truth of the matter asserted, which is inadmissible because Robinson does not claim, nor do we find, that it comes within any hearsay exception."). This Court should affirm the lower court's denial of this claim.

In Analyzing Whether Pearcy's Affidavit Constituted Newly Discovered Evidence, the Trial Court Properly Did Not Consider Hearsay Statements from Travis Smith and Juan Banda.

Dailey next challenges the trial court's finding regarding Travis Smith and Juan Banda. In an effort to bolster his newly discovered evidence claim regarding Pearcy's affidavit, Dailey presented the testimony of Travis Smith and Juan Banda despite the many objections lodged by the State. The trial court ultimately allowed the testimony during the evidentiary hearing, but deferred ruling on the actual admissibility of the evidence until it entered its final order. (2PCR pp. 12075, 12115). In its order denying relief, the trial court found that Travis Smith and Juan Banda's testimony constituted inadmissible hearsay which did not fall under any exception to the rule against hearsay. (2PCR p. 8881). The trial court properly excluded the testimony, and Dailey has failed to show any error.

Travis Smith should not have testified in the first place because Dailey completely failed to show that information from Travis Smith constituted newly discovered evidence. Smith was a known witness that Dailey's attorneys spoke with before Dailey's trial as well as his prior to previous postconviction evidentiary hearing. Smith would have known about Pearcy's alleged statements to him at the time he talked with Dailey's

attorneys. Accordingly, this evidence is not newly discovered under *Jones II*.

Additionally, the statements allegedly said by Pearcy to Smith are clearly hearsay. The statements do not exculpate Dailey, and even if they did, Dailey never established that the factors of *Chambers* were met. Unlike the confessions in *Chambers*, the alleged confession by Pearcy, as testified to by Smith, lacked indicia of reliability. As Dailey himself admits, Pearcy was not available for cross-examination. Therefore, *Chambers* is not controlling, and relief was properly denied.

The statements Pearcy allegedly made to Banda also constitute hearsay, and Banda's affidavit is hearsay upon hearsay. Dailey failed to satisfy any hearsay exception to justify admission of these statements. Unlike the statements at issue in *Chambers*, Pearcy's hearsay statements allegedly made to Banda do not involve an oral confession to the murder. To the contrary, Banda testified on cross-examination that Pearcy never admitted his guilt to him, nor did he claim to be solely responsible for the death of S.B. (2PCR pp. 12124-25). Thus, Pearcy's hearsay statements to Banda are not "self-incriminatory and unquestionably against [Pearcy's] interest. Accordingly, Banda's testimony and his affidavit do not meet the

admissibility requirements under the rules of evidence or under *Chambers*. *See, e.g. Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994) (affirming trial court's exclusion of affidavits based on being inadmissible hearsay documents and rejecting defendant's arguments regarding the statement against interest exception and *Chambers*).

Likewise, the statements do not qualify as a statement against interest or a declaration against penal interest when Pearcy never confessed to Banda. Further, by the time Pearcy allegedly made the statements to Banda in the 1990s, Pearcy had already been convicted of murder and sentenced to life in prison. (2PCR p. 12118); *Dailey*, 594 So. 2d at 255 ("Pearcy was convicted of first-degree murder and sentenced to life imprisonment.").

Testimony from Smith and Banda as to what Pearcy reportedly said was clearly hearsay. *Kormondy v. State*, 154 So. 3d 341 (Fla. 2015) ("[T]he newly discovered evidence offered by Kormondy, as to what Buffkin reportedly said, constitutes hearsay. *See* § 90.801(1)(c), Fla. Stat. (2014); *see also Wyatt v. State*, 71 So.3d 86, 104 n. 15 (Fla.2011) […] In other words, all of the inmates' statements consist of relating that Buffkin told them at various times that he was the shooter."). The trial

court properly determined that it was not admissible evidence. Dailey has failed to show any error regarding the trial court's disposition of Dailey's newly discovered evidence claim based on Pearcy's inadmissible affidavit and hearsay statements. The trial court's denial of this claim should be affirmed.

IB. DAILEY'S ALLEGATION INVOLVING DETECTIVE HALLIDAY ALLEGEDLY SHOWING NEWSPAPER ARTICLES TO JAIL INMATES DOES NOT MEET THE REQUIREMENTS OF NEWLY DISCOVERED EVIDENCE, AND THE TRIAL COURT PROPERLY DENIED THIS CLAIM.

James Wright and Michael Sorrentino Were Potential Witnesses that Dailey Has Known About for Decades, And Their Testimony Does Not Constitute Newly Discovered Evidence.

In his next claim, Dailey alleges that "newly discovered evidence" established that James Wright and Michael Frank Sorrentino remembered being questioned about Dailey's case while they were housed at the Pinellas County Jail with Dailey, and the detective questioning them had shown them newspaper articles. The lower court properly denied this claim as untimely or otherwise procedurally barred because the facts on which the claim are based were known to both Dailey and his attorney. *See* Fla. R. Crim. P. 3.851(d)(2); Fla. R. Crim. P. 3.851(f)(5)(B).

Significantly, in Dailey's postconviction motion from 1999, he alleged **that both Wright and Sorrentino "were approached by Detective Halliday prior to Mr. Dailey's trial and shown**

newspaper articles regarding the murder.” (PCR V1/30). Dailey claimed that this testimony would have “debilitated the credibility of Paul Skalnik’s statement that this information about the crime came from Mr. Dailey.” (PCR V1/30). He raised the claim as an ineffective assistance of counsel claim due to Dailey’s trial counsel’s failure to call Wright and Sorrentino as witnesses during trial.

By doing so, Dailey established two things. First, Dailey essentially conceded that the evidence that he now claims to be newly discovered would have been known at the time of trial or it was at least ascertainable through the exercise of due diligence. *See Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008) (where the defendant essentially conceded that the evidence did not qualify as newly discovered when he alleged that evidence of Richard Hitchcock’s abuse to relatives was newly discovered evidence and also alleged that trial counsel was ineffective for not presenting evidence that Richard Hitchcock had abused family members). Thus, this evidence does not satisfy the first part of the *Jones II* test.

Second, even if his evidence was not discoverable at the time of trial, it was clearly known by Dailey and his counsel by 1999, and therefore, cannot be considered timely raised as a

newly discovered evidence claim. If it first became discoverable in 1999, Dailey waited eighteen years to file his newly discovered evidence claim. This clearly is not timely. Fla. R. Crim. P. 3.851(d)(2), *see also Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable."). The lower court's ruling finding this claim untimely requires affirmance.

Dailey alleges, however, that the trial court was required to consider Wright and Sorrentino's testimony even if the claim is procedurally barred. Initial Brief at 27. This is incorrect. First, a trial court is required to dismiss a successive motion that fails to meet the exceptions to the time limitations. Fla. R. Crim. P. 3.851(e)(2). Clearly, there is no requirement that claims be analyzed despite the lack of timeliness.

Additionally, in order to constitute newly discovered evidence, the evidence must meet the first prong of *Jones II*, which requires that the evidence was unknown and could not have been known by the exercise of due diligence. *Jones II*, 709 So. 2d at 521. "In determining whether **newly discovered evidence** warrants setting aside a conviction, a trial court is required

to consider **all newly discovered evidence** which would be admissible at trial and then evaluate the weight **of both the newly discovered evidence and the evidence which was introduced at trial** to determine whether the evidence would probably produce a different result on retrial." *Roberts v. State*, 840 So. 2d 962, 972 (Fla. 2002) (emphasis added); *see also Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991) (*Jones I*)). Here, there is no newly discovered evidence in the first place, so there was nothing for the court to consider.

Even if Daily satisfied the first prong of *Jones II*, and even if the evidence were admissible at trial, Dailey failed to establish that the evidence would be of such nature that it would probably produce an acquittal on retrial or yield a less severe sentence. The lower court found that the value of the impeachment testimony of Wright and Sorrentino was weak and questionable when they never claimed that they saw any of the snitches who testified at trial being called into the interview room. (2PCR p. 8885). This is significant because neither Wright nor Sorrentino testified at Dailey's trial. Their testimony at the evidentiary hearing was used to show that if detectives showed them newspaper articles while they were in jail, then all three inmates who testified against Dailey at trial (James

Leitner, Pablo Dejesus, and Paul Skalnik) were unreliable because they must have also been shown newspaper articles by detectives or otherwise inspired to lie. There are many flaws in that argument.

Most significantly, the witnesses who testified against Dailey at trial reached out to Detective Halliday on their own to offer information; they did not provide information as a result of Detective Halliday going to the jail and interviewing inmates. (DAR V8/1028). Both Leitner and Dejesus testified at Dailey's trial that they came forward and provided information to law enforcement without prompting from law enforcement. Leitner and Dejesus decided to contact a detective from jail, named Detective McCuesick, to advise him that they had information about Dailey. (DAR V8/1028, DAR V9/1064, 1105-06). Detective McCuesick then put Leitner and Dejesus in contact with Detective Halliday. (DAR V8/1028).

Paul Skalnik also testified at Dailey's trial that he contacted Detective Halliday about information he obtained from Dailey, and Detective Halliday went to the jail to interview him. (DAR V9/1147, 1183). Therefore, the trial witnesses Leinter, Dejesus, and Skalnik provided information to Detective Halliday because they all reached out to Detective Halliday to

offer the information. They did not provide the information when Detective Halliday summoned inmates from Dailey's pod at Pinellas County Jail. Testimony that Wright and Sorrentino were shown newspapers when they were questioned by detectives does not show that any subsequent information offered by Leitner, Dejesus, and Skalnik must have been a lie.

Moreover, the testimony of Leitner and Dejesus related to Dailey's conduct while in jail and his communication to Pearcy, rather than information that could have been gleaned from a newspaper. Dailey thought that as long as he did not testify, he could "beat his case." (DAR V9/1092, 1095). Dailey told Leitner and Dejesus that if Pearcy got a retrial, Dailey planned to testify at Pearcy's trial to tell the jury that he was the person who really committed the murder. (DAR V9/1066, 1092, 1095). Dailey had also explained that he murdered the victim because he "just lost it." (DAR V9/1067). Dailey failed to show how any allegation that Detective Halliday had newspaper articles with him when he questioned other inmate would have any impact on this testimony from Leitner and Dejesus.

Skalnik testified that Dailey said that he had given notes to the law librarian to be passed to his friend, and he asked Skalnik whether the notes would be admissible in trial. (DAR

V9/1112-14). Skalnik also testified that Dailey went to him for advice about what would happen if Pearcy did not testify during Dailey's trial. (DAR V9/1115-16). With regard to the murder, Dailey told Skalnik that the victim was screaming and staring at Dailey, and she would not die. (DAR V9/1117). Dailey admitted to Skalnik that he stabbed the victim and threw the knife away. (DAR V9/1116-17, 1153).

Dailey offered no evidence during the evidentiary hearing claiming that Skalnik's testimony resulted from Detective Halliday showing newspaper articles to Skalnik, nor has Skalnik or Leiter or Dejesus claimed that they were shown newspaper articles by Detective Halliday. Had Dailey called Wright and Sorrentino as trial witnesses accusing Detective Halliday of being equipped with newspapers while questioning inmates at the jail, it would not have impeached the trial testimony of James Leitner, Pablo Dejesus, and Paul Skalnik.

Wright and Sorrentino merely testified that a detective questioned them about whether Dailey had said anything about his case, but Dailey did not speak to them about his case, so they did not provide any information to the detective. This evidence does not refute the evidence presented at trial. Just because Dailey did not talk to them about his case, does not mean that

Dailey did not speak with anyone else about his case. By the same token, the fact that these witnesses did not lie to detectives does not establish that trial witnesses must have lied to detectives.

When Detective Halliday questioned inmates, like Sorrentino and Wright, no one gave him any information. (DAR V9/1191-92). So even if Detective Halliday had newspapers, which he consistently denied having, it would not have impacted the trial testimony of the actual trial witnesses in Dailey's case.

To the extent that Dailey is now arguing that the testimony from the trial witnesses must be unreliable because they offered the information about Dailey after the detectives went to jail to interview inmates in Dailey's pod, that argument is based on pure speculation. It also is not proven from any of the evidence that Dailey purports to be newly discovered. In fact, Dailey has been asserting this theory since the time of his trial. (DAR V10/1243-1249). The lower court's finding of this claim being untimely should be affirmed.

Evidence from Travis Smith Was Not Newly Discovered Evidence, and Smith's Testimony was Inadmissible.

While this claim was premised on allegedly newly discovered evidence from Wright and Sorrentino, Dailey later filed an affidavit from Travis Smith and was permitted to call Travis

Smith as a witness during the evidentiary hearing. The lower court allowed Travis Smith to testify, over the State's objection, as to hearsay statements from James Leitner and Pablo Dejesus. While the court permitted the testimony, it deferred ruling on its admissibility until after the parties had filed their closing arguments. The court ultimately found this entire claim procedurally barred.

Dailey, however, contends that Smith's testimony was newly discovered evidence, and Dailey alleges that the court erred in not evaluating Smith's testimony. As previously mentioned, Smith talked with Dailey's trial counsel before Dailey's trial, and he also talked with Dailey's postconviction counsel during Dailey's initial postconviction proceedings. (2PCR p. 12100). **All of Smith's testimony during the 2018 evidentiary was based on events that occurred in the 1980s. Dailey failed to show how this information was somehow unknown to him at the time of trial and could not have been known by him by the use of due diligence when Dailey's trial and postconviction attorneys had been in communication with Smith.** Accordingly, the trial court properly found this claim procedurally time-barred.

Dailey argues that to the extent that the information from Smith could have been discovered previously, his prior

postconviction counsel was ineffective under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). This Court has repeatedly rejected claims of ineffective assistance of postconviction counsel. *Tompkins v. State*, 994 So. 2d 1072, 1088 (Fla. 2008) (reiterating that ineffective assistance of postconviction counsel is not a cognizable claim); *Gonzalez v. State*, 990 So. 2d 1017, 1034 (Fla. 2008) ("To the extent that Gonzalez is making an ineffective assistance of postconviction counsel claim, this Court has repeatedly rejected such a claim."). Given how untimely this claim was raised, it was proper for the trial court to reject it. The court certainly was not required to evaluate Smith's testimony like Dailey contends.

Even if this claim had been timely raised, Smith's testimony regarding being shown newspapers would have no impact on Dailey's case, and the remaining testimony was not admissible. Like Wright and Sorrentino, Smith testified that while in county jail, he was questioned by police about Dailey, but he refused to answer any questions. (2PCR p. 12094). Smith stated that the police had newspaper clippings and the story was covered on the news while he was with the police. (2PCR pp. 12095-96). Smith stated, "They showed me a couple papers which,

like I said, I wasn't too interested in because I really didn't enjoy speaking with them." (2PCR p. 12096). These statements do not show that Leitner, Dejesus, and Skalnik were dishonest in relaying statements that Dailey made to them, especially given that Leitner, Dejesus, and Skalnik offered the information on their own accord. Dailey has not proved, in any way, that Leitner, Dejesus, and Skalnik were shown newspaper articles to induce their testimony or that any of the information they relayed to law enforcement derived from their reading of newspaper articles. This evidence fails to satisfy either prong under *Jones II*.

The remaining testimony from Smith constituted inadmissible hearsay. Smith testified that Leitner and Dejesus were trying to collaborate a story as to what they were going to say when they talked with a prosecutor; Smith knew that what they were saying was not true; and that it was a plot to try to get their sentences reduced. Smith's testimony regarding what he allegedly overheard from a conversation between Leitner and Dejesus was hearsay, and it is not admissible under any exception to hearsay. *See Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994) (statements of defendant's pretrial cellmates were hearsay and not admissible in postconviction proceeding); *Roman v. State*,

937 So. 2d 235(Fla. 3d DCA 2006) (explaining that even when a testifying witness does not actually repeat the statements of a non-testifying witness, but it is inferred from the testimony, the statements constitute inadmissible hearsay.).

Additionally, Smith's contention that Leitner and Dejesus were being untruthful and were motivated to get their own sentences reduced was speculative and based on improper lay opinion, and therefore, would not have been admissible. § 90.701 Fla. Stat. (2018); *see, e.g. Geissler v. State*, 90 So. 3d 941 (Fla. 2d DCA 2012) (reversible error in allowing nurse practitioner to testify that child victim was truthful regarding allegations of sexual abuse); *Thorp v. State*, 777 So. 2d 385, 394-95 (Fla. 2000) (where trial court erred in allowing inmate to testify as to what he believed defendant meant when he stated that he "did a hooker"); *Antone v. State*, 382 So. 2d 1205, 1213-14 (Fla. 1980) (a question of a witness which sought "to elicit the individual and personal view of the witness" was improper). Not only were these statements inadmissible during the evidentiary hearing, but they would not be admissible during a new trial. Dailey is not entitled to postconviction relief.

IC. THE TRIAL COURT PROPERLY DENIED DAILEY'S CLAIM ABOUT PAUL SKALNIK, WHICH WAS BASED ON ALLEGATIONS ALREADY LITIGATED IN PREVIOUS POSTCONVICTION PROCEEDINGS.

Under this section, Dailey argues that the lower court erred in summarily denying his claim that Paul Skalnik had a deal and that his reputation in the community discredited his testimony. In summarily denying this claim, the lower court specifically found it untimely. (2PCR p. 8887). The court noted that "[a]ll of this evidence could have been discovered earlier using due diligence." (2PCR p. 8887). The court explained that much of the documents Dailey relied upon were dated back to the 1980s. (2PCR p. 8887).

Dailey's assertion that his untimeliness can somehow be excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), is absolutely false. *Martinez* and *Trevino* addressed circumstances in which a defendant could raise a claim in a federal habeas petition that was not raised in state proceedings. *Banks v. State*, 150 So. 3d 797, 800 (Fla. 2014). *Martinez* and *Trevino* apply only to federal habeas proceedings and neither case provides an independent basis for relief in state court proceedings. *Banks*, 150 So. 3d at 800 (internal citations omitted).

Dailey claims that his prior postconviction counsel was

ineffective for not discovering this evidence sooner. Initial Brief at 38. As this Court has acknowledged, the United States Supreme Court "specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists[.]" *Gore v. State*, 91 So. 3d 769 (Fla. 2012). In *Martinez*, the Court did not choose "to alter decades of precedent and hold that a claim of ineffective assistance of collateral counsel is now an independent, cognizable claim." *Id.* Accordingly, this Court has found that claims of ineffective assistance of postconviction counsel provide no valid basis for relief because they are not cognizable claims. *See Banks*, 150 So. 3d at 800; *Mann v. State*, 112 So. 3d 1158 (Fla. 2013); *Gore v. State*, 24 So. 3d 1 (Fla. 2009); and *Waterhouse v. State*, 792 So. 2d 1176 (Fla. 2001).

Additionally, Dailey's claim also fails because it is based on a claim nearly identical to the one previously raised by Dailey in his initial 3.851 motion. In his initial postconviction motion, Dailey provided six documents from Skalnik alleging that the State promised him favorable treatment in exchange for his testimony against Dailey. *Dailey*, 965 So. 2d at 44-45. Dailey specifically alleged that Skalnik's testimony about Dailey confessing was false; the State knew it lacked

credibility; Skalnik had received a deal in exchange for his false testimony and had lied about not receiving a deal; and the State Attorney's Office was aware that Skalnik was being rewarded for his untruthful testimony, but it withheld that evidence. (PCR pp. 54-62). During Dailey's 2003 evidentiary hearing, his trial attorney, Henry Adringa, admitted that the "public defender had a file on Mr. Skalnik and Mr. Skalnik was well known throughout." (2PCR p. 400). Dailey's former postconviction counsel also referred to Skalnik as a liar who lacked credibility. (2PCR p. 478).

Dailey raised the claim under *Giglio v. United States*, 405 U.S. 150 (1972), alleging that the State knowingly presented false testimony, and as a newly discovered evidence claim that Skalnik testified falsely at Dailey's trial. As for the newly discovered evidence claim, this Court found that Dailey failed to show that the documents relating to Paul Skalnik would probably produce an acquittal on retrial. *Dailey*, 965 So. 2d at 45. This Court also affirmed the denial of the *Giglio* claim, finding. *Id.*

Given that these same allegations against trial witness Paul Skalnik have been made by Dailey before, this claim should be considered procedurally barred. *Hendrix v. State,* 136 So. 3d

1122, 1125 (Fla. 2014) ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion."). In the instant case, Dailey has essentially revived his previous claim by producing additional documents, which the trial court noted are from the 1980s.

Even if taken as true, how Skalnik was sentenced and treated in 1989 by the Texas Department of Corrections is not, and cannot be considered, newly discovered evidence. (2PCR pp.21-22). *See Lambrix v. State*, 217 So. 3d 977 (Fla. 2017) (newly discovered evidence claim was untimely and procedurally barred when claim was based on evidence that had been received seventeen years prior). Dailey's attorneys knew about Skalnik's reputation and his criminal history, and they even had a file they kept on him. Clearly, they could have easily determined that Mr. Watts represented Skalnik. Contrary to Dailey's assertion, Mr. Watts, a local attorney licensed by The Florida Bar, is not "a newly discovered witness [that] was unknown to Dailey or his counsel prior to 2017." Initial Brief at 38.

It was improper for Dailey to wait until years after this postconviction claim was denied, and then raise a very similar claim of newly discovered evidence, based on information and

documents that were already known to him or easily discoverable. *See Pardo v. State*, 108 So. 3d 558, 567 (Fla. 2012) (finding claim previously raised and litigated procedurally barred and rejecting the defendant's argument that the issue previously presented was not fully developed). This claim is untimely and procedurally barred. Accordingly, this Court should affirm the lower court's rejection of this claim.

ID. AN INDIAN ROCKS BEACH POLICE REPORT FROM 1985 WRITTEN BY A LEAD DETECTIVE DOES NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE.

The lower court summarily denied this newly discovered evidence claim, finding it was untimely raised because it was based on a police report created in 1985. (2PCR pp. 8887-8888). While Dailey cites *Martinez* and *Trevino* in an attempt to circumvent the time bar, the lower court properly found that "allegations of ineffective assistance of postconviction counsel do not qualify as an exception to the time bar." (2PCR p. 8888). *See Howell v. State*, 145 So. 3d 774, 775 (Fla. 2013) (holding that defendants may not evade the time bar established by rule 3.851(d)(1) by alleging that postconviction counsel was ineffective for failing to raise any specific claim); *see also Banks*, 150 So. 3d at 800; *Mann v. State*, 112 So. 3d 1158 (Fla. 2013); *Gore v. State*, 24 So. 3d 1 (Fla. 2009); and *Waterhouse v.*

State, 792 So. 2d 1176 (Fla. 2001).

It is further worth noting that Dailey previously raised a claim in his original 3.851 motion from 1999 alleging that the State withheld evidence from him that showed that at some point before the murder, the victim and Pearcy were together without Dailey. (PCR V1/60). The evidence at issue was a police report from Indian Rocks Beach. Apparently, Dailey's initial postconviction counsel spoke with Indian Rocks Beach Detective Flesher, who investigated S.B.'s death, and he advised Dailey's counsel about the investigation notes. Dailey's previous postconviction counsel raised the claim as a violation pursuant to *Brady v. Maryland*, 373 U.S. 83, 86 (1963), and he subsequently withdrew the claim.

Eighteen years after first raising that claim, Dailey raised another claim in his second, successive postconviction motion asserting that newly discovered evidence exists in the form of a police report from Indian Rocks Beach, which allegedly shows that at some point during the evening, Dailey was not with the victim and Pearcy. On appeal, Dailey argues that the previous *Brady* claim concerned *different* notes from Indian Rocks Beach. **Nevertheless, Dailey absolutely fails to explain how *any* notes from Indian Rock Beach Police Department can be considered**

newly discovered when Dailey clearly knew that the police department was involved in the murder investigation and the notes were created in the 1980s.

Notably, Dailey alleges that this new evidence was from Detective Terry Buchaus. Initial Brief at 41. Detective Buchaus testified during Dailey's trial in 1987. (DAR V6/775). He was the detective assigned to the case to investigate the murder. (DAR V6/792). **Dailey has absolutely failed to show how investigative notes from a lead detective on the case, who was known to Dailey, could not be discoverable through the use of due diligence until thirty-two years after the murder occurred.**

Even if Dailey could somehow show that the police report could not have been obtained through due diligence, Dailey certainly did not prove that the evidence would have resulted in an acquittal. Assuming arguendo that these reports would be admissible at trial, they would not weaken the case against Dailey to give rise to a reasonable doubt as to his culpability. Dailey seems to be arguing that this evidence proves that Dailey was not with Pearcy when the victim was killed. Shaw allegedly stated in the police report that after Pearcy took him to the phone booth, Pearcy later returned home to get Dailey. Shaw did not see "the girl" with Pearcy. (2PCR p. 94). This does not mean

that Pearcy killed the victim without Dailey being present.

Just because Shaw stated that he did not see the victim does not mean that she must have been dead at that point. Certainly, she could have been in another area of the house, waiting in the car, or even at different location. Significantly, Shaw's version of events within the "newly discovered" police report still has Pearcy and Dailey leaving the house together during the night and returning home together while Daily was "walking bow-legged and his pants were wet." (2PCR p. 94). Shaw's account from the police report also describes a tense setting between Pearcy and Dailey along with suspicious behavior after they returned home together in the early hours of the morning. Shaw stated that Dailey and Pearcy were "real quiet" that morning and did not say anything. (2PCR p. 94). According to Shaw, Pearcy and Dailey went to the laundromat to wash their clothes, they got their car washed, and they left for Miami without having any prior plans to do so. (2PCR p. 94). Shaw indicated that very little was said during the drive to Miami, and after Dailey left Miami, Pearcy seemed "a little less nervous." (2PCR pp. 94-95). Even if this evidence met the first prong of *Jones II*, it would not render a different a different outcome in Dailey's trial. *See Dailey*, 965 So. 2d at

46 ("even accepting Shaw's most recent version of events, the statements are not such that they would probably produce an acquittal on retrial.").

IE. GIVEN THAT THERE WAS NO NEWLY DISCOVERED EVIDENCE, THE TRIAL COURT DID NOT NEED TO CONDUCT A CUMULATIVE ANALYSIS OF THE EVIDENCE.

Next, Dailey challenged the trial court's cumulative analysis. The court specifically determined that "a cumulative analysis does not seem necessary" because there was "no newly discovered evidence proven to support Claim One (A) and Claim One (B) is untimely and otherwise does not give rise to any reasonable probability that the Defendant would be acquitted upon retrial." (2PCR p. 8885). Dailey argues that the trial court improperly failed to consider all the newly discovered evidence because it did not evaluate sub-claims (C) and (D). Initial brief at 42. However, the trial court found claims I(C) and I(D) were untimely, so there was no newly discovered evidence to evaluate.

Significantly, the lower court found all of Dailey's newly discovered evidence claims were either procedurally barred or without merit. As this Court has acknowledged, when individual claims are without merit, the cumulative error claim must fail. *Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2008); *see also Israel v.*

Sate, 985 So. 2d 510 (Fla. 2008) ("where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails.") (internal citations omitted).

Dailey's argument under this section essentially amounts to a plea for a carte blanche evaluation of whatever "evidence" he decides to bring forward. That obviously is not the standard for cumulative review. *Jones*, 709 So. 2d at 521. In *Jones II* this Court explained that in order to determine whether evidence is of such nature to probably produce an acquittal on retrial, the trial court should "'consider all **newly discovered evidence which would be admissible**' at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" *Jones*, 709 So. 2d at 521 (internal citation omitted). As previously established, Dailey has not shown that any of this evidence was newly discovered evidence, nor has he established that it was admissible evidence.

Nevertheless, throughout this entire claim, Dailey relies upon and references evidence that was neither newly discovered nor admissible. For example, despite the fact that Pearcy never testified at Dailey's trial (and his out-of-court statements

were deemed inadmissible during the 2003 and 2018 evidentiary hearings), Dailey references numerous statements Pearcy has provided and many of those statements were not even part of Dailey's newly discovered evidence claim. Dailey also relies upon the inadmissible hearsay statement from Banda and Smith. He further cites to deposition testimony, polygraph examination results, police reports, and letters in an effort to make his case. This is clearly improper. *See Suggs v. State*, 238 So. 3d 699 (Fla. 2017) ("the only additional evidence presented in this proceeding potentially admissible in any retrial is that regarding the key addressed in claim two, and there is no reasonable probability that, had this evidence been disclosed to the defense, the result of the trial would have been different."); *cf. Walton v. State*, 2018 WL 2251447 (Fla. May 17, 2018) (rejecting Walton's interpretation of cumulative analysis under *Hildwin* and *Swafford v. State*, 125 So. 3d 760 (Fla. 2013)). Dailey's request for a different kind of cumulative review of anything and everything that he considers to be evidence-whether admissible or not and whether newly discovered or not, is incorrect and improper.

The lower court properly denied Dailey's motion, and this Court should affirm.

ISSUE II

DAILEY'S *GIGLIO* CLAIMS ARE PROCEDURALLY BARRED, AND THE TRIAL COURT'S SUMMARY DENIAL OF THIS ISSUE SHOULD BE AFFIRMED.

Under this issue, Dailey argues that the State presented false evidence at his trial and postconviction hearing in violation of *Giglio v. United States*, 405 U.S. 150 (1972), by failing to correct Paul Skalnik's allegedly dishonest trial testimony and for the manner in which the prosecutor impeached witness Oza Shaw during the 2003 postconviction evidentiary hearing.

While the title of Dailey's claim also mentions *Brady v. Maryland*, 373 U.S. 83, 86 (1963), and he includes one citation to *Brady*, Dailey failed to put forth any argument as to a *Brady* violation in his brief. Dailey's motion below similarly failed to raise a *Brady* claim (2PCR pp. 28-320), and the lower court found that Dailey failed to allege a *Brady* violation in his motion. (2PCR p.8888). The court also found that Dailey had previously raised and abandoned a substantially similar claim. (2PCR p. 8888). To the extent that Dailey is now attempting to raise a *Brady* claim on appeal, this insufficiently pled and procedurally barred claim must be rejected.

In denying Dailey's *Giglio* claims, the lower court found

Dailey's claims untimely. One of Dailey's *Giglio* claims involves Skalnik's trial testimony in 1987; Dailey complains that Skalnik did not reference a criminal charge filed in 1982 during his 1987 testimony. The trial court found that Skalnik's criminal history and his reputation were either known at the time of trial or could have been easily discovered. (2PCR p. 8889).

The other *Giglio* claim alleges that the State improperly impeached Oza Shaw during the 2003 evidentiary hearing when his testimony was consistent with the interview in the Indian Rocks Beach Police report. The court specifically found that this claim could have been raised shortly after the 2005 evidentiary hearing. (2PCR p. 8889).

Dailey challenges the lower court's finding of these claims being untimely and appears to be arguing that a *Giglio* claim can be raised at any time. Initial Brief at 70. That argument, however, disregards the limitations placed on successive postconviction motion filed later than one year after the conviction and sentence have become final. Fla. R. Crim. P. 3.851(d)(2)(A). Because Dailey's *Giglio* claims are based on facts and information that has been known, or at least easily available, to Dailey for decades, the lower court properly found the *Giglio* claims untimely. *See Moore v. State*, 132 So. 3d 718,

724 (Fla. 2013) (finding *Giglio* claim procedurally barred when it was based on information the defendant and defense counsel had at the time of trial); *Byrd v. State*, 14 So. 3d 921, 927 (Fla. 2009) (finding *Giglio* claim procedurally barred when it was based on a 1981 police report that had been previously disclosed to the defendant); *Buenoano v. State*, 708 So. 2d 941, 948 (Fla. 1998) (finding *Giglio* claim based on the alleged unreliability of a statement used at trial regarding the content of pills was procedurally barred when the defendant had until 1992 to have the pills examined to determine whether the statement was false).

Even if these claims had been timely raised, Dailey would not be entitled to relief. 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). In reviewing *Giglio* claims, this Court defers to the factual findings supported by competent, substantial evidence, but conducts a de novo review of the application of the law to the facts. *Rivera v. State*, 187 So. 3d 822, 835 (Fla. 2015).

Paul Skalnik Did Not Present False Testimony About his Criminal History.

Dailey first contends that Skalnik lied during Dailey's 1987 trial about his criminal history by failing to disclose that he had been charged with a crime of violence, and the State knew the testimony was false but failed to correct it. Dailey cited the following trial testimony in support of his claim:

> Q. Sir, how bad were your charges?
>
> A. They were grand theft, counselor, not murder, not rape, no physical violence in my life.

(2PCR p. 30). Dailey concludes that because Skalnik testified "not murder, not rape, no physical violence," he was concealing his charge of lewd and lascivious assault. However, that statement from Skalnik was taken out of context. The following colloquy presents an accurate picture of what Skalnik was referring to:

> Q. Mr. Skalnik, it's pretty common knowledge if you testify, you get consideration for that isn't it?
>
> A. You and I are going to differ on that. Counselor, if I faced four grand theft charges, three of them carried a maximum of five years in the State Penitentiary, I testified and after I had finished, spent two and a half years of which two years were in isolation, I received a maximum sentence on three out of the four cases. After two and a half years, I would have thought DOC would have ended my time. Instead, I was ten months in a maximum security prison in the State of Arizona 3000 miles away, where I was assaulted on September of '84.

> Does that sound like a good deal?
>
> Q. Sir, how bad were your charges?
>
> A. They were grand theft, counselor, not murder, not rape, no physical violence in my life. Does that sound like a good deal?
>
> Q. I am saying whether it's a good deal or not, It's pretty common knowledge over in Pinellas County Jail, that if you testify, you get a deal; right.
>
> A. I am an example to prove that's not common knowledge. I am sorry. I differ with you.

(DAR V9/1158-59).

It is clear from this testimony that Skalnik was referring to specific charges and the sentences he received after he had testified in other cases to show that he did not receive a benefit for his testimony. That example was immediately followed by the question, "how bad were your charges." Skalnik advised that they were grand theft, because those were the charges he was referencing in his example.

Dailey failed to show that Skalnik's testimony was false, nor has he shown that the State knowingly presented false testimony. *See State v. Woodel*, 145 So. 3d 782, 807 (Fla. 2014); *Rodriguez v. State*, 919 So. 2d 1252, 1270 (Fla. 2005). The State

had no need to correct Skalnik's testimony, because there was no evidence showing that it was untrue.[2]

Nevertheless, if the statement could be considered false and the prosecutor had known it to be so, Dailey has failed to explain how that testimony would have been material when the jury already knew that Skalnik had committed various crimes and had testified against other defendants numerous times. *See Moore v. State*, 132 So. 3d 718, 726 (Fla. 2013) (where the existence of a plea deal was not material because the jury knew that the witness had already been offered a plea deal). Whether Skalnik had been charged with the additional crime of lewd and lascivious assault would not have made him any more or less credible considering what the jury already knew about him. Finally, Skalnik was never convicted of the lewd and lascivious conduct, so it would not have been used for impeachment purposes.

The Prosecutor Did Not Force Oza Shaw To Testify Falsely In 2003.

Next, Dailey alleges that the State improperly impeached Shaw during the 2003 postconviction evidentiary hearing.

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[2] To the extent that Dailey is raising a substantive claim regarding the prosecutor's closing argument, that claim is clearly procedurally barred.

According to Dailey, Shaw's postconviction testimony was consistent with the "newly discovered" police report from the lead detective on the case, so the prosecutor improperly attempted to elicit false testimony from Shaw by impeaching him on cross examination. Interestingly, Dailey never actually alleges what statements by Shaw purportedly constituted false testimony.

Shaw had previously testified during Dailey's trial and had also been deposed, and his 2003 testimony added details that his previous testimony did not contain. The State was merely asking Shaw about his prior statements and why his testimony at the evidentiary hearing added details. (PCR V3/345-356). The State never elicited material testimony from Shaw that the State knew was false.

Even Dailey's counsel on direct-examination acknowledged that Shaw relayed information in 2003 that was not relayed during Dailey's trial:

> Q. Mr. Shaw […] do you recall you testified in Dailey's case back in 1987?
>
> A. Yes.
> Q. And when you were asked about the events of that evening you never relayed that Mr. Pearcy had come back up and they both left together approximately an hour after you had come back from using the telephone having been dropped off there by Jack Pearcy. Why

didn't you relate to the Court that you saw Jack come back himself and get Jim Kailey out of the bedroom?

A. No one ever asked me. That never even came up.

(PCR V3/345). The prosecutor's cross examination simply followed that line of questioning by asking Shaw about the various opportunities he was asked about the series of events leading up to the murder, and why additional details were added in 2003 that were not present during Dailey's trial in 1987. The prosecutor certainly did not get Shaw to admit to any false statements during cross examination, and Dailey has failed to make any such showing.

Instead, Dailey appears to be claiming that Shaw testified truthfully in 2003, even though his testimony differed from his trial testimony. **Dailey cannot have it both ways; he cannot ask this Court to believe Shaw's 2003 version of events but then to also find that Shaw testified falsely in 2003 constituting a *Giglio* violation.**

Even if Dailey could show that the statement was somehow false and the State knew it to be so, Dailey has not shown how any such statement would be material. Shaw's 2003 version of events is different because he places Dailey at home with himself and Gail Bailey after Shaw returned from the telephone booth. However, even Shaw's 2003 testimony still has Dailey and

Pearcy leaving the house together during the night and returning home together at the end of the night/early morning with Dailey wearing wet pants. (PCR V3/344). As this Court has previously found,

> even accepting Shaw's most recent version of events, the statements are not such that they would probably produce an acquittal on retrial. There remains evidence that Dailey and Pearcy returned to the house together later that night, that Dailey was not wearing his shirt, that his pants were wet, and that the victim was found in the water. There is also testimony from three inmates that Dailey confessed to the killing.

Dailey, 965 So. 2d at 46.

The lower court's summary denial of these meritless and procedurally barred *Giglio* claims should be affirmed.

ISSUE III

DAILEY IS NOT ENTITLED TO THE WHOLESALE ADMISSION OF EVIDENCE FROM COURT FILES MERELY BECAUSE THE FILES WERE PART OF A REQUEST FOR JUDICIAL NOTICE.

Dailey has couched this issue in terms of judicial notice; however, it really is about Dailey's request for the lower court to admit the documents into evidence so that he could rely upon them in his closing argument. Therefore, the trial court's ruling should be reviewed for an abuse of discretion. *See Williams v. State*, 967 So. 2d 735, 747-48 (Fla. 2007), *as revised on denial of reh'g* (Oct. 18, 2007) (A trial court's

ruling on the admissibility of evidence will generally be upheld absent an abuse of discretion).

On December 12, 2017, Dailey filed a request for judicial notice that included Jack Pearcy's court records in Florida and all his court files in Kansas; James Leitner's court files in Florida and Colorado; Pablo Dejesus's court files in Florida; and Paul Skalnik's court files in Florida, Texas, and Massachusetts. (2PCR pp. 1074-75). As evidenced from the size of the instant appellate record on Dailey's second, successive motion for postconviction relief, Dailey's notice was extremely voluminous containing at least 6,883 pages of records from other court files.

The State subsequently filed an objection to the request for judicial notice, noting that "the court files of James Leitner, Pablo Dejesus, and Paul Skalnik are not at all relevant to the evidentiary hearing scheduled for January 3, 2018. In addition, the court file of codefendant Jack Pearcy from Johnson County, Kansas are not pertinent to the evidentiary hearing in any way." (2PCR pp. 7964-7966).

During a status conference December 21, 2017, the court advised Dailey that he needed to be more specific with the documents that he wanted judicially noticed for the court to

review in closing argument. (2PCR pp. 12031-34). The court directed Dailey to have a printout of the documents and a specific list of the documents he wanted to use by the time of the evidentiary hearing.

At the evidentiary hearing January 3, 2018, Dailey did not have a printout of the documents for judicial notice. He also did not seek to admit any of the documents into evidence, nor did he call Skalnik, Dejesus, or Leitner as witnesses. Dailey, however, admitted that he intended to use documents from the court files associated with his request for judicial notice in his closing argument. (2PCR pp. 12245-46). The court again asked Dailey to produce the records that he was going to be asking the court to consider in his closing arguments. (2PCR p. 12247). The court ordered that within ten days of the hearing, Dailey provide the evidence he intended to rely upon in his closing argument. (2PCR p. 12253). Dailey did so, and the State filed an objection. (2PCR pp. 8098-8104).

The State argued that Skalnik, Leitner, and Dejesus did not testify at the 2018 evidentiary hearing, and it would be improper for Dailey to use extraneous court files in an attempt to impeach their trial testimony. (2PCR p. 8100). The State further argued that the depositions were hearsay, and just

because they were in a court file that could be judicially noticed, does not mean that they were admissible evidence for Dailey to use in his case. (2PCR pp. 8101-02).

The court held another hearing January 18, 2018, regarding the evidence that Dailey wanted to admit (through his request for judicial notice) after the evidentiary hearing was conducted. At the hearing, the State argued there was a difference between a request for judicial notice and an attempt to use documents that have been judicially noticed as evidence in support of a claim. (2PCR p. 12265).

The lower court subsequently entered an order granting in part and denying in part Dailey's request for judicial notice. The lower court liberally granted much of Dailey's request for judicial notice. (2PCR pp. 8117-8121). On the other hand, the court specifically denied portions of the request that the court found were made to circumvent the rules of evidence. (2PCR p. 8117). The court rejected Dailey's request for Pearcy's Kansas and Colorado court files, Pablo Dejesus's Pinellas County court files, James Leitner's Pinellas County and Colorado court files, Paul Skalnik's court files, and Beverly Andres Andringa's deposition. (2PCR p. 8117). In doing so, the court noted that "[c]ontrary to Defendant's interpretation of those cases,

postconviction courts are not required to consider, through judicial notice, extraneous documents which are not evidence but could potentially become impeachment evidence if the Court were to grant the instant motion and order a new trial." (2PCR p. 8117). The court also found that it was not required to disregard the rules of evidence by taking judicial notice of documents that are not relevant to claims in which the evidentiary hearing was granted. (2PCR p. 8117). The lower court's ruling should be affirmed.

This Court has recognized that even though a court may take judicial notice of court records of this state or any other state, "the fact that a record may be judicial noticed does not render all that is in the record admissible." *Dufour v. State*, 69 So. 3d 235, 253 (Fla. 2011), *as revised on denial of reh'g* (Aug. 25, 2011) (citing *Allstate Ins. Co. v. Greyhound Rent-A-Car, Inc.*, 586 So. 2d 482, 483 (Fla. 4th DCA 1991)). "[T]he court's authority to take judicial notice of records cannot be used to justify the wholesale admission of hearsay statements within those court files, such as through police reports or letters." *Dufour*, 69 So. 3d at 253; *see also Stoll v. State*, 762 So. 2d 870, 876 (Fla. 2000) ("We have never held that such otherwise inadmissible documents are automatically admissible

just because they were included in a judicially noticed court file.").

Here, Dailey was requesting to do just that. Dailey sought to have thousands of pages of court files and documents judicially noticed so that he could rely upon specific documents within the files (most of which contained hearsay or were otherwise irrelevant) in his closing argument. Those documents were not admitted into evidence during the evidentiary hearing, and some of the documents did not even relate to the claims in which the evidentiary hearing was granted.

Notably, Dailey did not call Andringa, Dejesus, Leitner, or Skanlik as witnesses during the evidentiary hearing, nor did he seek to have any of those documents admitted into evidence during the hearing. Instead, Dailey requested to have all the court files judicially noticed, and he believed that he could rely upon any documents within the court file in his closing argument merely because they had been judicial noticed. The trial court properly limited his ability to do so, and Dailey has failed to show any abuse of discretion under the circumstances.

Dailey's reliance on *Hildwin v. State*, 141 So. 3d 1178 (Fla. 2014) is misplaced. First, Dailey has failed to show how

depositions and entire court files would be admissible evidence. Dailey argues that because *Hildwin* requires a court to consider the evidence from a prior postconviction proceeding in its cumulative analysis, the court should have considered Adringa's deposition. However, Andringa testified during the prior evidentiary hearing (PCR V3/381), and her testimony did not lead to a finding of newly discovered evidence. Again, Dailey has failed to show how deposition testimony would be admissible. *Hildwin* certainly does not stand for the proposition that a court must consider any information the defendant wants it to, regardless of the rules of evidence.

Lastly, even if the lower court somehow abused its discretion, any error is harmless because the admission of the documents, or even the granting of Dailey's request for judicial notice, would not have impacted the lower court's disposition of Dailey's claims. Certainly, Pearcy's court files in Kansas and Colorado would not have on bearing on whether Pearcy's 2017 affidavit was admissible during the evidentiary hearing. The court files of Dejesus, Leitner, and Skalnik, would not have influenced Dailey's "newly discovered evidence" claim involving Pearcy in any way.

Similarly, if the lower court would have reviewed Beverly

Andringa's deposition and the court files of Pearcy, Dejesus, Leitner, and Skalnik, it would not have determined that Dailey's remaining untimely claims were timely raised, nor would it have changed the outcome of Dailey's improperly raised claim of actual innocence. Accordingly, there is no reasonable possibility that any purported error in failing to grant Dailey's entire request for judicial notice impacted the lower court's order denying postconviction relief.

ISSUE IV

DAILEY IS NOT INNOCENT, AND FLORIDA DOES NOT RECOGNIZE FREESTANDING CLAIMS OF ACTUAL INNOCENCE.

Florida law does not provide for a freestanding claim of actual innocence. *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008). Instead, sufficiency of the evidence is reviewed on direct appeal, and if new evidence subsequently surfaces, Florida law allows a defendant to bring a newly discovered evidence claim. *Id.* As previously argued and established, Dailey failed to meet the requirements under *Jones II* for establishing newly discovered evidence, and the lower court properly denied his claims.

The lower court properly rejected Dailey's freestanding claim of actual innocence. As correctly concluded by the lower court, "no legal grounds exist upon which to recognize this

claim of actual innocence." (2PCR p. 8891). Dailey is not entitled to relief, and the lower court's rejection of this claim should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests that this Honorable Court affirm the denial of relief of all of Dailey's successive postconviction claims.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 18-557

JAMES MILTON DAILEY

Appellant

v.

STATE OF FLORIDA

Appellee

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

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PRELIMINARY STATEMENT

The Appellant, James Milton Dailey, relies on the arguments presented in the Initial Brief of the Appellant ("Initial Brief"), and offers the following reply to the Answer Brief of Appellee ("AB") dated July 2, 2018. Any claims not argued are not waived and Mr. Dailey relies on the merits of his Initial Brief.

Citations shall be as follows: The record on appeal from Dailey's first trial proceedings shall be referred to as "TR1" followed by the appropriate volume and page numbers. (volume:page). The record on appeal from Dailey's second trial proceedings shall be referred to as "TR2" followed by the appropriate volume and page numbers. (volume:page). All cites from the first postconviction record on appeal shall be referred to as "PC ROA" followed by the appropriate volume and page numbers. All cites from the second postconviction record on appeal shall be referred to as "R1" followed by the appropriate page numbers. All cites from this record on appeal will be referred to as "R2" followed by the appropriate page number(s). All other references will be self-explanatory or otherwise explained herein. All emphases are supplied unless otherwise noted.

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ARGUMENT

ARGUMENT I: The Evidence Relating To Jack Pearcy Taking Sole Responsibility For The Murder Of S.B. And Exonerating James Dailey Is Newly Discovered.

A. Pearcy's affidavit is newly discovered.

In 2017, *for the first time*, Jack Pearcy explicitly and unambiguously accepted sole responsibility for the murder of S.B., swearing, under penalty of perjury, to the following: "James Dailey was not present when [S.B.] was killed. I alone am responsible for [S.B.'s] death." R2 64.

In arguing that Pearcy's 2017 affidavit is not newly discovered evidence, the State relies on a 1993 sworn statement by Pearcy. AB at 21. Pearcy's 1993 statement and his 2017 affidavit are distinct statements. In his 1993 statement, Pearcy confirmed that after James Dailey, Gayle Bailey, S.B., and Pearcy returned to the house, Pearcy left the house with only S.B. and Oza Shaw. R2 9621. James Dailey did not go with them. *Id*. When Pearcy returned to the house about ninety minutes later, S.B. was no longer with him. *Id*. at 9621-22. S.B. was not out in the car or waiting for Pearcy to come back outside. *Id*. at 9622.[1] As previously recognized by both the lower court and this Court, in the 1993 statement, Pearcy did *not* admit to the murder of S.B. or the commission of any crime. *Dailey v. State*, 965 So. 38, 46 (Fla. 2007). The 1993 statement did not bar relief from subsequent exonerating statements made by Pearcy. Dailey cannot and should not be

[1] This testimony is also corroborated by Oza Shaw's original statement to law enforcement, provided less than two weeks after the murder. *See* R2 91-95.

faulted because Pearcy chose not to attest to the truth until years after the crime. Dailey filed a newly discovered evidence claim within one year of Pearcy signing the affidavit, thereby satisfying the requirements of Florida Rule of Criminal Procedure 3.851(d).

The State's remaining arguments, concerning Pearcy's motives, as well as the timing and circumstances surrounding the affidavit, go to weight, not admissibility. Moreover, the State mischaracterizes Pearcy's affidavit as one "[Dailey's] attorney's drafted [ ] for Pearcy accepting 'sole responsibility' for the murder of S.B.," and claims "his attorney got Pearcy to sign the affidavit." AB at 22. The affidavit was not constructed by Dailey's counsel out of whole cloth; it was based on conversations between Pearcy and Dailey's counsel (R2 12149), and it augmented, but did not contradict, statements Pearcy made in his 1993 sworn statement (R2 9616-26). As the lower court recognized, Pearcy signed the affidavit freely, without duress. (R2 8881).

Finally, the State's representation that "most of the contents of the affidavit are not true" mischaracterizes Pearcy's testimony. AB at 22. At the evidentiary hearing, Pearcy admitted signing an affidavit (Defense Exhibit 5), acknowledged that he signed it under penalty of perjury, and identified his signature on the affidavit itself. R2 12130-31. When asked if the statements in the affidavit were true, he responded, "No." R2 12137. When asked to identify which statements were not true, Pearcy stated, "I'm not sure. There's quite a few lines on there." *Id*. After being directed by the court to read the affidavit, Pearcy stated "I agree with [lines] 1 and 2, and I take the Fifth Amendment from that

point forward." R2 12139. Counsel then asked, going line by line, whether each statement was true, but Pearcy refused to answer, repeating over and over, "Fifth Amendment." R2 12140-41. At no point did Pearcy testify or even imply that "most" of the contents of the affidavit were not true. Instead, Pearcy repeatedly refused to testify, asserting his privilege against self-incrimination. Pearcy did testify that after signing the affidavit he spoke with someone from the State and most of his immediate family members, noting that his family was concerned that if he testified consistently with the contents of the affidavit, he would undermine his chances of parole. R2 12145-47. These are the circumstances surrounding the affidavit that a jury would be required to take into account in considering whether or how much to credit Pearcy's affidavit, should it be introduced into evidence at a re-trial.

B. Pearcy's affidavit is a third-party admission of guilt.

Pearcy's affidavit is a third-party admission of guilt under *Chambers v. Mississippi*, 410 U.S. 284 (1973), and, contrary to the State's arguments, the lower court misapplied the four-factor test set forth in *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015), in ruling otherwise.

First, with regard to whether or not the statement at issue was made spontaneously to a close acquaintance shortly after the crime occurred (161 So. 3d at 1261): although Pearcy's specific statement (the affidavit) was not made until 2017, the affidavit in effect affirms spontaneous statements made to acquaintances Travis Smith (pretrial, in 1986)

and Juan Banda (sometime between 1992 and 1996, and again in 2007) and is corroborated by their testimony (R2 12099, R2 12118-19, 12121).[2] It thus satisfies this prong.

Second, with regard to whether the confession or statement is corroborated by some other evidence in the case (161 So. 3d at 1261), Smith and Banda's testimony provides this corroboration. The statements Pearcy made to them over the years are consistent with the claims in the 2017 affidavit and stand for the same basic proposition: that Pearcy killed S.B. and Dailey did not. Oza Shaw's original statement to law enforcement also corroborates the sequence of events attested to in Pearcy's 2017 affidavit.

Third, with regard to whether the confession or statement was self-incriminatory and unquestionably against interest (161 So. 3d at 1261), the State relied on the lower court's finding that this factor was not met because Pearcy had already been tried, convicted, and sentenced to life in prison for S.B.'s murder. AB at 23-24. This argument neglects to consider the parole and perjury implications for Pearcy, about which the State appeared to demonstrate great concern before and during the evidentiary hearing. The State strongly implied that there would be consequences if Pearcy testified consistently with the contents of his affidavit that he alone killed S.B., and indeed twice requested that Pearcy be provided independent counsel to advise him regarding the potential

[2] In *Aguirre-Jarquin v. State*, this Court found third-party admissions admissible under *Bearden* and *Chambers* despite the admissions being made years after the murder. 202 So. 3d 785, 798 (Fla. 2016).

consequences.[3] In addition, Pearcy testified that after signing the affidavit he spoke with most of his close family, all of whom expressed concern about Pearcy hurting any chance he had at parole if he testified consistently with the contents of the affidavit. R2 12145-47. Pearcy's family was present in the courtroom during his 2018 testimony. R2 12146. Had Pearcy testified consistently with the contents of the affidavit and the State charged Pearcy with perjury, any chance at parole would effectively have been eviscerated, a fact which obviously weighed on Pearcy, and also his family, who had specifically warned him against testifying for this reason. In order to tell the truth at the hearing, Pearcy would have had to face his mother and step-father, who were present at the hearing, and publicly admit to not only sexually battering and murdering a fourteen-year-old child, but also to falsely laying the blame for the horrific crime *on a friend* – a friend whose wrongful execution may well result from Pearcy's cowardice and deceit. Pearcy could not bring himself to lie about the affidavit (despite the State's characterizations to the contrary), retreating to claims of privilege instead. The State fails to acknowledge the indisputable point that Pearcy "stood to benefit nothing by disclosing his role" in the death of S.B. *Chambers*, 410 U.S. at 301. The United States Supreme Court found this detail compelling in analyzing the third factor in *Chambers*. Pearcy had nothing to gain by finally telling the truth, but stood to lose the emotional and financial support of his family, the respect of his parents, and any hope of a life beyond prison walls.

[3] In addition, the State visited Pearcy in prison prior to his testimony. R2 12145.

Finally, with regard to whether the declarant is available for cross-examination (161 So. 3d at 1261), although Pearcy himself was unavailable (having invoked his Fifth Amendment privilege), Travis Smith and Juan Banda were available for cross examination regarding Pearcy's statements. Furthermore, this Court has held that failing to meet one of the *Bearden* prongs does not necessarily render the third-party admission inadmissible: "the primary consideration in determining admissibility is whether the statement bears sufficient indicia of reliability." *Bearden*, 161 So. 3d at 1265, n.3. Indicia of reliability here include, *inter alia*, Banda and Smith's testimony, Oza Shaw's initial statement to police, the statements of Betty Mingus and Deborah North,[4] along with the exculpatory hair evidence found in the victim's hand, all of which powerfully corroborate the substance of Pearcy's affidavit.

The State fails to address any of these arguments in its claim that the lower court properly applied *Chambers*, instead stating "the State agrees that the reliability of the statement at issue is a key consideration" and then claiming "Pearcy's affidavit was clearly not reliable – even Pearcy admitted as much" (AB at 24). In fact, Pearcy simply refused to testify with regard to his statement, citing his privilege against self-incrimination. A blanket assertion of unreliability is not analysis. Careful application of the *Bearden* factors demonstrates that the Pearcy 2017 affidavit is indeed admissible as

[4] Betty Mingus corroborated the phone conversation between her and Oza Shaw on the night S.B. was killed. R2 11904. Deborah North observed S.B. alone with just one male, near the crime scene, shortly before S.B. was killed. R2 11712.

a third-party admission of guilt.

C. Pearcy's affidavit is admissible as a statement against interest.

The State argues, and the lower court incorrectly concluded, that "Pearcy's statements in the affidavit were not contrary to his interests and did not expose him to liability given that he had already been convicted and sentenced for the murder." AB at 25-26. Remarkably, in the *very next paragraph* the State concedes that it *twice* requested Pearcy be appointed independent counsel, explaining that its concern for Pearcy had to do with "the possibility that Pearcy's testimony *could be used against him* at a future parole hearing, and it wanted to ensure that Pearcy adequately understood the potential *consequences of his testimony*." AB at 26.

Additionally, at the evidentiary hearing, after Pearcy sought to invoke his Fifth Amendment privilege, the lower court attempted to compel Pearcy to answer counsel's questions by ordering him to do so. R2 12143. The State interrupted the court and stated:

> Judge, I think in fairness to Mr. Pe[a]rcy, you need to explain to him and ask him about his Federal Court and make sure that he's exhausted all his State, exhausted his Federal, and then he's still eligible for parole.
>
> Any statement made by him in the course of today *could be used against him at future parole hearings*, and inquire whether he wants an attorney to discuss that…

R2 12143. The State cannot now claim that Pearcy's statements did not expose him to liability or were in no way against his interest. AB at 26. Indeed, if this Court were to credit that claim, it would suggest that the State was not in fact genuinely concerned with the welfare of Pearcy before and during the hearing, but instead misrepresenting its

concerns to the Court in an effort to prevent the admission of powerful evidence of innocence in a capital case.

Further, the State's assertion that Pearcy's affidavit did not subject him to a perjury charge is false. AB at 27. Chapter 837, Florida Statutes (2018) defines perjury broadly to include perjury when not in an official proceeding (§ 837.012) and perjury by contradictory statements (§ 837.021). Although Dailey inadvertently identified the incorrect subsection, this does not negate his argument that Pearcy's affidavit was signed under penalty of perjury and thus subjects him to criminal prosecution for any false or contradictory statements made under oath. Because Pearcy's affidavit was signed under oath, this subjected him to prosecution for perjury if it contradicted another sworn statement by him. *See McAlpin v. Criminal Justice Standards & Training Com'n*, 155 So. 3d 416, 421 (Fla. 1st DCA 2014).

ARGUMENT II: Travis Smith And Juan Banda's Testimony Was Admissible And The Lower Court Erred In Excluding This Evidence.

A. Travis Smith

In *Chambers*, the United States Supreme Court held that a trial court erred by excluding, on hearsay grounds, the testimony of three witnesses that a person other than the defendant had admitted to committing the murder for which the defendant was convicted. 410 U.S. at 301-02. This is exactly what Dailey is seeking – admission of Smith's testimony that another person, Pearcy, admitted – to Travis Smith – that Pearcy committed the murder for which Dailey was convicted and sentenced to death. The

State's claim that Smith's testimony does not "exculpate Dailey" (AB at 30) is illogical on its face; the only reasonable conclusion from Pearcy's statement that he "committed the crime himself" (R2 12096-97) is that he did it and *Dailey did not*. The State's case at trial excluded the theory that anyone besides Dailey and Pearcy participated in, or witnessed, the killing of S.B. Smith's testimony is unquestionably exculpatory, and as such, is precisely the sort of proof deemed admissible in *Chambers*.

Furthermore, contrary to the State's assertion (AB at 30), Dailey did establish that the *Bearden* factors were satisfied with regard to Smith's testimony. Pearcy's confession to Smith was made spontaneously and shortly after the murder occurred (R2 12076); Smith's testimony is corroborated by Juan Banda's testimony, Pearcy's affidavit, and Pearcy's sworn statement from 1993; the statements testified to by Smith were against Pearcy's interest; and Smith was available for cross examination (the State did, in fact, cross examine him at the evidentiary hearing, R2 12100-01). Accordingly, Smith's testimony was admissible under *Chambers* and the lower court erred in concluding otherwise.

Irrespective of whether Smith's testimony is procedurally barred, the lower court erred in failing to consider his testimony when evaluating the weight of the other newly discovered evidence. This Court has held "in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial … a trial court *must even consider* testimony that was previously excluded

as *procedurally barred* or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013). The lower court should have treated Smith's testimony as admissible evidence and considered it when evaluating Dailey's newly discovered evidence claim, and in failing to do so, erred.

B. Juan Banda

Juan Banda's testimony and affidavit are clearly admissible under *Holmes v. South Carolina*, 547 U.S. 319 (2006), an argument the State entirely fails to address. In *Holmes*, the defendant's efforts to introduce the testimony of several witnesses that another man had either acknowledged the defendant was "innocent" *or* had actually admitted to committing the crime were initially denied based on the state's evidence code. *Id*. at 323. The Supreme Court held that due process required the testimony be admitted.

The facts here precisely mirror those in *Holmes*. Banda testified that Pearcy twice told him "Mr. Dailey was innocent of the crime that he was sentenced to death row for." R2 12118-19, 12121. Accordingly, *Holmes* is controlling in this case, and Banda's testimony cannot be excluded as hearsay. *See also Chambers*, 410 U.S. at 302.

The State further argued that Pearcy's statements to Banda do not satisfy any hearsay exception because they did not constitute "an oral confession to the murder" and because Banda testified "that Pearcy never admitted his guilt to him, nor did he claim to be solely responsible for the death of S.B." AB at 30. In light of *Holmes*, this argument must fail.

The State's theory of the crime has always been that Dailey and Pearcy killed S.B. together. At no time has the State ever alleged that another person aided, abetted, or participated in the death of S.B. Therefore, Pearcy's admissions to two different people that Dailey is completely innocent of this crime necessarily implicate Pearcy. As a result, Pearcy's statements to Banda that Dailey is innocent constitute third-party admissions of guilt – precisely the type of proof that the Supreme Court has held cannot be excluded based on evidentiary technicalities.

Pearcy's statements to Banda are additionally admissible as declarations against penal interest. The State claims Pearcy's statements do not qualify as declarations against penal interest because by the time Pearcy made them, he "had already been convicted of murder and sentenced to life in prison." AB at 31. But Pearcy's acknowledgment of Dailey's innocence amounts to an admission that Pearcy alone committed the crime, puts him in jeopardy of a perjury charge since it is contrary to other statements he has made under oath, and significantly reduces the chances that he will ever be granted parole. *See* R2 9301, 12413; *see also supra* Claim I(c) at 7-8. As such, his statements to Banda are clearly against interest, and admissible as a hearsay exception.

Conclusion

The testimony of Travis Smith and Juan Banda is admissible and the lower court erred in concluding otherwise. The State's reliance on *Kormondy v. State*, 154 So. 3d 341 (Fla. 2015) (AB at 31), for the proposition that Smith and Banda's testimony was hearsay is

misplaced. Kormondy, who was convicted under a felony murder theory, offered affidavits as proof that his co-defendant, Curtis Buffkin, was the actual shooter. *Id*. at 343. Kormondy was sentenced to death while Buffkin was sentenced to life; Kormondy sought to support his claim that he was less culpable than Buffkin and that his sentence was disproportionate. *Id*. at 343. Kormondy never denied being a participant in the criminal episode and was *not* offering the affidavits as a third-party admission of guilt to prove his innocence. *Id*. at 345. In contrast, Dailey has always maintained his innocence and has never admitted participating in any way in the death of S.B. The testimony of Banda and Smith was not offered to prove Dailey was "less culpable" than Pearcy, but rather was offered as a third-party admission of guilt, and as such is admissible under *Chambers*. Accordingly, the lower court erred in denying this claim.

ARGUMENT III: The Evidence That Detective Halliday Showed Newspaper Articles Regarding S.B.'s Murder to Dailey's Fellow Inmates Was Admissible, Significantly Undermines the Testimony of the Critical Jailhouse Informant Testimony, and Would Likely Lead to an Acquittal or Less Severe Sentence on Re-trial.

A. Wright and Sorrentino's testimony regarding Halliday's conduct was newly discovered and would likely lead to an acquittal on retrial.

The purpose of Wright, Sorrentino, and Smith's testimony[5] was to reveal the gravely unreliable nature of the jailhouse informant testimony introduced at Dailey's trial.

At the evidentiary hearing, James Wright and Michael Sorrentino both testified that,

[5] Dailey relies on the merits of his initial brief as to the admissibility of Wright, Sorrentino, and Smith's testimony.

after Pearcy's jury recommended a sentence of life (not the death sentence the State had pursued), and prior to Dailey's trial, Detective Halliday came to the jail where Dailey was being held; pulled all fifteen inmates in Dailey's pod into a private interview room, one by one; spread newspaper articles regarding Dailey's case across the desk in front of them; and asked them if Dailey had spoken about the murder. The State claims that this testimony is insignificant because: (1) the informants who ultimately testified against Dailey (Pablo Dejesus, James Leitner, and Paul Skalnik) were not among the fifteen inmates to whom Wright and Sorrentino referred; (2) Dejesus, Leitner, and Skalnik did not provide information as a result of Halliday coming to the jail and interviewing inmates but rather came forward on their own; and (3) there was no direct evidence that Halliday showed newspaper articles to Dejesus, Leitner, and Skalnik. AB at 35-37. The State's response fundamentally misunderstands Dailey's argument and is unavailing.

Halliday's visit to the jail and interviews with *every one* of Dailey's fellow pod-mates, seeking information against Dailey, was akin to sending up a smoke signal at the Pinellas County Jail broadcasting his need for help in making the case against Dailey. Halliday's remarkable decision to place newspaper articles about the murder before the inmates he interviewed was an additional signal: making it clear that he was prepared to do *whatever it took* to convict Dailey, including providing potential jailhouse informants with information about the case. Indeed, Halliday's (mis)conduct made such an impression that lay witnesses, with no other connection to Dailey or his case, were able to recall the

incident some thirty years later.

It is completely irrelevant that Dejesus, Leitner, and Skalnik were not among the fifteen inmates originally pulled out and interviewed by Halliday; the point is that they undoubtedly knew these interviews had taken place, and that Halliday seemed desperate for help. *See* R2 12200; TR1 9:618. Sorrentino specifically testified that Halliday's newspaper display had provided him with enough information so that "had I wanted to say something or fabricate something [against Dailey] all the tools were there to give them whatever they might be looking for." R2 12109.

It is likewise irrelevant that Dejesus, Leitner, and Skalnik supposedly came forward on their own; the point is that they came forward *after* the first fifteen interviews had taken place – after the smoke signal had been sent up. And it is irrelevant that there is no direct evidence that Halliday showed articles about the murder to Dejesus, Leitner, and Skalnik; the point is that the proof that he showed such articles to other inmates gives rise to any one of the following reasonable inferences: (1) he showed such articles to Dejesus, Leitner, and Skalnik once they came forward, in order to bolster their testimony; *or* (2) he otherwise provided them with information regarding the case that would serve to make their testimony more compelling; *or* (3) his extraordinary (and extraordinarily improper) conduct prompted Dejesus, Leitner, and Skalnik to concoct stories of Dailey's alleged confessions, anticipating that Halliday would be indiscriminately receptive to any such narratives and would likely reward them for this testimony. Were a jury to hear from

Wright and Sorrentino, it is probable that it would make at least one of these three inferences. Even if the jury chose to credit Halliday's claims that he did not provide Dejesus, Leitner, and Skalnik with any information about the murder, the third inference alone – that Halliday's interview of fifteen inmates and display of newspaper articles provided Dejesus, Leitner, and Skalnik with an incentive to fabricate stories implicating Dailey in the murder – would be sufficient to grossly undermine the credibility of the three jailhouse informants and the State's case more broadly. And because the entire case against Dailey was circumstantial – there was no DNA or other physical evidence connecting him to the crime – the credibility of the jailhouse informants was essential to his conviction and death sentence. For this reason, it is probable that the evidence provided by Wright and Sorrentino would lead to an acquittal on re-trial, or, at a minimum, a less severe sentence.

The lower court's conclusion to the contrary is not supported by competent substantial evidence as it failed to conduct the required cumulative analysis. Instead, the court reviewed Wright, Smith, and Sorrentino's testimony in isolation, completely apart from the other powerful evidence of innocence, and concluded that it would not produce an acquittal at retrial. This is error and subject to *de novo* review by this Court. Similarly, the State's assertion that Wright and Sorrentino's testimony was "weak and questionable when they never claimed that they saw any of the snitches who testified at trial being called into the interview room" must fail. AB at 35.

Assuming *arguendo* that the testimony of Wright, Sorrentino, and Smith, detailed above, is procedurally barred, the lower court was nevertheless required to consider it when evaluating the weight of the other newly discovered evidence. The State claims, incorrectly, that the lower court was required to dismiss the claim. AB at 34. As this Court has made clear, "in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial … a trial court *must even consider* testimony that was previously excluded as *procedurally barred* or presented in another proceeding in determining if there is a probability of an acquittal." *Swafford*, 125 So. 3d at 775-76. Since the testimony of Wright, Sorrentino, and Smith is directly relevant to Dailey's newly discovered evidence claim, and also necessary to evaluate whether a new trial would probably result in acquittal, the lower court should have admitted it. The lower court was required to evaluate the testimony of Wright, Sorrentino, and Smith in the context of a cumulative analysis under the second prong of the newly discovered evidence analysis.

B. Smith's testimony regarding informants Leitner and Dejesus was admissible and, taken together with Wright and Sorrentino's testimony, would likely lead to an acquittal on retrial.

Smith testified the State Attorney's Office "used to offer funds and stuff for people to offer information about another person's case. It was common practice back in those days." R2 12088. Smith further testified he observed Dejesus and Leitner discussing Dailey's case: "They were trying to collaborate a story together as to what they were

going to say when they talked to the State Attorney." R2 12087, 12093. Contrary to the State's argument, this testimony is neither speculative nor an improper lay opinion.[6] Rather, the testimony is admissible per Section 90.608(2), Florida Statutes (2018), which "allows a party to attack the credibility of a witness by showing that the witness is biased. Matters that demonstrate bias include prejudice, an interest in the outcome of a case, and *any motivation for a witness to testify untruthfully*." *Mardis v. State*, 122 So. 3d 950, 953 (Fla. 4th DCA 2013) (internal citations omitted). Here, Smith's testimony bears directly on Dejesus and Leitner's motivation to testify untruthfully and significantly undermines their credibility. Smith's eyewitness account supports the inference created by Wright and Sorrentino's testimony: that Halliday's conduct (interviewing fifteen inmates at the jail and showing them newspaper articles about the murder) lured others into coming forward with fabricated "confessions," in the hope of receiving some benefit or consideration in their own cases (as indeed they did). TR1 8:1014; 9:1082. Because the jailhouse informant testimony was absolutely critical to Dailey's capital murder conviction, the testimony of Wright, Sorrentino, and Smith, which would give a jury reason upon reason to doubt its reliability, would necessitate acquittal at a retrial.

ARGUMENT IV: The State Conflates Dailey's Prior *Giglio* Claim With This Current Newly Discovered Evidence Claim.

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[6] The State failed to respond to Dailey's claim that Sorrentino's testimony was a proper lay witness opinion and thus forfeits any argument to the contrary. *See* Initial Brief at 32-33.

The State asserts that Dailey's initial postconviction claim, that the State hid evidence it gave Skalnik a favorable plea deal in exchange for his trial testimony, is identical to Dailey's current claim, concerning Skalnik's reputation for dishonesty. AB at 45. These are in fact two distinct claims. As detailed by the State, Dailey's initial brief raised a claim under *Giglio v. United States*, 405 U.S. 150 (1972), alleging that the State knowingly presented false testimony. AB at 46. This is distinct from Dailey's current claim that at the time of Dailey's trial, Skalnik's reputation for dishonesty was well-established and unquestionably known to the State, who repeatedly presented him as a reliable source of accurate information rather than as a pathological liar and con man. The assertion that these two claims are the same is unfounded.

ARGUMENT V: The Indian Rocks Beach Police Department Report Is Newly Discovered, Supports Dailey's Argument that Pearcy Acted Alone in Committing the Murder, and Would Likely Lead to an Acquittal on Re-trial.

The State misunderstands the weight of Shaw's original statement to law enforcement. The newly discovered[7] report by Detective Terry Buchaus of the Indian

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[7] The State faults Dailey for failing to explain how the Indian Rocks Beach Police Department reports could not have been discovered earlier through the use of due diligence. AB at 49-50. Dailey was prepared to explain the failed attempts by prior counsel to get these records, briefly outlining them at the case management conference, at which time he requested an evidentiary hearing on the claim. *See* R2 11993-94. The lower court denied the request and thereby denied Dailey the opportunity to present further evidence. R2 8887-88. The State cannot now fault Dailey for failing to present additional evidence when the lower court forbade him from doing so.

Second, the State failed to address Dailey's argument that the lower court improperly denied this claim because it erroneously concluded that these police reports were previously raised "in the context of a *Brady* claim, which counsel abandoned at the

Rocks Beach Police Department reveals that in witness Oza Shaw's initial interview with police, he shared the following: on the evening of the murder, Shaw, Pearcy, and S.B. left the house together, leaving James Dailey behind; Pearcy and S.B. dropped Shaw at a phone booth and went off alone together; Shaw later walked home and fell asleep in the living room, and was awakened in the early hours of the morning when Pearcy returned, *without* S.B., went into Dailey's room, and left again with Dailey. At Dailey's trial, Shaw omitted a single, critical detail: that Pearcy had come home alone and only then left with Dailey.

Shaw's testimony at a new trial would so weaken the State's case against Dailey as to give rise to a reasonable doubt as to his culpability. Shaw's testimony, coupled with Pearcy's 1993 sworn statement and 2017 affidavit, as well as Deborah North's testimony, corroborates Dailey's testimony that he was not with Pearcy when S.B. was killed. The State contends that just because Shaw saw Pearcy return home without S.B. to pick up Dailey does not mean that Pearcy killed S.B. on his own. AB at 50-51. To support this argument, the State speculates that S.B. could have been in another area of the house, waiting in the car, or at a different location. *Id*. Pearcy's 1993 statement, however, makes quick work of the State's unlikely hypothetical. Pearcy testified that when he returned to the house S.B. was "no longer with [him]," clarifying

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evidentiary hearing on Defendant's initial postconviction motion." R2 8888. This is flatly incorrect and belied by the record. *See* Initial Brief at 40-41.

that she was *not* at the house or waiting in the car "*or anything like that*." R2 9622. The *only* potential evidence of guilt remaining is the fact that Dailey was seen wearing wet pants a few hours after S.B. was killed, for which he gave a plausible explanation. No reasonable jury, in reaching the question of guilt or penalty, could reasonably conclude that wet pants alone suffice.

According to *Tompkins v. State*, 994 So. 2d 1072 (Fla. 2008), the newly discovered evidence need *not* be probative of the defendant's innocence (as the State implies); it must only make it probable that the defendant would be acquitted, or receive a less severe sentence, on re-trial. *See also Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991). Oza Shaw's initial, contemporaneous statement to police – the same version of events to which he testified at Dailey's 2003 postconviction hearing – meets this standard. The fact that Pearcy came home by himself, without S.B., would so "weaken[] the case" against Dailey as to "give rise to a reasonable doubt about his culpability." *Swafford*, 125 So. 3d at 767. The State recognized as much when it went to such great lengths to "impeach" Shaw at the prior postconviction hearing.[8]

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[8] The State *appeared* to impeach Shaw at the prior postconviction hearing by alleging that his testimony that Pearcy returned home alone without S.B. and picked up Dailey was nothing more than a recent fabrication. PC ROA 345-52. The lower court relied on this misrepresentation when it incorrectly concluded "Mr. Shaw's new testimony is of questionable value…it would seem most likely that his memory in the time closer to the actual events would be more reliable than nearly twenty years later." PC ROA 179-80. The truth, of course, is that Shaw's postconviction testimony precisely mirrored his initial statement to law enforcement – a fact the State failed to bring to the court's attention.

The case against Dailey was entirely circumstantial and the State's freshly formulated alternative scenarios do not find support in the evidence it urged Dailey's jury to credit in convicting him and sentencing him to death. Given Shaw's original account, the relevant question is not whether the victim "might" have been alive when Shaw saw Pearcy return to the house alone; the relevant question is whether the State's far-fetched narrative would have been sufficient to prove Dailey guilty of capital murder beyond a reasonable doubt, particularly in light of (1) the lack of any physical evidence against Dailey; (2) Deborah North's testimony that she saw the victim with just one man near the spot where the victim was killed (R2 11712); and (3) Pearcy's own 1993 statement in which he stated that when he returned to the house to get Dailey, the victim was "no longer with [him]" and that she was not at the house, waiting in the car "or anything like that" (R2 9622). It is unquestionable that the Indian Rocks Beach Police Department report complicated the State's case to such an extent that, were it presented to a jury on re-trial, it is probable Dailey would be acquitted.

ARGUMENT VI: The Trial Court's Summary Denial Of Dailey's *Giglio* Claims Was Error.

By 1987, when Dailey was tried, the State was decidedly familiar with its star witness, Paul Skalnik, the jailhouse informant who provided the most inflammatory testimony against Dailey. Skalnik was a known quantity within Pinellas County, and prosecutors knew the details of past charges against him, including that, in 1983, Skalnik had been charged with the sexual assault of a twelve-year-old girl. Despite knowing full well who

Skalnik really was, prosecutors elected to use him as a witness again and, not only that, allowed him to grossly understate his criminal history to Dailey's jury under oath and without correction – mischaracterizing the charges he had faced over the years – as part of a larger effort to create the illusion of credibility in a person with none.

Prosecutors not only knew that Skalnik was a pedophile, pathological liar, and serial con artist; they also knew that his testimony about Dailey, like his testimony about defendants in so many other cases, was questionable on its face. Skalnik claimed Dailey made incriminating statements while standing at the bars of his cell, as Skalnik passed by on his way to recreation *from his isolation cell*.[9] TR1 9:1115. *See also* R2 8208. It strains credulity to think that Dailey would casually mention phrases like "the young girl kept staring at [me], screaming and would not die" in the course of a fleeting, public interaction with a segregated inmate with whom he was barely familiar. Moreover, Dailey would have had to yell, in the presence of every inmate in the G-9 pod, to Skalnik through a locked gate, standing cell, and another locked gate, just to get Skalnik's

[9] Dailey testified at the prior postconviction proceeding that he was aware Skalnik was in isolation, he knew inmates were not supposed to talk to inmates in isolation, and he was further aware that Skalnik was an ex-police officer and "a snitch." PC ROA 3:324-25. In other words, Skalnik was the *last* person Dailey would to speak about his case. In addition, Dailey testified that by the time Skalnik claimed this supposed confession was made (April or May 1987), Dailey was already aware that Leitner and Dejesus were testifying against him. Given that Dailey knew that two inmates already claimed to have evidence against him, it is even more improbable that Dailey would have had any kind of conversation about his case with an inmate with whom he had no relationship – and of whose reputation he was aware – particularly the drive-by confession described by Skalnik. *See* also Initial Brief at 59.

attention before this alleged confession could have occurred. *See* R2 8208.

The State's argument that Skalnik's false characterization of his criminal history was not error is unpersuasive. AB at 58-59. Skalnik's statement that he had never been charged with a physically violent crime in his life is broad and clearly not in reference to one specific moment in his life.

At Dailey's trial, defense counsel asked Skalnik, "How bad were your charges?" He replied, "They were grand theft, counselor, not murder, not rape, no physical violence *in my life*." TR1 9:1158. The State's claim that this quote was "taken out of context" and that "[w]hether Skalnik had been charged with the additional crime of lewd and lascivious assault would not have made him any more or less credible" with the jury (AB at 60) ignores how the prosecution framed its case to the jury in closing arguments, improperly bolstering Skalnik's credibility by capitalizing on his deception under oath:

> The three prisoners that were brought on from the Pinellas County Jail are thieves and drug dealers … I am not asking you people to like them … But I am asking you to believe them. And there is no reason why you shouldn't. And this is why … [T]here is a hierarchy over in that jail just like in life. Some crimes are worse than others and 46 brutal, cutting, stabbing wounds to a 14-year-old girl is worse than buying a stolen car.

TR1 10:1277-78.

In other words, the prosecutor encouraged the jury to base its credibility determination on the idea that there was a moral hierarchy within the jail "just like in life," and on the belief that the three jailhouse informants, including Skalnik, had reason to believe themselves morally superior to the defendant, and thus a reasonable, relatable, non-self-

interested incentive to want to see him convicted. Jurors would have been far less likely to find Skalnik credible, consistent with the prosecution's own argument, had they known that Skalnik had faced charges of sexually assaulting a girl even younger than the victim in Dailey's case. Arguing that Skalnik's crimes were limited to non-violent property offenses, while simultaneously suggesting that the victims of his crimes were not children – particularly in light of the State's familiarity with Skalnik – was willfully deceptive. R2 88-90. Dailey's jurors never learned that the source of the trial's most sensational evidence was not only a con man but a pedophile, a fact that, by the State's own logic, would rank him at the bottom of any jailhouse moral hierarchy. Had a jury been armed with this knowledge, Skalnik's credibility, upon which so much of the case against Dailey hinged, would have been – as it should have been – utterly undermined.

ARGUMENT VII: The Lower Court Erred In Denying Dailey's Request To Judicially Notice Certain Records In Violation Of Section 90.202, Florida Statutes.

The State misconstrues Dailey's judicial notice claim. Whether the documents Dailey sought to have judicially noticed could be admitted into evidence is a separate inquiry from whether they are items which are proper for judicial notice. *See* § 90.202(6), Fla. Stat. (2017).

Second, "the postconviction court must consider the effect of the newly discovered evidence, in addition to all of the admissible evidence *that could be introduced at a new trial*…" *Hildwin v. State*, 141 So. 3d 1178, 1187 (Fla. 2014). "The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the

evidence when making its decision." *Lightbourne v. State*, 742 So. 2d 238, 247 (Fla. 1999). The State argues *Hildwin* is not controlling because Dailey failed to show how the depositions and court files would be admissible evidence at a new trial. AB at 69. This is not the argument Dailey has made. For example, Dailey did not argue that Andringa's deposition would be admissible carte blanche at a new trial. Dailey did argue that Andringa could be called as a witness at a new trial to testify consistently with the contents of her deposition. Since Ms. Andringa could testify at a new trial, the lower court, under *Hildwin*, was required to consider her testimony when conducting its cumulative analysis. There would be no way for the court to assess what her testimony at a new trial would look like without reviewing her prior deposition testimony.

The same can be said of the prior criminal convictions of Pearcy, Dejesus, Leitner, and Skalnik, all of which Dailey asked the lower court to judicially notice. Their convictions are relevant, admissible evidence which could be introduced at a new trial. The lower court was required to weigh this evidence when considering the cumulative effect of the newly discovered evidence. The lower court's failure to take judicial notice of the requested documents was error.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied James Dailey relief. Accordingly, this Court should order his conviction vacated and remand the case for a new trial, or for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Christina Pacheco, Assistant Attorney General, capapp@myfloridalegal.com and christina.pacheco@myfloridalegal.com, on this 23rd day of July, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant, was generated in Times New Roman 14 point font, pursuant to Florida Rules of Appellate Procedure 9.100 and 9.210.

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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA**

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

JAMES DAILEY,
Defendant.
_____/

DEFENDANT'S SECOND SUCCESSIVE MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE

Defendant James Dailey, through undersigned counsel, files this successive motion to vacate under Fla. R. Crim. P. 3.851. This motion is filed in light of newly discovered evidence of actual innocence.

CITATIONS TO THE RECORD

The following symbols will be used to designate references to the record: "T" refers to the transcript of trial proceedings; "R" refers to the record on direct appeal to the Florida Supreme Court; and "PCR" refers to the post-conviction record on appeal to the Florida Supreme Court. All other references will be self-explanatory. All emphasis is supplied unless otherwise noted.

1. The judgment and sentence under attack and the name of the court that rendered the same.

The Circuit Court of the Sixth Judicial Circuit, Pinellas County, entered the judgments of conviction and sentence under consideration. (See Attachment A).

Mr. Dailey was tried by a jury and found guilty of first degree murder on June 27, 1987. The jury recommended a sentence of death for the first degree murder conviction on June 30, 1987, by a vote of twelve to zero. The trial court sentenced Mr. Dailey to death on August 7, 1987. On November 14, 1991, the Florida Supreme Court affirmed the conviction, but vacated Mr. Dailey's death sentence because the trial court improperly instructed the jury on and considered the aggravating circumstances of "cold, calculated, and premeditated" and that the murder was committed to avoid arrest. The trial court also improperly failed to assign any weight to numerous mitigating circumstances, and

erroneously relied on evidence from a different trial, which was not introduced in the guilt or penalty phase, at Mr. Dailey's trial. *Dailey v. State*, 594 So.2d 254 (Fla. 1991). On remand, the trial court, *without empaneling a new jury*, again sentenced Mr. Dailey to death and the Florida Supreme Court affirmed. *Dailey v. State*, 659 So.2d 246 (Fla. 1995). To be clear, Mr. Dailey did not waive his right to a jury, but specifically filed a motion to empanel a new jury and hold a new penalty phase. This motion was denied by the trial court and the denial was affirmed by the Florida Supreme Court. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995). The Supreme Court of the United States denied certiorari on January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

On March 28, 1997, Mr. Dailey filed a Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. He filed amended motions on April 11, 1997, and November 12, 1999. The circuit court denied the Motion after a limited evidentiary hearing. Mr. Dailey appealed the denial and filed a State Habeas Petition in the Florida Supreme Court. *Dailey v. State*, 965 So. 2d 38 (Fla. 2007). The Florida Supreme Court affirmed the denial of his 3.850 Motion and denied his State Habeas Petition. *Id.*

Thereafter, Mr. Dailey filed a timely Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. *Dailey v. Sec'y, Florida Dept. of Corr.*, 8:07-CV-1897-T-27MAP (M.D. Fla. Mar. 29, 2012). The District Court denied his habeas petition on April 1, 2011. He filed a timely Notice of Appeal and Certificate of Appealability before the United States Court of Appeals for the Eleventh Circuit. (Case No. 12-12222-P), which was subsequently denied. The United States Supreme Court denied certiorari on April 29, 2013. *Dailey v. Crews*, 133 S.Ct. 2027 (2013).

On January 9, 2017[1], Mr. Dailey filed his First Successive Motion to Vacate Death Sentence based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) and *Hurst v. State*, 202 So. 2d 40 (Fla. 2016). This Court

[1] On January 1, 2017, undersigned counsel took over this case from prior postconviction counsel, David Gemmer, who retired on December 31, 2016.

denied that motion on February 20, 2017. Mr. Dailey filed a Motion for Rehearing on April 26, 2017, which was denied on May 10, 2017. A Notice of Appeal was filed on June 7, 2017. Simultaneously, with the filing of this motion, undersigned counsel also filed a Motion to Relinquish Jurisdiction at the Florida Supreme Court[2]. That appeal is still pending before the Florida Supreme Court.

2. Issues raised on appeal and disposition thereof.

The following issues were raised in Mr. Dailey's direct appeal:

1. The trial court erred by admitting evidence that the appellant exercised his right to an extradition hearing and by permitting the prosecutor to comment on that evidence during his opening argument (denied, harmless);
2. The trial court committed per se reversible error by allowing the state to introduce into evidence a booking photograph of Dailey that was not provided to defense counsel during discovery, without holding a *Richardson* hearing (denied);
3. The trial court erred by admitting evidence based on out of court statements by the co-defendant who did not testify at trial, thus violating Dailey's right to confrontation (denied);
4. The trial court erred in admitting the knife sheath as an exhibit, and accompanying evidence concerning its discovery, because the knife sheath was not connected to the appellant or to the crime and therefore, was irrelevant and inadmissible (denied, harmless);
5. The trial court erred by permitting the state to elicit hearsay evidence of prior consistent statements made to Detective Halliday by the three inmate witnesses (denied, harmless);
6. The trial court erred by restricting defense counsel's cross-examination of Paul Skalnik about the nature of his past and pending felony charges for taking money from women under dishonest circumstances (denied, harmless);
7. The trial court erred by instructing the jury over defense objection that the defense need not have been present when the crime was committed to be guilty of first degree murder (denied);
8. The trial court erred by failing to grant a mistrial when the prosecutor made two comments on the defendant's failure to testify during her closing argument (denied, harmless);
9. The trial court erred in qualifying Detective Halliday as an expert in homicide investigation and sexual battery because his opinion was based on nothing more than common intelligence and speculation (denied);
10. The trial judge erred by finding three aggravating factors that were not supported by the evidence and by considering a nonstatutory aggravating factor in his discussion of possible mitigating factors (evidence did not support the finding that the murder was committed to prevent a lawful arrest or that it was committed in a cold, calculated, and premeditated manner)(error);
11. The trial court erred by admitting into evidence a certified copy of Dailey's 1979 conviction for aggravated battery, including a notation that another charge had been dropped pursuant to a plea bargain (denied, harmless);
12. The trial court erred by failing to consider statutory and nonstatutory mitigation presented by

[2] *See Tompkins v. State*, 894 So. 2d 857, 859–60 (Fla. 2005) ("[I]f an appeal is pending in a death penalty case and this Court denies a motion to relinquish jurisdiction for the trial court to consider a new claim, the trial court should hold any successive postconviction motion in abeyance until the appeal process is completed.").

the defense (trial court erred by finding numerous mitigating factors but according them no weight);

13. The trial judge erred by basing his sentencing, in part, on off the record information from the co-defendant's trial, the co-defendant's PSI, and the prosecutor's sentencing memorandum, thus violating the appellant's right to confront the witnesses (trial court erred in considering this evidence).

The following issues were raised on direct appeal after Mr. Dailey's re-sentencing:

1. Trial court erred by denying appellant's motion for a new penalty phase trial because the jury's death recommendation was based on invalid jury instructions on three of five aggravating factors (denied);
2. The trial court failed to find and weigh mitigating circumstances shown by the evidence and not refuted by the state (denied);
3. The trial court violated appellant's constitutional right to due process by denying his motion to disqualify the sentencing judge because appellant had reasonable grounds to fear that the judge could not be impartial at resentencing (denied);

3. Disposition of all previous claims raised in post-conviction proceedings and the reasons the claims raised in the present motion were not raised in the former motions.

A. Motion to Vacate Judgment and Sentence:

1. Dailey's counsel was prejudicially ineffective at guilt phase (denied);
2. Ineffective assistance of counsel at the sentencing phase (denied);
3. Dailey was deprived of due process and equal protection because trial counsel failed to prepare a competent mental health professional in violation of *Ake v. Oklahoma* (denied);
4. State withheld exculpatory evidence (denied);
5. Newly discovered evidence (denied);
6. Prosecutorial misconduct for presenting misleading evidence and improper argument to the jury (denied);
7. State knowingly presented or failed to correct material false testimony (denied);
8. Dailey's sentencing is disproportionate to co-defendant's sentence (denied);
9. Trial court committed fundamental error by instructing the jury on HAC (denied);
10. Florida capital sentencing statute is unconstitutional (denied);
11. Jury instructions were incorrect and shifted burden to defense to prove death was inappropriate (denied);
12. Jury was misled by unconstitutional instructions which diluted their sense of responsibility (denied);
13. Rules prohibiting juror interviews are unconstitutional (denied);
14. Electrocution is cruel and/or unusual punishment (denied);
15. Cumulative error (denied);

See Dailey v. State, 965 So. 2d. 38 (Fla. 2007).

B. *Writ of Habeas Corpus*:

1. Florida's statute is unconstitutional under *Ring* because it permits the State to indict a

defendant without specifying whether it intends to prosecute under premeditated or felony murder theory (denied);

2. Florida's death sentencing statute is unconstitutional under *Ring* (denied).

C. *First Successive Motion to Vacate Judgement and Sentence*:

1. Mr. Dailey's death sentence stands in violation of the Sixth Amendment under *Hurst v. Florida* and *Hurst v. State* and should be vacated;
2. Mr. Dailey's death sentence stands in violation of the Eighth Amendment under *Hurst v. State* and should be vacated;
3. The denial of Mr. Dailey's prior postconviction claims must be reheard and determined under a constitutional framework.

D. *Claims not Raised in Previous Motions*:

This successive motion for postconviction relief is primarily predicated on newly discovered evidence and two *Giglio*[3] violations. In particular, it is based on evidence and affidavits which contradict testimony given by several State witnesses during Mr. Dailey's original trial and establishes that Jack Pearcy alone committed the crime. The information and evidence contained herein was obtained by current post-conviction counsel who began representing Mr. Dailey on January 1, 2017. Pursuant to Fla. R. Crim. P. 3.851(d)(2)(A), Mr. Dailey asserts that the facts upon which this motion is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence within the time prescribed by paragraph (1) of that rule, i.e. one year after the judgment and sentence became final. This motion is timely if filed within one year after the new facts were discovered, i.e. if filed on or before January 1, 2018.

Alternatively, any of the facts and circumstances that the court determines were available through due diligence to Mr. Dailey's prior counsel, were not discovered due to ineffective assistance of initial review post-conviction counsel, depriving Mr. Dailey of effective assistance of trial counsel and of effective assistance of initial review post-conviction counsel[4]. *See also McQuiggin v. Perkins*, 133 S.

[3] *Giglio v. United States*, 405 U.S. 150 (1972).

[4] To the extent that the facts and information contained in this motion could have been discovered by prior post-conviction counsel, prior post-conviction counsel was ineffective and Mr. Dailey is entitled to relief under *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013). Mr. Dailey could not have asserted ineffective assistance of post-conviction counsel as "cause" for his

Ct. 1924, 1931 (2013)(holding that defendants with an actual innocence claim may have their federal constitutional claims considered on the merits notwithstanding the existence of a procedural bar).

4. The nature of the relief sought.

Mr. Dailey seeks to set aside his conviction and sentence of death and receive a new trial.

5. Claims for which an evidentiary hearing is sought.

CLAIM I

NEWLY DISCOVERED TESTIMONIAL EVIDENCE PROVES THAT MR. DAILEY IS ACTUALLY INNOCENT

This claim is evidenced by the following:

All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motions to vacate, and all evidence presented by him during the previously conducted evidentiary hearing are incorporated herein by specific reference.

Under Florida and federal law, there are two requirements needed for relief based on newly discovered evidence. First, the asserted facts must have been unknown by the trial court, by the party, or by counsel at the time of the trial, and it must appear that defendant or his counsel could not have known them by the use of diligence. Second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512 (Fla. 1998). The *Jones* standard is also applicable where the issue is whether a life or death sentence should have been imposed. *Scott v. Dugger*, 604 So. 2d 465, 468 (Fla. 1992). *See also Jones v. State*, 591 So. 2d 911, 914-15 (Fla. 1991); *Robinson v. State*, 707 So. 2d 688, 691 n.4 (Fla. 1998); Fla.R.Crim.Pro. 3.851(d)(2)(A). When addressing this claim, this Court "must evaluate all the admissible newly

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failure to diligently develop his procedurally barred claims or his failure to file a timely appeal previously because he was represented by the same attorney in prior state and federal post-conviction appeals. This injustice is the type of scenario the *Martinez* Court found compelling enough to recognize an exception to well-settled law that ineffective assistance of initial review state post-conviction counsel can suffice as cause to excuse a procedural default. *Martinez*, 132 S.Ct. at 1315. Accordingly, Mr. Dailey requests that this Court allow a determination of his claims on the merits.

discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial." *Jones v. State*, 709 So. 2d 512, 522 (Fla. 1998)(citing *Kyles v. Whitley*, 514 U.S. 419, 441 (1994))(*Jones II*). Newly discovered evidence satisfies the second prong of the *Jones* II test if it "weakens the case against [the defendant] so as to give rise to a reasonable doubt as to his culpability." *Jones* II, 709 So. 2d at 526 (quoting *Jones v. State*, 678 So. 2d 309, 315 (Fla. 1996)). If the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence. *See Jones*, 591 So. 2d at 915.

The Due Process Clause of the Federal Constitution and the Eighth Amendment provide that when relevant evidence that would produce an acquittal has not been presented because it could not have been discovered, a capital defendant has a right to a new trial. Mr. Dailey raises four areas of newly discovered evidence; each one will be addressed in turn, though the Court must consider the totality of the evidence discussed below when evaluating this claim.

A. The April 20, 2017, affidavit of Jack Pearcy proves Mr. Dailey is innocent and that Jack Pearcy alone murdered Shelly Boggio.

Jack Pearcy was Mr. Dailey's co-defendant and was also found guilty of the first degree murder of Shelly Boggio. *Pearcy v. State*, 514 So. 2d 364 (Fla. 2nd DCA 1987). He received a life sentence. *Id.* Pearcy was called to testify at Mr. Dailey's original trial, but invoked his Fifth Amendment right to remain silent – even though he had already been tried and convicted for the murder of Shelly Boggio. (T. 412). The trial court found Pearcy in criminal contempt. (T. 413). Pearcy was then called to testify at Mr. Dailey's evidentiary hearing on November 7, 2003, however, he again invoked his Fifth Amendment right to remain silent. (PCR. 118).

However, on April 20, 2017, Pearcy admitted to being solely responsible for the murder stating, "James Dailey was not present when Shelly Boggio was killed. I alone am responsible for Shelly Boggio's death." (See Attachment B). He is available to testify at an evidentiary hearing.

B. The May 9, 2017, affidavit of James Wright and the June 12, 2017, affidavit of Michael Frank Sorrentino constitute new evidence further undermining the reliability and validity of the snitch testimony at Mr. Dailey's original trial.

James Wright was incarcerated at the Pinellas County jail with James Dailey and Jack Pearcy. Wright knew both Pearcy and Dailey, and had read about their case in the local newspaper. Wright maintains that Dailey consistently denied killing Shelly Boggio and never admitted to participating in her death. Dailey continuously maintained his innocence throughout his time at the county jail.

Additionally, Wright recalls a detective coming to the Pinellas County jail to interview him about the Pearcy and Dailey case. The detective asked Wright if Dailey talked about his case. The detective also brought newspaper articles to the jail about Shelly Boggio's murder when he interviewed Wright. *See* Wright affidavit, Attachment C.

Michael Frank Sorrentino was also incarcerated at the Pinellas County jail with James Dailey. Sorrentino and Dailey shared a cell and/or were in the same "pod" at the county jail for approximately eight to twelve months.

Sorrentino also remembered a detective coming to the jail to interview inmates about the Pearcy and Dailey case. The detective took Sorrentino into a room and had newspaper articles laying out on the table in plain sight. The detective asked Sorrentino if Dailey and/or Pearcy had talked to Sorrentino about their cases or if anything in the newspaper articles, "looked familiar." *See* Sorrentino affidavit, Attachment D. Both Wright and Sorrentino are available to testify at an evidentiary hearing.

C. Newly discovered evidence demonstrates that despite his testimony to the contrary, Paul Skalnik received a deal. Further, his reputation in the community discredits his testimony.

In addition to the evidence produced during the initial post-conviction evidentiary hearing which discredited Paul Skalnik, current counsel has discovered that Paul Skalnik had a reputation in the community for being deceitful. Current counsel has uncovered numerous memos produced by members of the Pinellas County Sheriff's Office who were working at the Pinellas County Jail while Paul Skalnik was incarcerated there. These memos include comments that Skalnik had "given false

statements about some of the corrections staff." (See Attachment E). Taken together with the written statements from other corrections officers, these memos show that Skalnik had a history of demonstrably false accusations against guards and other officials in the jail.

Skalnik's reputation for dishonesty followed him to Arizona where his probation officer there described him as manipulative. (See Attachment F). Skalnik also lodged numerous complaints while in the Arizona Department of Corrections' custody which were deemed to be "unfounded and without substance." *Id.*

Additionally, Skalnik testified at Mr. Dailey's trial that he was not promised or offered anything in exchange for his trial testimony from any person at the Pinellas County jail, law enforcement, or the State Attorney's Office. (T. 532). Skalnik also testified that he previously received no consideration on his sentence for his testimony in prior cases, but instead, "was probably treated worse than if I hadn't testified." (T. 532-33). However, his testimony was patently false.

Current counsel has uncovered a memo from the State Attorney's Office written about Skalnik which reads, "Will plea to a 3 yr. cap DOC. Off record: if D's aid in previous discussed case is substantial, the state will be seeking to mitigate – probation was discussed!" (See Attachment G). Additionally, in a separate State Attorney file there is another note in the prosecutor's files which reads, "**SO FAR** I've promised neither defendant nor attorney nothing!" (See Attachment H) (emphasis in original). Finally, undersigned counsel found a letter from Detective John Halliday – the lead detective in Mr. Dailey's case – to the Florida Parole Commission vouching for Skalnik and asking for his release on parole due to Skalnik's aid in a prior felony case. (See Attachment I).

Clearly Skalnik's testimony that he received no prior consideration from the State for his testimony was false. Further, even if Skalnik was promised nothing prior to Mr. Dailey's trial in exchange for his testimony, based on Skalnik's prior dealings with the State, is it clear that Skalnik expected some consideration from the State in exchange for testifying against Mr. Dailey.

Finally, Skalnik's dishonesty was taken one step further at trial when he lied about his criminal

history and tried to distinguish his crimes from the crime that Mr. Dailey was charged with. This testimony was false. At trial, Skalnik testified:

> Q: Sir, how bad were your charges?
> A: They were grand theft, counselor, not murder, *not rape, no physical violence in my life.*

(R. at 1158).

Current counsel has uncovered that Skalnik was charged in Pinellas County with lewd and lascivious actions on a child under 14 years of age. Yet, both Skalnik and the State remained conspicuously silent as to Skalnik's history of child sexual abuse, which included the vaginal penetration of a twelve-year-old child.

The State later added to the egregiousness of the error by arguing during closing that the "three prisoners that were brought on from the Pinellas County Jail are thieves and drug dealers." (R. 1277). And, that the jury was to believe their testimony because "there is a hierarchy over in that jail just like in life," where brutal crimes against children are worse than "buying stolen cars" or "sale and possession of cocaine." (R. 1278). Arguing that Skalnik's crimes were limited to non-violent monetary offenses, thus putting him higher on the believability hierarchy, was an outright lie by the State – especially given that the same State Attorney's Office had charged Skalnik with sexual assaults against children in the past. (See Attachment J).[5]

Finally, after Mr. Dailey's trial, the State requested that Skalnik be released on his own recognizance from the jail, even though he had previously violated his conditions of release every time he was out on bond, probation, or parole. As usual, Skalnik then disappeared and committed multiple new law violations. In April 1989, even though Skalnik was charged with four counts of grand theft and two felony failure to appear charges, the State agreed to five years imprisonment on each count to run concurrently, with no habitual felony offender status or other sentencing enhancements.

[5] Skalnik is currently serving a 50 month sentence in federal prison for failing to register as a sex offender and for illegally possessing a firearm as a convicted felon.

Additionally, according to Skalnik's prior attorney Richard Watts, the State also agreed to Skalnik's request to serve his time in the Texas' Department of Corrections' custody, where he was immediately paroled and released from custody, and never served his five year sentence. The State also did not go through the proper legal channels for transferring custody of inmates, including the Interstate Compact Agreement, or have Skalnik waive extradition. Mr. Watts is available to testify at a future evidentiary hearing.

D. Newly discovered Indian Rocks Beach Police reports, including Oza Shaw's original police interview, prove that Mr. Dailey was not with Jack Pearcy when Shelly Boggio was killed.

Current post-conviction counsel has found numerous police reports written by detectives with the Indian Rocks Beach Police ("IRBP") who co-investigated the death of Shelly Boggio with the Pinellas County Sheriff's Office. According to the IRBP reports, Oza Shaw stated that Jack Pearcy, Gayle Bailey, James Dailey, and Shelly Boggio returned to the apartment after going out. Jack Pearcy and Shelly Boggio then gave Mr. Shaw a ride to the telephone booth, Mr. Shaw stated that Mr. Dailey was not with them. When Mr. Shaw returned home, Gayle Bailey was in the living room. Mr. Shaw fell asleep but then awoke when Pearcy returned home, alone, without Shelly Boggio. Pearcy went into Mr. Dailey's room and the two left the house. (See Attachment K).

Taken together, all of this newly discovered evidence so weakens the State's case against Mr. Dailey and gives rise to reasonable doubt as to his culpability.

For more than thirty years, Mr. Dailey has consistently maintained his innocence for the murder of Shelly Boggio. The facts adduced at trial are summarized in the Florida Supreme Court's Opinion on direct appeal:

> On May 5, 1985, fourteen year-old Shelly Boggio, her twin sister Stacey, and Stephanie Forsythe were hitchhiking near St. Petersburg when they were picked up by James Dailey, Jack Pearcy and Dwaine Shaw. The group went to a bar and then to Pearcy's house, where they met Gayle Bailey, Pearcy's girlfriend. Stacey and Stephanie returned home. Shelly, Gayle and the men went to another bar and then returned to Pearcy's house about midnight. Shelly left in the car with Dailey and Pearcy, and when the two men returned without Shelly several hours later Dailey was wearing only a pair of wet pants and was carrying a bundle. The next morning, Dailey and Pearcy visited a self-service laundry and then told Gayle to pack because they were leaving for Miami.

> Shelly's nude body was found that morning floating in the water near Indian Rocks Beach. She had been stabbed, strangled and drowned. Dailey and Pearcy were charged with her death.

Dailey v. State, 594 So. 2d 254, 255-56 (Fla. 1991).

However, that is not a complete or accurate summary of the night's events. According to Oza Shaw and Gayle Bailey, after Stephanie and Stacey went home, Gayle Bailey, Jack Pearcy, James Dailey and Shelly Boggio went to a bar. (T. 379-80). Oza Shaw stayed home. (T. 421). When the group returned home, Jack Pearcy, Shelly Boggio and Oza Shaw left, and dropped Shaw off at a local phone booth. (T. 421). James Dailey was not with them. (T. 431-32). According to Oza Shaw's original statement to law enforcement, after he finished his phone calls, he walked home and found Gayle Bailey sitting in the living room. (See Attachment K). A little while later, Jack Pearcy returned home – without Shelly Boggio – and walked into James Dailey's room. *Id.* He got Dailey and the two left the house. Later that night, Pearcy and Dailey returned, and Dailey's pants were wet. Gayle Bailey originally told police on May 10, 1985, she did not think this was strange, because it was common for Dailey and Pearcy to go swimming at night. (See Attachment L).

The newly discovered evidence of Pearcy's admission to killing Shelly Boggio confirms Oza Shaw's sequence of events that night. Pearcy alone killed Shelly Boggio after dropping Shaw off at the phone booth and before returning to the house to pick up Dailey. Additionally, the affidavits from Wright and Sorrentino impeach the credibility of James Leitner, Pablo Dejesus, and Paul Skalnik's testimony that the facts they testified to at trial came from Dailey and not the local paper and/or Detective Halliday. Finally, the new reputation evidence against Paul Skalnik, and the proof of his concealed deals with the State, completely discredits his trial testimony.

All of the evidence detailed above was unknown at the time of Mr. Dailey's trial. In assessing the totality of the evidence described above, including the evidence presented at the prior post-conviction evidentiary hearing and the evidence at trial, Mr. Dailey has established that this evidence would probably produce an acquittal at trial. *Jones v. State*, 709 So. 2d 512, 522 (Fla. 1998)(citing *Kyles v.*

Whitley, 514 U.S. 419, 441 (1994)). U.S. Const. amend. V, VIII, and XIV.

> Based on the standard set forth in *Jones II*, the postconviction court must consider the effect of the newly discovered evidence, **in addition to all of the admissible evidence that could be introduced at a new trial**. *Swafford v. State*, 125 So.3d 760, 775-76 (Fla.2013). In determining the impact of the newly discovered evidence, the court must conduct a cumulative analysis of all the evidence so that there is a "total picture" of the case and "all the circumstances of the case." *Id.* at 776 (quoting *Lightbourne v. State*, 742 So.2d 238, 247 (Fla.1999))... As this Court held in *Lightbourne*, and more recently in *Swafford*, **a postconviction court must even consider testimony that was previously excluded as procedurally barred or presented in another postconviction proceeding in determining if there is a probability of an acquittal**. *Swafford*, 125 So.3d at 775-76; *Lightbourne*, 742 So.2d at 247.

Hildwin v. State, 141 So.3d 1178, 1184 (Fla. 2014). See *also Jones II*, 709 So. 2d at 522 ("Because this appeal involves a second evidentiary hearing in which claims of newly discovered evidence were presented and evaluated by a trial judge, we must evaluate all the admissible newly discovered evidence at this hearing in conjunction with newly discovered evidence at the prior evidentiary hearing and then compare it with the evidence that was introduced at trial."); *Swafford v. State*, 125 So. 3d 760, 775-76 (Fla. 2013) ("The *Jones* standard requires that, in considering the effect of the newly discovered evidence, we consider all of the admissible evidence that could be introduced at a new trial. In determining the impact of the newly discovered evidence, the Court must conduct a cumulative analysis of all the evidence so that there is a 'total picture' of the case and 'all the circumstances of the case.'" (quoting *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994)).

Review of the evidence

Before Mr. Dailey's capital trial, the State was in possession of hairs, which were found in the victim's hand. These hairs were sent to the Federal Bureau of Investigations ("FBI") laboratory in Washington, D.C. for testing and comparison to Mr. Dailey's hair samples. The FBI analyst concluded that the hairs found in the victim's hand "could not be associated with the suspect." (See Attachment M). Although this evidence was available to trial counsel and was admissible, it was not presented at Mr. Dailey's original trial, however, it is admissible evidence which must be considered when evaluating whether a new trial would probably produce an acquittal and/or a life sentence.

Second, Oza Shaw originally told law enforcement that he stayed home while Jack Pearcy, Gayle Bailey, James Dailey and Shelly Boggio went out. (See Attachment K). After the group returned home, Jack Pearcy and Shelly Boggio gave Mr. Shaw a ride to a telephone booth, and Mr. Dailey was not with them. *Id.* When Mr. Shaw returned home, Gayle Bailey was in the living room. *Id.* Mr. Shaw fell asleep, but then awoke when Pearcy returned home alone -- without Shelly Boggio. *Id.* Pearcy went into Mr. Dailey's room and the two left the house. *Id.* Pearcy and Mr. Dailey returned later that evening. *Id.* Shaw's testimony corroborates Pearcy's affidavit. Although this evidence was also available to trial counsel, it was not presented at Mr. Dailey's original trial, however, it is admissible evidence which must be considered when evaluating whether a new trial would probably produce an acquittal.

Third, the deposition testimony of Deborah North corroborates both Pearcy's affidavit and Shaw's testimony. (See Attachment N). Ms. North testified that sometime after midnight she saw Shelly Boggio at the Sea Breeze bar – a beach bar near Indian Rocks Beach. Ms. North saw Shelly outside, near a car that was stuck in the sand. Shelly was with one male. This timeline corroborates the Southwestern Bell Telephone records which show that Shaw placed a telephone call to his girlfriend at 12:15 a.m., and Shaw's testimony that Pearcy and Shelly drove off after dropping Shaw off at the phone booth. Additionally, Shelly's body was found within five miles from the Sea Breeze bar – where Pearcy was alone with the victim – further validating Pearcy's affidavit and placing him *alone* with Shelly near the crime scene around the time she was killed. Although this evidence too was available to trial counsel, it was not presented at Mr. Dailey's original trial, however, it is admissible evidence which must be considered when evaluating whether a new trial would probably produce an acquittal.

Thus, all of the evidence points to Jack Pearcy as having the motive, means, and opportunity to murder Shelly. Pearcy was familiar with Shelly and had previously shown up at her house, before being chased off by Shelly's dad (See Attachment O, pg. 19-20), and it was Pearcy who was dancing with Shelly at a bar the night she was killed. (R. 957). After the murder, when the group went to Miami, Pearcy registered at a motel under a false name, while Mr. Dailey used his real name. (See Attachment

P, pg. 66). Lastly, according to Pearcy's girlfriend at the time, Gayle Bailey, it was Pearcy who owned a roofing knife and sheath which he kept in the car. (See Attachment Q, pg. 24-26). It was also Pearcy who told police he knew where the knife and sheath were located, and drove police to the reservoir where the knife sheath was ultimately recovered. Although Pearcy told police he only knew of the knife's location because he saw Dailey throw it into the water from inside the car, this too was a lie. Detective Buchaus testified in his deposition that he "did have some doubts" about Pearcy's statement because Pearcy could have only known where the knife and sheath were located, if he threw it there himself or got out of the car and followed Dailey. (See Attachment P, pg. 81-82). All of this is admissible evidence which must be considered when evaluating whether a new trial would probably produce an acquittal.

Fourth, the final witnesses who testified against Mr. Dailey at trial, and the only other circumstantial evidence in the State's case, was the testimony of three jailhouse snitches. Because of court error, ineffectiveness of trial counsel, and/or newly discovered evidence none of these witnesses were properly impeached. First, the Florida Supreme Court found on direct appeal that the trial court erred by restricting defense counsel's cross-examination of Paul Skalnik about the nature of his past and pending felony charges for crimes of dishonesty. Second, the newly discovered evidence of the testimony of James Wright and Michael Sorrentino calls into question the veracity of James Leitner, Pablo Dejesus, and Paul Skalnik's testimony at trial. Wright and Sorrentino observed Detective John Halliday bring in newspaper articles to the jail about Mr. Dailey's trial in order to attempt to get inmates to testify that Dailey told them facts about the crime – when in reality they learned these facts from Detective Halliday and the newspaper. (See Attachments C & D).

Furthermore, in post-conviction proceedings, the defense presented evidence that Skalnik was not a credible witness and had accused the Office of the State Attorney for the Sixth Judicial Circuit of misconduct by having him testify falsely. The prosecutor at Mr. Dailey's original trial, Beverly Andringa, admitted in her post-conviction deposition that she would not use Skalnik as a witness again,

specifically stating:

Q: Would you call Mr. Skalnik to testify after 1988?
A: No.
Q: And would that be because you could not in good faith put him on believing that he would give truthful testimony?
A: Yes.

(See Attachment R, pg. 16).

And finally, a new jury would also hear that Paul Skalnik had a reputation for dishonesty, in addition to his numerous deals with the State Attorney's Office; including the sentencing deal Skalnik received after testifying in Mr. Dailey's case to serve his felony sentence under the supervision of the Texas Department of Corrections, and also to have all of his sentences run concurrently, without the habitual felony offender sentencing enhancement.

After a reweighing of the above evidence and the errors found by the Florida Supreme Court on direct appeal, Mr. Dailey has established that this evidence would probably produce an acquittal at trial. The State's case against Mr. Dailey relied solely on circumstantial evidence. Mr. Dailey has directly challenged that circumstantial evidence and offered unrebutted, reasonable explanations for his innocence and discredited all of the State's circumstantial evidence. In addition, Mr. Dailey can and will present the evidence set out throughout this pleading, through records, and witness testimony at an evidentiary hearing to establish his innocence. As noted above, in order to assess a newly discovered evidence claim, this Court must consider all the evidence presented, both at trial and at post-conviction. Comparing the lack of evidence against Mr. Dailey, and the new evidence that inculpates Mr. Pearcy, including his unequivocal confession that he alone was responsible for Shelly Boggio's death and that Mr. Dailey was not present when Shelly Boggio was killed, it is probable that if a jury heard this evidence Mr. Dailey would be acquitted and/or, at the very least, be given a life sentence.

In the end, in a circumstantial case, such as this, the State will bear a particularly high burden of proof at any new trial—i.e., all of the facts "must be inconsistent with innocence" and must "lead to a

reasonable and moral certainty that [Dailey] and no one else committed the offense charged." *Dausch v. State*, 141 So. 3d 513, 517 (Fla. 2014); *Ballard v. State*, 923 So. 2d 475, 486 (Fla. 2006)(evidence must exclude "all other inferences" than guilt).

The Florida Supreme Court has vacated convictions based on similar evidence, even under a far more demanding standard than the *Jones* newly-discovered-evidence test that applies here. *See*, e.g., *Dausch v. State* (directing judgment of acquittal because the physical evidence only linked the defendant to the crime scene, not to the murder); *Ballard v. State* (directing judgment of acquittal even though the defendant's DNA was at the crime scene). Because the State's already-tenuous theory has been seriously undercut—and because there is no credible evidence that is inconsistent with Mr. Dailey's defense—an acquittal is at least "probable" under the *Jones* standard.

CLAIM II

THE STATE VIOLATED THE CONSTITUTIONAL REQUIREMENTS OF *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES* AND ITS PROGENY, THUS DENYING MR. DAILEY OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

This claim is evidenced by the following:

All factual allegations contained elsewhere within this motion and set forth in the Defendant's previous motions to vacate, and all evidence presented by him during the previously conducted evidentiary hearing are incorporated herein by specific reference.

The State violated Mr. Dailey's Due Process rights under *Giglio*[6] by presenting false evidence at Mr. Dailey's original trial and post-conviction evidentiary hearing. The Supreme Court has held that, both the withholding of exculpatory evidence from a criminal defendant by a prosecutor, and the knowing use of false testimony, violate the Due Process Clause of the Fourteenth Amendment. *See*

[6] *Giglio v. United States*, 405 U.S. 150 (1972).

Brady v. Maryland, 373 U.S. 83, 86 (1963) and *Giglio v. United States*, 405 U.S. 150, 153-55 (1972).

Knowing use of false testimony violates due process. *Giglio v. United States*, 405 U.S. 150, 153 (1972). This rule applies regardless of whether the false testimony is solicited, or merely allowed to stand uncorrected after it appears. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Non-disclosure of evidence affecting credibility also falls within this rule "when the 'reliability of a given witness may well be determinative of guilt or innocence.'" *Giglio*, 405 U.S. at 154 (citing *Napue*, 360 U.S. at 269). In order to establish a *Giglio* violation, a defendant must demonstrate that 1) a state witness gave false testimony, 2) the prosecutor knew the testimony was false, and 3) the statement was material. *Id.* Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgement of [the finder of fact]." The *Giglio* standard has also been explained as a "materiality standard under which the fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *United States v. Bagley*, 473 U.S. 667, 679-80 (1985). The State bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Id.* at 680, n. 9.

In *Rogers v. State*, 782 So. 2d 373 (Fla. 2001), the Florida Supreme Court explained the analysis of a *Brady* claim in postconviction:

> Recently in *Young v. State,* 739 So. 2d 553 (Fla. 1999), we recognized this emphasis placed on the materiality prong and stated: [Although] defendants have the right to pretrial discovery under our Rules of Criminal Procedure, and thus there is an obligation upon defendant to exercise due diligence pretrial to obtain information . . . the focus in postconviction *Brady - Bagley* analysis is ultimately the nature and weight of undisclosed information. The ultimate test in backward looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome is undermined to the extent that there is a reasonable probability that had the information been disclosed, the result of the proceeding would have been different. *Young*, 739 So. 2d at 559. One week after our decision in *Young*, the United States Supreme Court decided *Strickler v. Green*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed. 2d 286 (1999), confirming its analysis in *Kyles*. . . . [Material evidence must be disclosed and the rule requires that in order to comply with *Brady*] the individual prosecutor has a duty to learn of any favorable

> evidence known to the others acting on the government's behalf . . ." *Kyles*, 514 U.S. at 437.

Rogers, 782 So. 2d at 377-78.

In Mr. Dailey's case, the State committed at least two *Giglio* violations. First, the State failed to correct the false testimony of Paul Skalnik. Skalnik lied about his criminal history during Mr. Dailey's capital trial when he tried to distinguish his crimes from the crime that Mr. Dailey was charged with. This testimony was false. At trial, Skalnik testified:

> Q: Sir, how bad were your charges?
> A: They were grand theft, counselor, not murder, *not rape, no physical violence in my life.*

(R. at 1158).

Current counsel has uncovered that Skalnik was charged in Pinellas County with lewd and lascivious actions on a child under 14 years of age. Yet, both Skalnik and the State remained conspicuously silent as to Skalnik's history of child sexual abuse, which included the vaginal penetration of a twelve-year-old child.

The State later added to the egregiousness of the error by arguing during closing that the "three prisoners that were brought on from the Pinellas County Jail are thieves and drug dealers." (R. 1277). And, that the jury was to believe their testimony because "there is a hierarchy over in that jail just like in life," where brutal crimes against children are worse than "buying stolen cars" or "sale and possession of cocaine." (R. 1278). Arguing that Skalnik's crimes were limited to non-violent monetary offenses, thus putting him higher on the believability hierarchy, was an outright lie by the State – especially given that the same State Attorney's Office had charged Skalnik with sexual assaults against children in the past. (See Attachment J).

The testimony left uncorrected by the State, that Skalnik had never been charged with a crime of violence, was false; the prosecutor knew the testimony was false; and the statement was material because there is a reasonable likelihood that the false testimony could have affected the judgment of

the finder of fact. Finally, the enormity of the error was compounded when the State emphasized Skalnik's lie during its closing arguments. By blatantly condoning Skalnik's falsehoods, the State misrepresented material facts to the jury and court, and committed a *Giglio* violation.

The second *Giglio* violation occurred during the testimony of Oza Shaw at Mr. Dailey's post-conviction evidentiary hearing. Mr. Shaw was called by the defense at the hearing and testified on direct examination that Jack Pearcy, Gayle Bailey, James Dailey, and Shelly Boggio returned to the apartment. (PCR. 339). Jack Pearcy and Shelly Boggio then gave Mr. Shaw a ride to the telephone booth, Mr. Dailey was not with them. (PCR. 339-40). When Mr. Shaw returned home, Gayle Bailey was in the living room. (PCR. 343). Mr. Shaw fell asleep but then awoke when Pearcy returned home, alone, without Shelly Boggio. *Id.* Pearcy went into Mr. Dailey's room and the two left the house. *Id.* During cross-examination, the State impeached Mr. Shaw and tried to allege that Pearcy returning home alone without Shelly Boggio and picking up Mr. Dailey, was a recent fabrication by Shaw. (PCR. 345-52). However, according to the Indian Rocks Beach Police report by Detective Terry Buchaus, who conducted the initial interview of Mr. Shaw three weeks after the murder, with Pinellas County Detective Halliday, Mr. Shaw did tell the police those same details in his original statement. (See Attachment K & S).

The egregiousness and prejudice resulting from the State's conduct is most clearly seen in the circuit court's order denying Mr. Dailey's initial motion to vacate. The court held, "Mr. Shaw's new testimony is of questionable value…it would seem most likely that his memory in the time closer to the actual events would be more reliable than nearly twenty years later." (PCR. 179-80). This also satisfies the materiality prong because clearly, the false testimony elicited by the State did affect the judgment of the finder of fact. The irony is that Mr. Shaw's testimony at the evidentiary hearing did more accurately reflect what he originally told law enforcement, than his original trial testimony.

The testimony elicited by the State on cross examination, that Mr. Shaw recently fabricated his testimony of Pearcy returning alone to the house, was false; the prosecutor knew the testimony he was

eliciting was false; and the statement was material to Mr. Dailey's guilt. By misrepresenting Mr. Shaw's original statement to law enforcement and implying that his testimony was fabricated for the purpose of the evidentiary hearing, the State misrepresented material facts to the court and committed a *Giglio* violation.

6. CLAIMS FOR WHICH AN EVIDENTIARY HEARING IS NOT SOUGHT

CLAIM III

SENTENCING TO DEATH AND EXECUTING SOMEONE WHO IS ACUTALLY INNOCENT VIOLATES THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Eighth Amendment prohibits cruel and unusual punishment. The United States Supreme Court has recognized that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional..." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). In a concurring opinion, Justice O'Connor agreed that "executing the innocent is inconsistent with the Constitution," "contrary to the contemporary standards of decency," "shocking to the conscience," and "offensive to a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 419 (internal quotations and citations omitted). Justice O'Connor concluded that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id.* In light of the overwhelming evidence of Mr. Dailey's innocence, allowing Mr. Dailey to be sentenced to death and executed violates his rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Florida Constitution also provides Mr. Dailey with the right to be free from cruel and unusual punishments. The Florida Constitution specifically provides that "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution."

Article I, §17.

Mr. Dailey recognizes that the Florida Supreme Court has rejected the claim that Florida's failure to recognize a freestanding actual innocence claim violates the Eighth Amendment. *Tompkins v. State*, 994 So 2d. 1072, 1089 (Fla. 2008)(citing *Rutherford v. State*, 940 So. 2d 1112, 1117 (Fla. 2006). However Mr. Dailey maintains that the Florida Supreme Court's rulings were wrongly decided and violate the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

Moreover, with the advent of DNA testing and the demonstration of the number of individuals wrongfully convicted, public support for the death penalty has lessened. Since 1973, there have been 159 exonerations from death row, 18 of those involving DNA evidence. http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited May 23, 2017). Florida leads the country in death row exonerations with 27. http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st (last visited May 23, 2017).

The Eighth Amendment has been construed by the United States Supreme Court to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). "Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time…Standards of decency have evolved since 1980. They will never stop doing so." *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010)(Stevens, J., concurring).

In *Baze v. Rees*, 553 U.S. 35 (2008), Justice Stevens explained that one of his strongest concerns about the continuing constitutionality of the death penalty was the possibility of executing an innocent person. "Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants

found guilty of capital offenses." See Garrett, *Judging Innocence*, 108 Colum. L.Rev. 55 (2008); Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J.Crim. L. & C. 761 (2007). "The risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive." *Baze v. Rees*, 553 U.S. 35, 85-86 (2008)(Stevens, J., concurring).

Because Mr. Dailey is actually innocent, allowing his death sentence to stand and allowing his execution to go forward is at odds with the "evolving standards of decency that mark the progress of a maturing society." While not conceding that Mr. Dailey had a constitutionally fair trial with constitutionally effective counsel, even if he had, upholding his death sentence and executing him violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

7. The Names, Addresses, and Telephone Numbers of All Witnesses Supporting the Claim Who Are Available To Testify At an Evidentiary Hearing.

Jack Pearcy
DOC #: 106311
Sumter Correctional Institution
9544 County Road 476B
Bushnell, Florida 33513-0667

Paul Skalnik
Register Number: 26050-078
FCI Seagoville
2113 North Highway 175
Seagoville, TX 75159

James Wright
917 18th Street South
St. Petersburg, FL
727-821-2839

Oza Shaw
12114 W 70th Terrace
Shawnee, KS 66216-2906
913-553-9311

Michael Frank Sorrentino
1295 W 49TH Place apt. 3
Hialeah, FL 33012-3138
786-499-8266

Richard Watts
1300 Dr. Martin Luther King Jr St N
Saint Petersburg, FL 33705-1002
Office: 727-821-1300

**And all witnesses called at Mr. Dailey's original trial

CERTIFICATION PURSUANT TO FLA. R. CRIM. P. 3.851 (e)

Pursuant to Fla. R. Crim P. 3.851(e)(2)(A) and (e)(1)(F), undersigned counsel hereby certifies that discussions with Mr. Dailey of this motion and its contents has occurred. Counsel has endeavored to fully discuss and explain the contents of this motion with Mr. Dailey, and that counsel, to the best of her ability, has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that this motion is filed in good faith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been filed with Clerk for the 6th Judicial Circuit, Pinellas County, and served upon Assistant Attorney General Christina Pacheco (Christina.Pacheco@myfloridalegal.com and capapp@myfloridalegal.com); Assistant State Attorney Sara Macks (smacks@co.pinellas.fl.us); Assistant State Attorney Kristi Aussner (SA6appealservice@co.pinellas.fl.us); and The Honorable Frank Quesada (bfedersp@jud6.org) on this 21st day of June, 2017.

Respectfully submitted,

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Filing # 58873621 E-Filed 07/11/2017 05:01:25 PM

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 1985-CF-007084-D
DEATH PENALTY CASE

JAMES DAILEY,

Defendant.
_____/

ANSWER TO SECOND SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

COMES NOW, the State of Florida, by and through the undersigned Assistant Attorney General, and hereby responds to the Defendant's second, successive motion pursuant to Florida Rule of Criminal Procedure 3.851, and in support thereof states the following:

FACTS AND PROCEDURAL HISTORY

This is the second, successive postconviction motion filed by Defendant, James Dailey. This case involves Dailey's 1985 murder of fourteen-year-old victim, S.B. *Dailey v. State*, 594 So. 2d 254, 255 (Fla. 1991). Facts at trial established that Dailey along with codefendant, Jack Pearcy, and their friend, Dwaine "Oza" Shaw, picked up S.B., her twin sister and their friend when they were hitchhiking. *Id.* The group went to a bar and later returned to Pearcy's house. *Id.* At some point S.B. went back out with other members of the group, and Dailey and

Pearcy eventually returned home without S.B. *Id.* Dailey's pants were wet and he was carrying something in his arms. *Id.* Later that morning, Dailey and Pearcy visited a self-service laundry and made plans to leave town. *Id.* at 256. That same morning, S.B.'s nude body was found floating in the water near Indian Rocks Beach. She had been stabbed, strangled, and drowned. *Id.*

The jury found Dailey guilty of first-degree murder and unanimously recommended death. *Dailey*, 594 So. 2d at 256. The trial court sentenced Dailey to death; however, on appeal the Florida Supreme Court found the sentencing procedure erred. The Florida Supreme Court affirmed Dailey's conviction, but reversed the sentence and remanded the case for resentencing. *Id.* at 259. Rehearing was denied March 19, 1992. *Dailey v. State*, 594 So. 2d 254 (Fla. 1991), *opinion corrected on denial of reh'g* (Mar. 19, 1991).

Upon the case being remanded, Dailey was resentenced before the trial judge. *Dailey v. State*, 659 So. 2d 246, 247 (Fla. 1995). Dailey again appealed his sentence to the Florida Supreme Court challenging various issues related to his resentencing without an entirely new penalty-phase jury, and Dailey also challenged the finding and weighing of mitigating circumstances along with the trial judge's refusal to disqualify himself. *Id.* at 248. The Florida Supreme Court found no error, and it affirmed his sentence of death. *Id.* at 248. The mandate was

issued May 25, 1995. Dailey filed a petition for writ of certiorari, which was denied January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

Dailey subsequently filed a motion for postconviction relief, which was denied after an evidentiary hearing. *Dailey v. State*, 965 So. 2d 38 (Fla. 2007). Dailey's motion included ineffective assistance of counsel/prosecutorial misconduct claims concerning Dailey's presumption of innocence, improper vouching for the credibility of witness Paul Skalnik, and an alleged misstatement of fact regarding when Shaw went to use the phone on the night of the murder. *Id.* at 43. Dailey also raised newly discovered evidence claims regarding Skalnik, Pearcy, and Shaw. *Id.* at 45-46. In addition, Dailey alleged that his counsel was ineffective for failing to use phone records to impeach Gayle Bailey, failing to cross-examine Skalnik about the circumstances surrounding his criminal charges, failure to use newspaper articles to impeach Skalnik's testimony, and failure to call Dailey to testify. *Id.* at 46-47. Dailey appealed the denial of relief to the Florida Supreme Court, and the court affirmed the court's denial of Dailey's postconviction claims.

Next, Dailey filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, in United States District Court, Middle District of Florida. *Dailey v. Sec'y, No.* 8:07-CV-1897-T-27MSS, 2008 WL 4470016, at *1 (M.D. Fla. Sept. 30, 2008). The

Department of Corrections filed a motion to dismiss the petition. The court dismissed numerous grounds and gave the parties the opportunity to address the merits of other grounds. *Id.* The court ultimately denied Dailey's remaining claims. *Dailey v. Sec'y, Florida 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 (M.D. Fla. Mar. 29, 2012).

Dailey also filed a successive motion for postconviction relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). The postconviction entered an order summarily denying relief on April 12, 2017. The appeal is currently pending in the Florida Supreme Court.

LEGAL ARGUMENT

CLAIM I

NONE OF THE EVIDENCE PURPORTED TO BE NEWLY DISCOVERED EVIDENCE IS ACTUALLY NEW; NONE OF THE EVIDENCE SHOWS THAT DAILEY IS INNOCENT; AND THE ENTIRE CLAIM IS PROCEDURALLY BARRED.

In his first claim, Dailey asserts that numerous statements and documents constitute "newly discovered evidence." Specifically, Dailey alleges that affidavits from Jack Pearcy, James Wright, and Michael Sorrento, along with Paul Skalnik's reputation for dishonesty, and Indian Rocks Beach Police reports all constitute this "newly discovered evidence."

Given that this second, successive motion has been filed well beyond the one-year time-period in which Dailey's judgment and sentence became final, Dailey's claims and sub-claims must be based on new evidence that would have been unknowable through the exercise of due diligence. *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008). To be considered timely filed as newly discovered evidence, his motion must have been filed within one year of the date upon which the claim became discoverable through due diligence. *Id.; Lambrix v. State*, 124 So. 3d 890, 901 (Fla. 2013).

To obtain a new trial based on newly discovered evidence, two requirements must be met: (1) the evidence must not have been known by the trial court, Dailey, or counsel at the time of trial, and it must appear that Dailey or his counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence must be of such nature that it would probably yield an acquittal less severe sentence. *Reed v. State*, 116 So. 3d 260, 264 (Fla. 2013) (quoting *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998)). Dailey has failed to meet these requirements.

Jack Pearcy

In his first sub-claim, Dailey asserts that an affidavit executed by codefendant Jack Pearcy in 2017 constitutes newly discovered evidence because Pearcy claims that Dailey was not

present when S.B. was killed, and Pearcy accepts sole responsibility for S.B.'s death. This claim is both untimely and procedurally barred.

This claim is nearly identical to one that Dailey raised back in 1999. In his previous claim, he alleged that "[s]ince the time of Mr. Dailey's trial, Pearcy has given a sworn statement exculpating Mr. Dailey from the murder of [S.B.]." (Exhibit B, p. 62). That claim was based on a statement that Pearcy made in 1993. (Exhibit B, pp. 62-63).

It appears that the only difference between Pearcy's 1993 statement and his 2017 statement is that his recent affidavit has now included the statement, "I alone am responsible for [S.B.]'s death." This was likely done in response to the postconviction court's previous ruling that the 1993 sworn statement was hearsay and would not have been admissible under the statement against interest exception because Pearcy did not take direct responsibility for the murder. (Exhibit C, p. 46).

Dailey has failed to show how the information contained in the 2017 affidavit constitutes newly discovered evidence that could not have been discoverable through due diligence when Dailey already knew of Pearcy's prior statement and the postconviction court ruled on that matter over twelve years ago. Dailey has made no effort to distinguish the 2017 affidavit from

previous evidence available to him, nor has he explained how this information only became discoverable within the past year.

Dailey has been denying involvement in the S.B. murder for decades, and the information contained in the affidavit is based on theories that Dailey has been asserting for years. Certainly, this was evidence that could have been discoverable through due diligence, as it was, in fact, already discovered given the previous statement from Pearcy. Therefore, this claim should be denied as untimely.

In addition, this claim is procedurally barred. "Claims raised and rejected in prior postconviction proceedings are procedurally barred from being re-litigated in a successive motion." *Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014). The postconviction court has already rejected Dailey's claim. Pearcy refused to testify during the evidentiary hearing, and, as previously mentioned, the court did not find his statement admissible. The court also determined that there were "no circumstances which indicate Mr. Pearcy's statement is reliable." (Exhibit C, p. 46). The court concluded that even if it were admissible, it would not result in an acquittal on retrial. Dailey is not entitled to now relitigate this claim. This court should deny this claim as procedurally barred.

However, even if this court were to address the merits of this claim, Dailey would not be entitled to relief. Dailey

certainly cannot show that this evidence would probably result in an acquittal or a life sentence. Notably, Dailey has not shown that Pearcy's affidavit would be admissible in court. The affidavit is hearsay, and the only applicable exception that could apply is the statement against interest hearsay exception. In order to be a statement against interest, it must subject the declarant to liability at the time of its making so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. § 90.804 (2)(c) Fla. Stat. (2016) In addition, a statement exposing the declarant to criminal liability that is offered to exculpate the accused is inadmissible unless corroborating circumstances show the trustworthiness of the statement. § 90.804 (2)(c) Fla. Stat. (2016).

It cannot be said that Pearcy would not have recently made the statements in the affidavit unless they were true. Pearcy has a life sentence, he has likely exhausted his appeals, and he now has nothing to lose. Additionally, Dailey has not offered any corroboration to show the trustworthiness of the statement. As correctly noted by the postconviction court, Pearcy would also have serious credibility issues.

Even if Pearcy's statement were to be admitted (or if he were to testify) indicating that he left the house and was alone with S.B. when she was murdered, there is still evidence that

Dailey and Pearcy returned to the house together, Dailey was not wearing his shirt, his pants were wet, and the victim was found in the water. The evidence established that after returning home with wet pants, Dailey and Pearcy went to a laundromat to wash clothes, they washed the car, packed up their belongings, and left town.

Pearcy's statement does not explain why Dailey was with him when he returned home, why Dailey's pants were wet, or why they decided to wash their clothes and leave town. Peacy's statement also does not explain why Dailey made incriminating statements to others.

The only explanation that has been provided by Dailey to minimize this extremely incriminating evidence of guilt is that Pearcy and Dailey decided to play Frisbee near the water during the early hours of the morning. Therefore, the jury would have to believe that after drinking, partying, and falling asleep, Dailey got back up again to play a game of Frisbee around 3:00 a.m. By the same token, the jury would have to believe that Pearcy killed S.B., returned home, woke up Dailey, and they both decided to drive to a different location near the water to engage in a friendly game of Frisbee.

Pearcy's updated statement would not have resulted in an acquittal. For all these reasons, this claim should be summarily denied.

James Wright and Michael Sorrentino

Next, Dailey alleges that James Wright and Michael Frank Sorrentino, who were housed at the Pinellas County Jail at the same time as Dailey, were interviewed by detectives, and Wright can attest to Dailey maintaining his innocence. In his 1999 postconviction motion, Dailey alleged that his trial counsel was ineffective for not calling Wright and Sorrentino to impeach Detective Halliday. (Exhibit B, p. 26). Just like in the instant motion, Dailey alleged that these two witnesses were approached by Detective Halliday prior to Dailey's trial and shown newspaper articles about S.B.'s murder. (Exhibit B, p. 26).

Dailey has essentially conceded that this evidence does not constitute newly discovered evidence since he admitted that his attorney should have called these witnesses to testify, and therefore, this evidence was either known by his counsel or could have been discovered through due diligence at the time of trial. *See Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008) (where Hitchcock essentially concedes that the evidence does not qualify as newly discovered evidence in a separate claim that his trial counsel was ineffective for not presenting that evidence).

Furthermore, Dailey testified during the 2003 evidentiary hearing that he been housed in several pods within the Pinellas County Jail, and the "police had been through those pods trying

to get people to testify against [him]." (Exhibit A, p. 324). He claimed that there were newspaper clippings around Pinellas County Jail. (Exhibit A, p. 328). Also, if Dailey had told Wright that he was innocent while they were in jail together, then Dailey would have had knowledge of that fact as well. This entire sub-claim is based on information that was known to Dailey decades before he filed his second, successive motion.

It is certainly not proper for him to now repackage his prior claims as newly discovered evidence when they were known to him at the time of trial. Not surprisingly, Dailey offers no explanation as to why he could not have previously presented this claim. Dailey has also failed to show how this evidence would have resulted in an acquittal. Accordingly, this sub-claim must be summarily denied.

Paul Skalnik

Next, Dailey claims that various pieces of "newly discovered evidence" show that witness Paul Skalnik was dishonest and he allegedly received a deal in exchange for this testimony or at least expected some consideration from the State in exchange for his testimony against Dailey. All this evidence has long been discoverable through due diligence.

In fact, these allegations have been made by Dailey before. Paul Skalnik has been the subject of extensive litigation. Dailey's initial postconviction motion alleged that Skalnik's

testimony about Dailey confessing was false, the State knew it lacked credibility, Skalnik had received a deal in exchange for his false testimony and had lied about not receiving a deal, and the State Attorney's Office was aware that Skalnik was being rewarded for his untruthful testimony, but it withheld that evidence. (Exhibit A, pp. 392-93; Exhibit B, pp. 56-58, 83).

During the previous evidentiary hearing, Dailey expressed his belief that Skalnik had been dishonest; Dailey knew that Skalnik "was a snitch," and Sklanik had to be watched closely because "he was a marked man in the county jail." (Exhibit A, pp. 318-19, 322-24). Dailey's trial attorney, Henry Adringa, admitted that the "public defender had a file on Mr. Skalnik and Mr. Skalnik was well known throughout." (Exhibit A, p. 400). Dailey's former postconviction counsel referred to Skalnik as a liar who lacked credibility. (Exhibit A, p. 398). Therefore, all of the "new evidence" that the current postconviction counsel has found is cumulative of the allegations already made by Dailey and his former counsel.

Notably, in ruling on Dailey's prior claims concerning Skalnik, the postconviction court found that there was no evidence of preferential treatment in exchange for Skalnick's testimony, and there was also no evidence known to the State which would have shown that Skalnick did not speak with Dailey in order to obtain his confession. (Exhibit C, p. 41). Given

that his claim is based on allegations previously litigated and rejected, it is both untimely and procedurally barred.

Even if this were newly discovered evidence, Dailey has not met his burden of establishing entitlement to relief. Significantly, Dailey has not even shown that this evidence would be admissible. Further, the jury knew that Skalnik had testified in various cases and he had already been cross-examined on his motives for testifying in Dailey's case. Additionally, this evidence only relates to Skalnik; both Lames Leitner and Pablo Dejesus testified about Dailey's admissions, and there was wealth of additional evidence that established Dailey's guilt.

If this "newly discovered evidence" were presented to impeach Skalnik at trial, it certainly would not produce an acquittal. This sub-claim should be summarily denied.

Indian Rocks Police Reports

In his last sub-claim, Dailey asserts, without explanation, that his current postconviction counsel has found numerous police reports by detectives from the Indian Rocks Beach Police. Significantly, Dailey fails to explain when these documents were located and how they were obtained. Case records show that Dailey made a public records request to various law enforcement agencies, including the Pinellas County Sheriff's Department, Indian Shores Police Department, and Florida Department of Law

Enforcement. (Exhibit E). Indian Rocks Police Department was not listed on the records request.

In 1999, the circuit court entered an order declaring substantial compliance with Dailey's requests for public records. However, Dailey's previous postconviction attorney raised a postconviction claim about not having access to the Indian Rocks Beach reports. (Exhibit A., p. 377, Exhibit C, p. 41). While Dailey's former postconviction counsel was granted an evidentiary hearing on the claim, he abandoned it at the evidentiary hearing.

Dailey has failed to meet his burden of showing due diligence. Dailey knew that the murder occurred in Indian Rocks Beach, and the Indian Rocks Beach Police had some involvement in the investigation. Dailey has not shown how these reports could not have been ascertained through due diligence.

Dailey's trial counsel would have known about these documents, and Dailey's initial postconviction counsel certainly was aware of them, but now twenty years after Dailey's postconviction counsel raised a claim regarding these reports, Dailey is now claiming that these reports constitute newly discovered evidence. This claim should be dismissed as untimely.

Even if this motion were timely filed and the reports were not discoverable through due diligence, Dailey cannot meet his burden of showing that this evidence would produce an acquittal.

It appears that the reports are not based on interviews conducted by detectives from Indian Rocks Beach, but rather, they are notes made by officers from Indian Rocks Beach based on interpretations of interviews conducted by detectives from Pinellas County Sheriff's Office. Therefore, they are hearsay, and Dailey has failed to offer any exception that would permit them to be admissible.

Even if the reports were admissible, they would not weaken the case against Dailey to give rise to a reasonable doubt as to his culpability. The contents of the report at issue relate to trial witness Oza Shaw. If Shaw were to testify in a manner consistent with the police reports, he would be subjected to a cross-examination about why he left some of those details out of his previous testimony. (Exhibit A, pp. 349-49). Shaw never mentioned that Dailey was at the house when he returned from using the public telephone, instead Shaw had maintained that when he returned to the house, Gayle Bailey was the only person he saw there.

In addition, Shaw's new statement does not exculpate Dailey. If Dailey had been at the house when Shaw returned home, Dailey still would have left later with Pearcy. Shaw's statement does not establish that S.B. would have been dead before Dailey left the house. Shaw merely stated that he did not see "the girl" with Pearcy when he returned home, but that does not mean

that she was not in the car, at another location, or even in another part of the house.

Shaw's statement also consistently maintains that Dailey returned early in the morning with wet pants and walking "bow-legged." Shaw stated that Dailey and Pearcy were very quiet when they woke back up that morning. They did their laundry, washed the car, were whispering to each other about something and later left for Miami. Shaw also indicated that very little was said during the drive to Miami, and after Dailey left Miami, Pearcy seemed less nervous. Dailey has not shown how this evidence would have resulted in an acquittal.

Based on the foregoing, this entire claim is untimely, procedurally barred, and meritless, and summary denial is appropriate.

CLAIM II

DAILEY HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT ANY *GIGLIO* VIOLATION OCCURRED.

In his second claim, Dailey blames the State of committing two violations of *Giglio v. United States*, 405 U.S. 150 (1972), by allegedly failing to correct Paul Skalnik's dishonest trial testimony and for the manner in which it impeached postconviction witness Oza Shaw. 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." *Wyatt v. State*, 71 So. 3d 86, 101 (Fla. 2011).

As will be shown below, Dailey has not established that any *Giglio* violations occurred. While Dailey's title of this claim also alleges errors in violation of *Brady v. Maryland*, 373 U.S. (1963), Dailey has failed to assert any *Brady* violation, and, therefore, any *Brady* allegation should be denied as improperly pled.

Paul Skalnik

Dailey first contends that Skalnik lied about his criminal history by failing to disclose that he had been charged with a crime of violence, and the State knew the testimony was false but failed to correct it. Dailey concludes that the jury was left with a false impression of Skalnik's criminal history due to the false testimony.

Dailey has cited the following trial testimony in support of his claim:

> Q. Sir, how bad were your charges?
>
> A. They were grand theft, counselor, not murder, not rape, no physical violence in my life.

Motion at 19. Dailey concludes that because Skalnik testified "not murder, not rape, no physical violence," he was concealing his charge of lewd and lascivious assault.

However, that statement from Skalnik was taken out of context. The following colloquy presents an accurate picture of what Skalnik was referring to:

> Q. Mr. Skalnik, it's pretty common knowledge if you testify, you get consideration for that isn't it?
>
> A. You and I are going to differ on that.
> Counselor, if I faced four grand theft charges, three of them carried a maximum of five years in the State Penitentiary, I testified and after I had finished, spent two and a half years of which two years were in isolation, I received a maximum sentence on three out of the four cases. After two and a half years, I would have thought DOC would have ended my time. Instead, I was ten months in a maximum security prison in the State of Arizona 3000 miles away, where I was assaulted on September of '84.
> Does that sound like a good deal?
>
> Q. Sir, how bad were your charges?
>
> A. They were grand theft, counselor, not murder, not rape, no physical violence in my life. Does that sound like a good deal?
>
> Q. I am saying whether it's a good deal or not, It's pretty common knowledge over in Pinellas County Jail, that if you testify, you get a deal; right.
>
> A. I am an example to prove that's not common knowledge. I am sorry. I differ with you.

(Exhibit D, pp. 1158-59).

It is clear from this testimony that Skalnik was referring to specific charges and the sentences he received after he had testified in other cases; he was referencing those specific charges as an example to show that he did not receive a benefit for his testimony. That example was immediately followed by the

question, "how bad were your charges." Skalnik advised that they were grand theft, because those were the charges he was referencing in his example.

Dailey has not shown that Skalnik's testimony was false, nor has he shown that the State knowingly presented false testimony. *See State v. Woodel*, 145 So. 3d 782, 807 (Fla. 2014); *Rodriguez v. State*, 919 So. 2d 1252, 1270 (Fla. 2005). The State had no need to correct Skalnik's testimony, because there was no evidence showing that it was untrue.

Even if the statement had been false and the prosecutor had known it to be so, Dailey has failed to explain how that testimony would have been material when the jury already knew that Skalnik had committed various crimes and had testified against other defendants numerous times. *See Moore v. State*, 132 So. 3d 718, 726 (Fla. 2013) (where the existence of a plea deal was not material because the jury knew that the witness had already been offered a plea deal). Whether Skalnik had been charged with the additional crime of lewd and lascivious assault would not have made him any more or less credible considering what the jury already knew about him. Summary denial of this claim is appropriate.

Oza Shaw

Next, Dailey alleges that the State improperly attempted to impeach Shaw during this testimony at the postconviction

evidentiary hearing. While Dailey presents this claim as a *Giglio* claim, he has completely failed to allege how the State elicited material testimony from Shaw when the State knew it was false. The record reflects that Shaw's testimony at the postconviction hearing differed from his trial and deposition testimony, and the State was merely asking Shaw why it was different.

During Shaw's testimony at the postconviction evidentiary hearing, he stated that Pearcy drove him to the phone booth and S.B. was in the car with them, but Dailey was not. (Exhibit A, p. 340). After making phone calls, Shaw walked back to the house. (Exhibit A, p. 342). He stated that Gail Bailey was at the house when he returned, and after speaking with her, he went to bed. (Exhibit A, pp. 342-43). He woke up later when Pearcy returned home. Pearcy went straight to Dailey's room, and they both left the house together. (Exhibit A, p. 343). Shaw stated that he did not see S.B. when Pearcy returned home. (Exhibit A, p. 344). Shaw went back to bed and later observed Dailey and Pearcy return to the house, and Dailey's pants appeared to be wet. (Exhibit A, p. 344). Shaw had never mentioned the part about Pearcy returning home to get Dailey in his trial testimony or his deposition.

Dailey's attorney asked Shaw why he never stated that Pearcy returned to the house to get Dailey when he testified

during Dailey's trial in 1987. (Exhibit A, p. 345). Shaw contended that, "No one ever asked me. That never even came up." (Exhibit A, p. 345).

During cross-examination, the prosecutor asked why Shaw never relayed that information to Detective Halliday when he was interviewed by him. (Exhibit A, p. 346). The prosecutor also asked Shaw about his deposition testimony in which he stated that he did not see Dailey in the house when he returned after making the phone call. (Exhibit A, p. 347-49, 351-52). The prosecutor continued.

> Q. Then you had three opportunities to say no Jack [Pearcy] went in to Jim [Dailey's] bedroom. Is this the first time you have testified to that, Mr. Shaw?
>
> A. No, as far as documented probably.
>
> [...]
>
> Q. How long have you known that?
>
> A. Since the beginning.
>
> Q. Since you were interviewed by detective Halliday in May of 1985?
>
> A. Yes, I knew it but I don't know how it didn't come out.

(Exhibit A, p. 352, 356).

At the outset, Dailey has failed to show how this claim is timely, given that it is based on statements made before trial, during trial, and at the evidentiary hearing. To the extent that Dailey might be arguing that his claim is based upon the newly

discovered evidence of the Indian Rocks Beach Police Report, Dailey has failed to show that the 1985 report is newly discovered. Even if it were, Dailey's claim still fails because Dailey has altogether failed to show how Shaw's testimony was false, and how the State knew that it was false but elicited it anyway. The State was merely asking Shaw why his testimony differed from previous testimony.

Shaw's statement was also not material. During trial, Gayle Bailey testified that when Shaw returned from using the pay phone, Dailey was not in the house. (Exhibit F, pp. 953, 970, 972-3). Accordingly to Bailey, she, Pearcy, Dailey, and S.B. were all going to drive S.B. home. They stopped back at the house first and Bailey used the bathroom, but when she was finished, Pearcy, Dailey and S.B. had already left. (Exhibit F, pp. 969, 972). According to Bailey, Pearcy, Dailey and S.B. left together, and Dailey and Pearcy returned together. (Exhibit F, pp. 958,972, 976, 978).

If Shaw's statement in the Indian Rocks Beach report were admissible, Shaw could be impeached by his prior testimony which was also consistent with Bailey's trial testimony. Additionally, Shaw's version of events in the Indian Rocks Beach report does not deny that Dailey and Pearcy returned home together and Dailey was wearing wet pants. Shaw's statement was clearly not material. Dailey has not met his burden of showing entitlement

to relief. This untimely, procedurally barred, and meritless claim must be summarily denied.

CLAIM III

NO NEWLY DISCOVERED EVIDENCE ESTABLISHES DAILEY'S INNOCENCE, AND DAILEY HAS NOT PRESENTED ANY EVIDENCE PROVING THAT HE IS ACTUALLY INNOCENT.

Florida law does not provide for a freestanding claim of actual innocence. *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008). Instead, sufficiency of the evidence is reviewed on direct appeal, and if new evidence subsequently surfaces, Florida law allows a defendant to bring a newly discovered evidence claim. *Id.* As previously argued and established, Dailey has failed to meet the test for newly discovered evidence.

Under federal law, actual innocence means factual innocence, and Dailey has not presented any new, reliable evidence establishing that he is "factually innocent of the crime." *Tompkins v. State*, 994 So. 2d 1072, 1089 (Fla. 2008). Instead, Dailey appears to be relying on generalized data about exonerations and nonspecific assertions about the public opinion surrounding the death penalty. Dailey has not presented any new, reliable evidence that would establish that no reasonable juror would have found him guilty. *House v. Bell*, 547 U.S. 518 (2006). This meritless claim must be summarily denied.

CONCLUSION

Every claim and sub-claim within Dailey's second, successive motion is legally insufficient to warrant an evidentiary hearing. Dailey's successive motion is untimely, and his factual claims are inadequate to support claims of newly discovered evidence and *Giglio* violations. Accordingly, the State respectfully requests that this court summarily deny Defendant's second successive postconviction motion.

Respectfully submitted,

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STATE OF FLORIDA

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CO-COUNSEL FOR STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of July, 2017, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Chelsea Rae Shirley, Maria E. DeLiberato, Julissa R. Fontan, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel-Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33637,

shirley@ccmr.state.fl.us, **deliberato@ccmr.state.fl.us**, **fontan@ccmr.state.fl.us**, and **support@ccmr.state.fl.us**; Sara Macks, Assistant State Attorney, Pinellas County Criminal Justice Center, 14250-49th Street North, Clearwater, Florida 33762-2800, **SA6appealeservice@co.pinellas.fl.us**; and a true and correct copy of the forgoing has been furnished via U.S. mail to The Honorable Frank Quesada, Circuit Judge, Pinellas County Criminal Justice Center, 14250 49th Street North, Clearwater, Florida 33762.

/s/ Christina Z. Pacheco
Co-Counsel for State of Florida

Filing # 58873621 E-Filed 07/11/2017 05:01:25 PM

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CASE NO. 1985-CF-007084-D
DEATH PENALTY CASE

JAMES DAILEY,

Defendant.
_____/

INDEX TO APPENDIX

Ex. A Excerpt of Transcripts from Evidentiary Hearing on, March 19, 2003.

Ex. B Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, dated November 12, 1999.

Ex. C Order Denying Amended Motion to Vacate Judgments of Conviction and Sentence with Special Leave to Amend, entered August 29, 2002.

Ex. D Excerpt of Paul Skalnik's Trial Testimony.

Ex. E Public Records Documents.

Ex. F Excerpt of Gayle Bailey's Trial Testimony.

ELECTRONICALLY FILED 07/11/2017 05:01:24 PM: KEN BURKE, CLERK OF THE CIRCUIT COURT, PINELLAS COUNTY

Respectfully submitted,

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/s/ Christina Z. Pacheco
Co-Counsel for State of Florida

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. **Case No. 1985-CF-007084**

James Dailey,
Defendant.
_____ /

STATE OF FLORIDA)
) ss
COUNTY OF SUMTER)

Affidavit of Jack Edward Pearcy, Jr.

I, Jack Edward Pearcy, Jr., declare on this 20th day of April 2017, and pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct:

1. My name is Jack Pearcy and I am an inmate at Sumter Correctional Institution. My DOC number is: 106311. I was James Dailey's co-defendant in the above mentioned case.
2. I was tried and sentenced to life imprisonment with the possibility of parole for the murder of Shelly Boggio.
3. On the evening of May 5, 1985, James Dailey, Gayle Bailey and I left my house in Seminole with Stacy Boggio, Shelly Boggio, and Stephanie Forsythe. We dropped Stacy Boggio and Stephanie Forsythe off at a nearby house or apartment.

4. James Dailey, Gayle Bailey, Shelly Boggio and I went to Jerry's Rock Disco where we drank and danced. Afterwards, we returned to my house in Seminole.
5. Gayle Bailey went into the bathroom. As Shelly and I were leaving the house, Oza Shaw – a friend who was staying at the house – asked me to drop him off at a pay phone so he could call his ex-wife.
6. Oza Shaw, Shelly Boggio and I left the residence in Gayle Bailey's car. James Dailey was not with us.
7. I dropped Oza Shaw off at the pay phone and left, alone, with Shelly Boggio.
8. I returned to the residence approximately one hour to one and half hours later alone. Shelly Boggio was not with me.
9. James Dailey was not present when Shelly Boggio was killed. I alone am responsible for Shelly Boggio's death.
10. I am available to testify at an evidentiary hearing and, if I am called to do so, I would testify consistently with this affidavit.

Jack Pearcy

FURTHER AFFIANT SAYETH NAUGHT.

Sworn and subscribed before me this 20th day of April, 2017, by Jack Pearcy, who is personally known to me or has produced the following identification:

inmate identification card

Notary Public, State of Florida

LISA M. BORT
MY COMMISSION # FF151342
EXPIRES: August 14, 2018

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT, IN AND
FOR PINELLLAS COUNTY, FLORIDA.

CASE NO. CRC85-07084-CF-A

STATE OF FLORIDA

vs.

JAMES DAILEY,

Defendant.

ORIGINAL

SWORN STATEMENT

of

JACK PEARCEY, JR.

Taken on March 19, 1993, at Florida State Prison, Starke, Florida, commencing at approximately 11:10 a.m.

Present was Brent D. Armstrong, Esquire, Druhill Professional Center, 611 East Druid Road, Ste. 308, Clearwater, Florida 34616.

JOHNS, STEPHENSON & ASSOCIATES
Court Reporters
116 NE Third Avenue
Gainesville, FL 32601
(904) 373-7778

JACK E. PEARCEY, JR.,

being first duly sworn, testifed as follows on

Examination By Mr. Armstrong:

Q Please state your name.

A Jack Edward Pearcey, Jr.

Q Mr. Pearcey, my name is Brent Armstrong. I'm an attorney. My office is located in Clearwater, Florida.

You and I have had a conversation prior to this statement regarding my purpose for being here, but I'd like to just repeat that so that it is on the record and talk about a few other things as well and then we'll get into the substance of your statement. Okay?

A All right.

Q As I advised you, I was appointed by the court in Pinellas County to represent Mr. Dailey on any kind of motion for post-conviction relief. Originally, I did some investigating into his case. However, for the past two years, I haven't done much until I was contacted by Mr. Swisher, who currently represents Mr. Dailey, to come up here and interview you.

Mr. Swisher was also court appointed to represent Mr. Dailey, whose sentence on his first degree murder case was reversed by the Florida Supreme Court. So, he currently has a resentencing hearing pending.

Whether or not that will be before a jury or simply before the judge, I don't know at this point. I know Mr. Swisher was pursuing trying to get him a complete new penalty phase.

In any event, Mr. Swisher asked me to come on up here and speak with you regarding any information you have that may help, hurt or just shed some light on the events which led up to Mr. Dailey's conviction for first degree murder.

Now, are you currently represented by an attorney?

A No, sir.

Q Is it your understanding that all of your appellate remedies in state court have been exhausted?

A Yes. At this point, I could still file the state habeas, but I'm not going to pursue that.

Q A state habeas you still can file or a federal habeas?

A Federal habeas.

Q Okay. So, as far as you know, you've done your direct appeal in state court and that was denied?

A Yes.

Q And then you've done some post-conviction relief in state court and that has been denied?

A Yes.

Q So, the avenue you have left is in federal court on a habeas proceeding?

A Yes.

Q Okay. And you don't have an attorney to represent you on that at this point?

A No.

Q One of the things we talked about was that this statement could be used against you if the federal courts give you a new trial in state court, do you understand that?

A Yes.

Q You and I have briefly gone over the facts of this case. Quite frankly, I had to refresh my recollection regarding the facts and I used the statement of facts which was contained in the brief that was prepared on behalf of Mr. Dailey. And I would like to read something into the record and then ask you about it.

On page four of that brief, it states that, quote, "Gayle Bailey testified that she lived with Jack Pearcey and James Dailey in Seminole, Florida, in May of 1985. Oza Dwaine Shaw from Olathe," O-l-a-t-h-e, "Kansas, was staying with them temporarily because of marital problems. Gayle was then pregnant with Jack Pearcey's baby and had subsequently given birth to the child, a boy who was almost two years old at the time of

the trial. Gayle said she had testified at Pearcey's trial and continued to visit him in prison occasionally.

"Gayle testified that on May 5th, 1986, she, Pearcey, Jim Dailey and Dwaine Shaw went to the beach, returning about five or six that evening. After dinner, the three men left for a few hours, returning with three women. They rolled and smoked a joint. Gayle reluctantly loaned Shelly Boggio her identification card and they all went out with the exception of Dwaine Shaw. They dropped off the two girls, but Shelly remained riding in the back seat with Dailey.

"They went to Jerry's Rock Disco and stayed about an hour. Shelly declined to dance with Jim but danced once with Jack with Gayle's permission. They returned home late, probably about midnight. Shaw was still there.

"When they went in the house, Shelly slumped in the chair as though she were drunk or something. Gayle went to the bathroom and, when she came out, Jack, Jim and Shelly were gone. Shaw was still on the couch. Gayle did not look in Dailey's bedroom to see if he was there. She was angry because Jack brought the girls home, danced with Shelly and left without her to take Shelly home."

Okay, I'm going to stop reading from the brief

and ask you about those several sentences that I just read. Is the last part of that correct, that when Gayle went to the bathroom, she came out, you, Jim and Shelly were gone?

A No. I had left with Shelly, and Jim, I don't know where he was. He could have been in his bedroom or wherever. And when Shelly and I left, Oza asked me to drop him off to make a phone call to his ex-wife, Rose, in Kansas and the three of us left and I dropped Oza off a couple blocks from the house at a quick trip type store.

Q And when you say the three of you left, who were the three that you're talking about?

A Shelly, myself and Oza.

Q Okay. Do you know where Jim was at that time?

A Could have been in the kitchen, his bedroom. I guess he wasn't in the bathroom because Gayle was in there, but I'm not specific on where he was.

Q All right. Do you recall when you returned to the house?

A Approximately an hour, ninety minutes later, something like that.

Q Okay. When you returned to the house, what happened?

A I went in, got Jim up. He was in his bedroom.

I told him, "Come on, let's go smoke a couple joints, drink a beer or something." He said all right. We got up and left.

Q Okay. Was Shelly with you at that time?

A No, Shelly was no longer with me.

Q She wasn't out in the car, waiting in the car or anything like that?

A No.

Q Okay. So, you had left with Shelly, then returned about an hour later without Shelly?

A Right.

Q Went into the house, got Jim. You and Jim then left?

A Yeah, went to Bellair Causeway.

Q Approximately how long were you and Jim gone?

A An hour.

Q An hour? So, you returned to your house approximately when?

A Two o'clock.

Q Did you see anybody when you returned? Was anybody up, Oza, Gayle --

A Oza and Gayle were in the living room.

Q Okay, reading from the same brief, this is on page six, "Oza Dwaine Shaw testified that he was presently incarcerated. He recalled that on May 5, 1986,

he, Jack and Jim rode around most of the day drinking beer. They spotted three girls hitchhiking at about three or four o'clock in the afternoon. The girls recognized the car and knew Jack and Jim. The six of them rode around drinking beer for another hour or two. Afterwards, they all went to the house in Seminole, where they drank more beer.

"Eventually, the others left and Shaw fell asleep on the couch. When he awoke, they had returned and Jack was leaving with Shelly. Shaw asked Jack and Shelly for a ride to the phone booth, where he called his ex-wife and his girlfriend. Dailey did not go with them. Shaw walked home after about an hour and found only Gayle there. He did not look in Dailey's bedroom.

"After talking to Gayle, he fell asleep until two or two-thirty in the morning when Jack and Jim returned. He noticed that Jim seemed to walk a little bowlegged and the inside of his pants were wet. There was no conversation. Everyone went to bed."

Is that correct?

A Yes.

Q Okay. So, he indicates -- apparently, he testified at trial, at least his testimony as summarized, that he did in fact leave with you and Shelly, was dropped off at a phone booth and then he returned to the

house, but Jim was not with the three of you when the three of you left originally --

A When we left.

Q Okay. I believe both Gayle and Oza testified that Jim's pants were wet. Do you have any idea how his pants got wet?

A Yeah. We went to the Bellair Causeway after I picked him up and was playing frisbee and he ended up going out in the water. When he went in the water, he went out there and then he was still staying out there while we was playing frisbee. We drank beer; we smoked a couple joints.

MR. ARMSTRONG: Okay, I think that's all I have.

(Thereupon, an off-the-record discussion was had.)

Q Okay, we're back on the record.

Mr. Pearcey, did you make a statement after your arrest to law enforcement or a representative of the state attorney's office in Pinellas County?

A Yes. At one time, along with my lawyer, **Ky Koch, we set up -- he set up for us to meet with the state attorney at that time and give a statement, which I did give a statement, and all the facts are the same except for in my statement I said Shelly was present in

the car when I came back and picked Jim up, which she wasn't, and I said Jim, her and I left and then I said -- made a statement as to what Jim had done, exonerating myself, which all of it, it was just a self-serving statement to exonerate myself.

Q So, you made that statement to help yourself out?

A Right. At that time, Jim wasn't even in custody. I was in custody and they were going to charge me and I was just trying to get around it, that's all, lay the blame somewhere else.

MR. ARMSTRONG: Okay, that's all I have.

(Thereupon, the proceedings were adjourned at 11:20 a.m.)

STATE OF FLORIDA

COUNTY OF ALACHUA

I, Karen L. Biery, Official Court Reporter and Notary Public, State of Florida at Large, do hereby certify that the witness, JACK PEARCEY, JR., was by me first duly sworn to testify the whole truth; that the foregoing statement given by said witness was reported by me in Stenograph, reduced to typewriting by my hand; and the foregoing pages, numbered 1 through 10, inclusive, constitute a true and accurate transcription of said proceedings.

I further certify that the statement was taken at Florida State Prison, Starke, Florida, commencing at approximately 11:10 a.m. on March 19, 1993.

I further certify that I am neither attorney nor counsel for any of the parties; nor a relative or employee of any attorney or counsel connected herewith; nor am I financially interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto affixed my hand and official seal this 7th day of April 1993.

Karen L. Biery

Karen L. Biery
Official Court Reporter
Notary Public, State of Florida

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE FLORIDA, IN AND FOR PINELLAS COUNTY
CASE NO. CRC85-07084CFANO

STATE OF FLORIDA,

Plaintiff,

vs.

JAMES DAILEY,

Defendant.

_____/

VOLUME II

AMENDED TRANSCRIPT

PROCEEDINGS: Hearing

DATE: January 3, 2018

BEFORE: The Honorable Frank Quesada
Circuit Court Judge

PLACE: Pinellas County Justice Center
14250 49th Street North
Clearwater, Florida 33762

REPORTED BY: Charlene Eannel, RPR
Court Reporter

(Pages 88 - 218)

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THE COURT: All right. Thank you, Counsel.

We left off in your case. You may proceed

MS. SHIRLEY: Yes, Your Honor. We would call Jack Percy as our next witness, Your Honor.

THE COURT: All right.

THE BAILIFF: It might be a second getting him up on the elevator, Judge.

THE COURT: I understand.

(Thereupon, the witness was duly sworn on oath.)

THE COURT: You may proceed.

MS. SHIRLEY: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. SHIRLEY:

Q. Would you please state your name for the record?

A. Jack Edward Percy.

Q. And, Mr. Percy, how old are you?

A. 62.

Q. And where do you currently reside?

A. In Pinellas County Jail.

Q. Where were you before the Pinellas County Jail?

A. Sumter Institution.

Q. All right. And have you ever been convicted of a felony?

A. Yes, ma'am.

Q. How many times?

A. I'm not sure right off the top.

Q. You how tall are you, Mr. Percy?

A. Five foot, eight.

Q. Do you know Mr. Dailey, James Dailey?

A. Yes, ma'am.

Q. Would you please identify him and point him out for the Court?

A. I'm not sure I recognize this dude in orange, but if he's in jail, it looks different from the last time I seen him.

Q. Okay. How do you know Mr. Dailey?

A. From 30-something years ago.

Q. Are you his codefendant in the case we're here about today?

A. I am.

Q. All right. Did you sign an affidavit in this case, Mr. Percy?

A. I did.

MS. SHIRLEY: May I approach the witness, Your Honor?

THE COURT: You may.

MS. SHIRLEY: For the record, I'm showing Mr. Percy what's been marked Defense Exhibit No. 5.

BY MS. SHIRLEY:

Q. Would you please look at that, Mr. Percy?

A. (Witness complies.)

Q. Is that the affidavit that you signed in this case, Mr. Percy?

A. Yes, it is.

Q. All right. Would you please turn to page 2?

A. (Witness complies.)

Q. Is that your signature there on the bottom of page 2 of Exhibit 5?

A. It is.

Q. Did you sign that affidavit under penalty of perjury?

A. I reckon, if that's the law.

MS. SHIRLEY: May I approach the witness, Your Honor?

THE COURT: You may.

MS. SHIRLEY: At this time, Your Honor, the Defense would move Defense Exhibit No. 5 into evidence.

MR. MARTIN: We object. It's hearsay.

MS. SHIRLEY: And, Your Honor, under Chambers v. Mississippi, this is a third-party admission of guilt. It clearly says that Mr. Percy alone committed the murder, and it's also a statement against interest.

MR. MARTIN: Judge, that's still an out-of-court

hearsay. There is no exception.

This case was -- is here in front of Your Honor because of that affidavit in order to take the testimony of Jack Percy. The only way that this goes forward any further, if Jack Percy testifies today, "I am solely responsible for the death of Shelly Boggio." You can't just put in an affidavit that says he swore to it and put it in. It's hearsay.

We need to hear it from Mr. Percy's lips.

THE COURT: Sustained.

MS. SHIRLEY: May I have a second, Your Honor?

THE COURT: Sure.

MS. SHIRLEY: Your Honor, the statement is an admission. It is sworn to. Under Chambers v. Mississippi, the State rules that hearsay cannot bar third-party admission of guilt. And the cite for that is Bearden versus State, 161 So.3d 1257, page 1264, 2015.

Furthermore, Your Honor, we would still ask His Honor to receive this affidavit into evidence as a proffer.

MR. MARTIN: Well, I don't know what I'll --

THE COURT: As a proffer, of course it goes into evidence or be received as --

MR. MARTIN: It --

THE COURT: -- evidence for the proffer for the Appellate Court to review.

MS. SHIRLEY: Yes, Your Honor.

MR. MARTIN: Right.

THE COURT: And that's fine.

MR. MARTIN: So it's in evidence as a proffer --

THE COURT: Yes, sir.

MR. MARTIN: -- as Defense Exhibit No. 4 for a proffer. What is the proffer?

THE COURT: The proffer is that document, period.

MR. MARTIN: Period. Okay.

BY MR. SHIRLEY:

Q. Mr. Percy, since you signed this affidavit, have you spoken to anyone from your family?

MR. MARTIN: Your Honor, I'm going to object. That's not relevant.

THE COURT: Counsel, what's the relevancy of that?

MS. SHIRLEY: (No response.)

THE COURT: Do you want to consult with cocounsel?

MS. SHIRLEY: Your Honor, may I approach the witness again?

THE COURT: You may.

BY MR. SHIRLEY:

Q. Mr. Percy, I'm showing you Defense Exhibit No. 5 again. Would you please look at that just briefly?

A. (Witness complies.)

MR. MARTIN: Judge, since she's showing him Defense Exhibit No. 5, are we still dealing with the proffer? I thought it was 4?

MS. SHIRLEY: I believe it's No. 5.

MR. MARTIN: Are we still dealing with the proffer? Because right now, it's only in as a proffer.

THE COURT: I have no idea.

MR. MARTIN: I have no idea, either.

THE COURT: Certainly, if it's a --

MS. SHIRLEY: May I ask the next --

THE COURT: -- prior written statement, it's being used to refresh his recollection. For the purpose of other than introducing it into evidence, I'll allow it.

Counsel, what's the -- but you're showing him --

MS. SHIRLEY: Defense Exhibit No. 5 --

THE COURT: -- which is Mr. Percy's affidavit, right?

MS. SHIRLEY: Right.

THE COURT: That's the one dated the 20th day of

April, 2017?

MS. SHIRLEY: Yes, Your Honor.

THE COURT: All right.

MR. MARTIN: It's in evidence as a proffer. It's not evidence of this hearing right now, it's in as a proffer. She keeps referring to it as being in evidence and it's not. It's in as a proffer.

THE COURT: And that's fair enough. I don't know if Mr. Percy knows the difference, but certainly it's in as a proffer for an Appellate Court to review, not in evidence in this case.

If you want to continue with the proffer, that's fine. If you want to ask questions, that's okay, too.

MS. SHIRLEY: Yes, Your Honor. I will ask questions.

BY MR. SHIRLEY:

Q. So, Mr. Percy --

MR. MARTIN: Excuse me. I apologize.

You said you want to continue as a proffer or to ask questions? I need to know what she's doing.

THE COURT: We're about to get that response here in a second.

Ma'am?

MS. SHIRLEY: We're going to be asking

questions, Your Honor.

THE COURT: Oh, so you're going to proceed with the case-in-chief?

MS. SHIRLEY: Yes, Your Honor.

THE COURT: All right. Thank you. Go ahead.

BY MR. SHIRLEY:

Q. Mr. Percy, I'm going to ask you a series of questions, and please let me know if they're true.

MR. MARTIN: Your Honor, whoa --

MS. AUSSNER: Objection --

MR. MARTIN: I'm going to object to this whole series of questions.

THE COURT: She didn't even ask the question yet, but I've got a gut feeling it's not going to be a proper question.

Mr. Percy, it's getting a little contentious I'm going to ask that you listen to the question, give me a moment to rule. And then, of course, if I sustain the objection, the attorney will ask you another question. If I overrule the objection, I'll look to you and ask you to please answer the question. All right?

THE WITNESSS: All right.

THE COURT: All right.

BY MS. SHIRLEY:

Q. Mr. Percy, just backing up. So you agree that you signed an affidavit in this case?

A. I did.

Q. Okay. And are the statements in the affidavit true?

A. No.

Q. Which statements in the affidavit are not true?

A. I'm not sure. There's quite a few lines on there.

Q. Okay. So now we're going to go through your affidavit line by line and just tell me if the statement is true.

MR. MARTIN: Your Honor, I object to that.

THE COURT: (Indiscernible) proffer.

MR. MARTIN: I object to that process. If they want to show it to him, he can say, it's this line, this line, and this line.

THE COURT: Well, however you wish to proceed. Counsel can do it any way you want, but we are in a proffer, but you're asking for him to basically attest to the -- certain portions of that affidavit at this point? He's under oath.

MS. SHIRLEY: Correct, he's under oath. And Mr. Percy said that some statements in the affidavit are not true, so now I'm asking him which of those

statements are not true.

THE COURT: All right.

MR. MARTIN: But that's not part -- that's not part of the proffer now. We're getting too substantive. We've gone --

MS. SHIRLEY: Correct.

MR. MARTIN: -- beyond the proffer. That's why I'm objecting to the process.

THE COURT: All right.

Counsel, the affidavit is in as a proffer to protect the record. And if you wish to ask any questions about that, I'll give you an opportunity to do so within a proffer. But certainly if I hear anything that I need to consider in the case-in-chief, I'll do it.

But at this point, understand, it's a proffer. If you want to have him look at that affidavit and tell you what's true and what's not true as far as the proffer goes, go ahead and do that. But if you find something that you think is interesting and would be admitted into evidence, you can then ask it in your case-in-chief.

MS. SHIRLEY: Yes, Your Honor.

THE COURT: So use this proffer for some discovery, if you so wish. Go ahead.

MR. MARTIN: We're in a proffer mode.

THE COURT: We are in the proffer mode, Counsel.

MR. MARTIN: Okay. I just want to make sure --

THE COURT: I understand.

MR. MARTIN: -- okay. We're still in a proffer.

THE COURT: Yeah. We don't have a jury present. And if it becomes relevant, we will -- all right.

Sir, you have an affidavit in front of you. Do you want to take an opportunity to read it, and Counsel is going to ask you a few questions about it.

BY MR. SHIRLEY:

Q. Have you had a chance to read the affidavit, Mr. Percy?

A. I have.

Q. Okay. And are there statements in the affidavit that you're now saying are not true?

A. I agree with 1 and 2, and I take the Fifth Amendment from that point forward.

THE COURT: Well, that's an interesting position. Are you telling me paragraphs 1 and 2 are true?

THE WITNESSS: The one marked 1 and 2. I don't know if they're -- if it's a paragraph.

THE COURT: Well, the number 1 and number 2 in your affidavit, one is that's your correct name, and

number 2, that you're tried and sentenced to life imprisonment. Both of those are true facts?

THE WITNESSS: Correct.

THE COURT: All right. Counsel, do you want to ask another question? You asked which ones were true?

MS. SHIRLEY: Yes, Your Honor.

THE COURT: And he's acknowledged that 1 and 2 were true.

Continue with your proffer, if you wish.

BY MR. SHIRLEY:

Q. Is line number three true?

A. I take the Fifth Amendment on that.

Q. Is line number four true?

A. The same thing, Fifth Amendment.

Q. Is line number five true?

A. The same thing, Fifth Amendment.

Q. Is line number six true?

A. Same thing, Fifth Amendment.

Q. Number seven?

A. Fifth Amendment.

Q. Number eight?

A. Fifth Amendment.

MS. SHIRLEY: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. SHIRLEY:

Q. And then is line number nine true, Mr. Percy?

A. Fifth Amendment.

Q. And line number ten?

A. Fifth Amendment.

MS. SHIRLEY: Your Honor, I don't think Mr. Percy can take the Fifth Amendment since he's already been tried and convicted for this.

THE COURT: I don't think he can, either. And if any of you have a particular motion, I will hear it.

MS. SHIRLEY: We're going to ask Your Honor to instruct the witness to answer the question.

THE COURT: All right.

State, do you want to be heard on this?

MR. MARTIN: Not right now.

THE COURT: Okay.

Mr. Percy, I don't understand your position, as far as the Fifth Amendment goes. We're talking about a crime that you have been convicted of, and certainly I don't believe the State could try you twice for the same crime.

And understand, that I'm going to compel your testimony, which, in some extent, may grant you some

sort of use immunity anyway, if you do answer the question, if the State decides to prosecute you.

But at this point, I'm going to direct that you answer the question as to whether line three is correct.

MR. MARTIN: Judge, before you do -- I apologize, but may Counsel and I approach?

THE COURT: Sure. Come on up.

(Sidebar conference was held.)

THE COURT: Do you want the witness present for this discussion?

MR. MARTIN: It will be real short, Judge. I don't believe you compelling him grants him any type of use immunity.

I'm concerned about that statement that you made to him, "I will grant use immunity," but that's an executive function. You could compel him (inaudible) only recourse. If he does not answer, you can hold him in direct contempt, but I don't think it gives him any type of use immunity. I didn't want that to be in his head to come back later.

THE COURT: All right. Thank you.

(Sidebar conference was concluded.)

THE COURT: Mr. Percy, I'm instructed that granting you any type of use immunity is purely an

executive function, which means that is something that the Governor of the fine State of Florida can do through the State Attorney's Office, but I cannot do that.

Nonetheless, I'm going to compel you to answer it and --

MR. MARTIN: Judge, I apologize again, but I had Counsel whisper in my ear. I forgot something. May we approach one more time?

THE COURT: Sure.

(Sidebar conference held.)

MR. MARTIN: Judge, I think in fairness to Mr. Percy, you need to explain to him and ask him about his Federal Court and make sure that he's exhausted all his State, exhausted his Federal, and then he's still eligible for parole.

Any statement made by him in the course of today could be used against him at future parole hearings, and inquire whether he wants an attorney to discuss that and with all those in mind, do you wish to --

MS. FERNANDEZ: That motion was --

THE COURT: I'm sorry.

THE COURT REPORTER: I can't hear her.

MS. FERNANDEZ: They made a motion about independent counsel, Your Honor, and that's the law

of the case. That's already decided. He's not entitled to independent counsel.

THE COURT: He has counsel.

MS. FERNANDEZ: He had his opportunity --

MS. AUSSNER: No, that's not --

MR. MARTIN: Not with regard with what future hardship may occur by any type of statement --

THE COURT: He does that at his own peril. I will instruct him that there could be some future problems with it, but I'm not here to advise you of any law.

(Sidebar conference concluded.)

THE COURT: Mr. Percy, again, I'm being asked to let you know that there can be some future repercussions. You may have some federal remedies. There may be some federal prosecution for which the State Court conviction and jeopardy would not apply.

But nonetheless -- and it may affect your -- any type of parole hearing, if you're subject to any type of parole, or may affect any type of future proceedings that you have either in State or Federal Court.

But, nonetheless, you signed the affidavit, and, at this point, I'm going to compel you to answer the question -- the question about whether paragraph 3 is

true and correct.

THE WITNESSS: No, I'm still invoking my Fifth Amendment right.

THE COURT: Which means you will refuse to answer the question?

THE WITNESSS: Correct..

THE COURT: All right. Fair enough.

What's your next question?

BY MR. SHIRLEY:

Q. Mr. Percy, since you signed the affidavit, have you had any contact or spoken to anybody from your family or the State?

MR. MARTIN: Your Honor, I'm going to object. That's a two-part question.

THE COURT: Sustained.

BY MR. SHIRLEY:

Q. Have you spoken to -- Mr. Percy, since signing the affidavit, have you spoken to anybody from the State?

A. Yes.

Q. Have you spoken to anybody in your family?

A. Yes.

Q. Who did you see -- who did you speak to from the State?

A. That, I'm not sure.

Q. Were they male or female?

A. Male.

Q. Who did you speak to from your family?

A. Pretty much all of my close family.

Q. Who does that include?

A. Mother, stepfather, son, daughter-in-law, sister, niece, a few of them.

Q. Okay. Are any of those people in court today?

A. I see two of them here.

Q. Who?

A. My mother and stepfather.

Q. Have they advised you not to testify, Mr. Percy?

MR. MARTIN: Your Honor, I'm going to object to relevancy and hearsay.

THE COURT: That's not relevant, Counsel.

MS. SHIRLEY: May I proffer the answer, Your Honor?

MR. MARTIN: When you say, "They" --

THE COURT: Proffer, sure, if you want, but go ahead.

BY MS. SHIRLEY:

Q. Mr. Percy, has your mother advised you not to testify?

A. As I told you since you came back to see me after the affidavit, I spoke with all my family and they told me I needed to do what I thought was right, but that

I needed to not make a rash decision since my parole just got denied for seven years and think about what I was doing. That's what they advised me.

Q. Okay.

MS. SHIRLEY: May I have a moment, Your Honor?

THE COURT: Yes, ma'am.

MS. SHIRLEY: No further questions, Your Honor.

THE COURT: All right. Counsel, I find it's a rather unique situation. You had filed an affidavit, and using that as a basis to seek some legal remedy, then you present the very affiant who refuses to acknowledge the truthfulness of every meaningful assertion in that affidavit.

Where does that leave us?

MS. SHIRLEY: (No response.)

THE COURT: I mean, what do I do with that? I understand that the implications and whether the affidavit is in evidence or not, but still it's a bit problematic, in my modest opinion. But, again, you-all can explain that to me later on in your arguments and we'll take it from there.

MS. SHIRLEY: Yes, Your Honor.

THE COURT: Any further questions of Mr. Percy?

MS. SHIRLEY: Not from the Defense, Your Honor.

THE COURT: Counsel, do you wish to

cross-examine Mr. Percy?

MR. MARTIN: I do in regards to the affidavit and their proffer, since we do have a proffer.

THE COURT: Well --

MR. MARTIN: I'm not going beyond that.

THE COURT: I'm not too sure it's appropriate, either, but go ahead.

MR. MARTIN: Okay. We're not -- I'm not going into the substance of the affidavit. It's how the affidavit was procured.

THE COURT: Fair enough, Counsel. Go ahead. To that extent, I'll allow to you do it.

MR. MARTIN: May I approach the witness?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. MARTIN:

Q. Mr. Percy, let me direct your attention to Defense Exhibit No. 5 dated April 20th, 2017, the affidavit of Jack Edward Percy, Jr.

That's you, sir, correct?

A. Say --

Q. That's you?

A. Correct.

Q. It was signed on the 20th day of April 2017, correct?

A. Correct.

Q. On that day, did you provide Counsel with the information that's in this affidavit, or was this affidavit just handed to you?

A. It was given to me.

Q. Did you type up that affidavit?

A. No.

Q. Prior to you signing that affidavit, how many times did you meet with Counsel from Mr. Dailey's Defense team?

A. That's the first time I ever met with the lady that was speaking with me.

Q. The first time was before this affidavit?

A. Was when I signed that affidavit.

Q. And who did you meet with before you signed that affidavit?

A. I met with other people for the CCA, whatever organization, before.

Q. Okay. Prior to coming in the courtroom today, did you tell Counsel that you weren't going to testify?

A. Correct.

MR. MARTIN: Just one more minute, please? We appreciate your indulgence.

THE COURT: We've got all afternoon.

BY MR. MARTIN:

Q. Mr. Percy, how many parole hearings have you had?

A. Three.

Q. After each parole hearing, has a member of Mr. Dailey's Defense team come to see you?

A. I can't be sure one way or the other on that.

Q. But you had -- the most recent parole hearing, right after that, a member of Mr. Dailey's Defense team came to see you, right?

A. Correct.

Q. Now, the one before that, did a member of the Defense team come to see you, which would have been your second one?

A. Possibly. I'm not sure.

Q. All right. And your first one, did someone from his team come to see you and talk to you about Mr. Dailey's case and whether or not you would testify?

A. Oh, I'm not sure if they talked to me right after. Like I stated before, they talked to me through the years since we were convicted, but I can't say it was specifically after the parole hearing.

Q. All right. And in this particular case, you had a recent parole hearing and members of Mr. Dailey's team showed up?

A. In this case, yes.

MR. MARTIN: Thank you, Judge. I'm going to give this back to the clerk before I walk away with it.

THE COURT: Thank you.

Any redirect within the scope?

MS. SHIRLEY: Yes, Your Honor.

REDIRECT EXAMINATION

BY MS. SHIRLEY:

Q. Mr. Percy, members from Mr. Dailey's Defense team came to see you after your parole hearing, correct, not during your parole hearing?

A. No.

Q. No, not during, or --

A. No, not during. After, as you said.

Q. And when members of Mr. Dailey's Defense team arrived at the prison, did you ask them if we had anything for you to sign on this date that we're talking about, April, I believe, 20th?

A. State that one more time.

Q. When the attorneys for Mr. Dailey's Defense team showed up at Sumter Correctional --

A. You're talking about yourself?

Q. Yes. Did you ask us when we arrived if we had anything for you to sign?

A. You may have had that laying on the desk, and I may have asked you if you wanted me to sign that or something. I'm not real sure exactly how it went down.

MS. SHIRLEY: Thank you, Mr. Percy.

Just a moment, Your Honor.

That's all.

THE COURT: May this witness be excused from his subpoena?

MS. SHIRLEY: Yes, Your Honor.

THE COURT: Thank you, sir. You're excused from your subpoena. Have a safe journey.

THE WITNESSS: And I apologize to Shelly's family for any pain that I've caused.

UNIDENTIFIED WOMAN: Thank you.

THE COURT: You may proceed.

MS. SHIRLEY: We would call Lisa Bort (phonetic). She's in the witness room.

MR. MARTIN: Your Honor, as to the witness Ms. Bort, Ms. Bort is the one who notarized the affidavit. So if that's the case, are we still in the proffer regarding the affidavit? Because that's the only thing that it relevant to.

THE COURT: I have no idea. Let's take it on a question-by-question basis. I have no idea.

This is the notary of the affidavit?

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE FLORIDA, IN AND FOR PINELLAS COUNTY
CASE NO. CRC85-07084CFANO

STATE OF FLORIDA,

Plaintiff,

vs.

VOLUME I

JAMES DAILEY,

Defendant.

_____/

PROCEEDINGS: Hearing

DATE: January 3, 2018

BEFORE: The Honorable Frank Quesada
Circuit Court Judge

PLACE: Pinellas County Justice Center
14250 49th Street North
Clearwater, Florida 33762

REPORTED BY: Charlene Eannel, RPR
Court Reporter

(Pages 1 - 87)

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Also Present:

Seth Miller - Innocent Project

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Court.

THE COURT: You may proceed, Counselor.

DIRECT EXAMINATION

BY MS. FONTAN:

Q. Good morning.

Could you please state your name for the record, please?

A. Travis Smith.

Q. Thank you. And are you currently employed?

A. No.

Q. Are you disabled?

A. Yes, ma'am.

Q. Okay. And where do you currently reside?

A. 860 34th Avenue South, St. Pete.

Q. And do you know Mr. James Dailey?

A. Yes, I do.

Q. How do you know him?

A. We were incarcerated years ago together.

Q. Okay. Was this back when Mr. Dailey had a case originally in the mid 1980s?

A. Yes, it is.

Q. And did you meet him in the county jail?

A. Yes, ma'am.

Q. At the time you were also at the county jail, correct?

A. Correct.

Q. And do you remember seeing about Mr. Dailey's case on the news?

A. Yes, I do.

Q. Was it in newspapers?

A. Yeah. Well, it was on TV and then, yeah, they had papers about it.

Q. Okay. It's fair to say that there was extensive coverage on the case?

A. Yes, ma'am.

MR. HELLICKSON: Objection, Judge, as far as leading.

THE COURT: Sustained.

All right. This is a good time for everyone to take out your cell phones.

THE WITNESS: I'm sorry.

THE COURT: Oh, it's yours. All right. I thought it was someone out there.

It's a good time for everyone to take out your cell phones and be sure they're off, okay? I'm going to ask you to take the gum out of your mouth so our court reporter can --

THE WITNESS: All right. Sorry.

THE COURT: Not a problem.

All set? Counsel, you may proceed.

BY MS. FONTAN:

Q. Do you recall how extensive the news coverage was on Mr. Dailey's case?

A. Yes. It was on there quite a few times, and it showed scenes, it showed pictures of the alleged crime scene or whatever and, you know, the guy on -- they showed the scene.

Q. Okay. So the crime scene was one of the things depicted in the coverage?

A. Yes, ma'am.

Q. Now, while in the Pinellas County Jail, did you meet an individual or know an individual by the name of Pablo deJesus?

A. Yes, I do.

Q. Do you --

MR. HELLIICKSON: I will object to any kind of questioning about Mr. Pablo deJesus or Mr. James Lightner. They're not issues in this particular case. It's not relevant. We're objecting to any kind of reference to that -- those individuals.

THE WITNESS: Excuse me.

THE COURT: Well, it may be a little premature.

THE WITNESS: Yeah.

THE COURT: I will consider -- let's take it on a question-by-question basis.

Who are you talking about now?

MS. FONTAN: These were two, Pablo deJesus and Mr. James Lightner.

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: Yes, I do know who they were.

MS. FONTAN: Just give me a moment, Mr. Smith. One question at a time.

Your Honor, with respect to this testimony, I know obviously the State is continuing to object, but this testimony -- but the testimony that Mr. Smith is providing under --

THE COURT: Counselor, at this point, just ask the question, and if there's an objection, I'll deal with it, and we'll take it from there, all right?

MS. FONTAN: Yes, Your Honor.

BY MS. FONTAN:

Q. Now, did you also know a Mr. James Lightner?

A. Yes, I did.

Q. And did these individuals work at the law library in the county jail?

MR. HELLICKSON: I will object, as far as leading.

THE WITNESS: Well, they did work at the --

THE COURT: I will overrule that. That calls

for a yes or no.

THE WITNESS: Yes, they did work at the law library. In fact, they took the job that I once had.

BY MS. FONTAN:

Q. Okay. So you, yourself, used to work at that?

A. Yes, ma'am. I'm a paralegal, and I worked in the law library, and there was a situation where I was --

THE COURT: Sir, wait for the next question.

MS. FONTAN: We'll get to that.

THE WITNESS: Oh, I'm sorry.

THE COURT: Listen carefully to the question, and answer the question. If it requires any explanation, you will have an opportunity to provide that.

THE WITNESS: Yes, sir.

THE COURT: Go ahead, Counsel. What's your next question?

MS. FONTAN: All right. Thank you.

BY MS. FONTAN:

Q. Mr. Smith, with respect to the law library and the inmates who worked there, what did they do?

A. Well, the job was to assist other inmates coming to the law library who were trying to research a case or whatever or, you know, look for information because they had no outside -- they had no outside counsel, you know.

Some of them hadn't seen a public defender, and although many of them got appointed public defenders later, but at that time none of them had, so people go in there to seek a little research. You know, a person walking in there would try to assist them.

Q. Okay. Do you know if Mr. Dailey ever sought the assistance of Mr. deJesus or Mr. Lightner?

A. Well, I had an opportunity to be in the library a couple of times while he was there, because we shared a cell, but I never asked him -- but he never went and asked for a book, but he never discussed that with them.

Q. Okay. Did you ever see Mr. Dailey discussing his case?

A. Well, actually, no, simply because, you know, it was common practice that, you know, you would advise people that, you know, don't discuss your case with people in there because many of them -- just like those two, were -- you know, they were seeking information to try to help themselves.

Q. Okay. Now, you indicated that "those two" -- when you said "those two," do you mean deJesus and Lightner?

A. Yes, ma'am.

Q. And what type of information did they try to seek?

MR. HELLICKSON: I will object, Judge, as far as hearsay.

THE WITNESS: Excuse me?

MR. HELLICKSON: I'm objecting to hearsay.

THE COURT: All right. What's the question again, Counselor.

BY MS. FONTAN:

Q. Now, Mr. Smith, did you have an opportunity to observe -- did you have an opportunity to observe Mr. deJesus and Mr. Lightner discussing Mr. Dailey's case?

A. Yes, I did.

MR. HELLICKSON: Object, Judge, as far as relevancy, as far as hearsay.

THE WITNESS: Hearsay?

THE COURT: Overruled.

Sir, I'll handle the objections. You listen to the questions and answer those, all right?

THE WITNESS: Yes, sir.

BY MS. FONTAN:

Q. What did you observe?

A. Well, I was in the law library, and I observed those two had -- they would try to look --

MR. HELLICKSON: Object, Judge, as far as his observations as far as getting into any testimony of deJesus and Lightner.

THE COURT: Well, that's hearsay.

MR. HELLICKSON: It is certainly hearsay.

THE WITNESS: Huh?

THE COURT: All right.

MS. FONTAN: Your Honor, they are his observations.

THE COURT: What's the purpose of this?

MS. FONTAN: The purpose of this, Your Honor, is to undermine the testimony of Mr. Lightner and Mr. deJesus that claimed that Mr. Dailey had made some sort of a confession.

THE COURT: All right. You may proceed.

MS. AUSSNER: Your Honor, I apologize, but Mr. Lightner and Mr. deJesus are not any part of Claim 1B.

THE COURT: How does all that fit in?

MS. SHIRLEY: Your Honor, I believe Claim 1B was that the snitch testimony at trial was unreliable, and newly-discovered evidence from Mr. Smith goes to that.

THE COURT: All right. Overruled.

Go ahead.

BY MS. FONTAN:

Q. If could you please describe to us what you observed with Mr. --

MR. HELLICKSON: If I can just -- I'm sorry to interrupt.

It's not new-discovered evidence. He's already been listed in the post -- you know, Number 1, back in 2003, he was listed as a witness two different times, and he -- the Defense made the decision not to call him, for strategy purposes.

It's not relevant now to come into this particular case. There is no question as to newly -- not new-discovered evidence. It's already been discussed. It's already been raised in a post-conviction hearing back in 2003.

THE COURT: Ms. Fernandez, are you going to enlighten us on that person?

MS. DELIBERATO: Ms. Deliberato, Your Honor.

THE COURT: I'm sorry.

MS. DELIBERATO: Yes, Your Honor. And this is all certainly something that we can address in our written closing argument, but as Your Honor is aware, we've alleged this motion in several different ways, one being newly-discovered evidence, the second being ineffective assistance of prior post-conviction counsel --

THE COURT: Wasn't that already addressed, though?

MS. DELIBERATO: No, it was not, not post-conviction counsel. That's what they're saying.

THE COURT: Oh, post-conviction counsel?

MS. DELIBERATO: Under Martinez. It's in our motion. We argued it extensively at the case management conference. So the reason we're presenting this evidence, which Your Honor will review and so -- as will the Supreme Court, so will the Federal District Court regardless -- and that's why it's either newly discovered or it's ineffective assistance of initial review post-conviction counsel or, as in the record --

THE COURT: We'll leave it here. It gets proffered one way or another. Counsel, I'll take it and deal with these objections at the time that we get involved --

MS. MACKS: Your Honor, we want to add one final thing to the record.

THE COURT: Yes, ma'am.

MS. MACKS: That's that Martinez is not a State law claim. That's a Federal law claim.

There's no entitlement to an evidentiary hearing on ineffective post-conviction counsel in State Court. That does not exist. So to have testimony come forth in an evidentiary hearing in State Court

is highly improper on an ineffective assistance of post-conviction counsel claim, which is not even a valid post-conviction claim in State Court.

THE COURT: How is that a remedy in State Court?

MS. DELIBERATO: We wholeheartedly disagree, Your Honor. Well, a couple of ways. Number 1, it's -- it would be a claim raised that if it's barred in State -- I mean, Mr. Dailey has the right to present this evidence in State and/or Federal Court.

He has the right to effective assistance of post-conviction counsel in State Court also, under Spalding v. Dugger, which is a Florida Supreme Court case that we cited at our case management conference, and I don't have the cite with me, but the State does not get to say it's not allowed, but then when we get into Federal Court and say: Oh, there was no testimony presented as to that.

Mr. Dailey has the right under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and the corresponding provisions of the Florida Constitution, to present this evidence.

THE COURT: All right. I will deal with that issue in closings. Thank you. Thank you.

Go ahead.

MS. FONTAN: Thank you, Your Honor.

BY MS. FONTAN:

Q. Mr. Smith, between Mr. deJesus and Mr. Lightner, did you observe them discussing Mr. Dailey's case?

A. Yes, I did.

Q. What did you observe?

A. Well, when we came to know them as working (indiscernible). What they were doing is they would -- like, it was obvious they were trying to find out different elements of his case and try to piece together getting a story straight as to what they was going to say, because it was common practice for the State attorney --

MR. HELLICKSON: I will object.

THE WITNESS: -- to come over there --

MR. HELLICKSON: Hearsay.

THE COURT: Sustained.

THE WITNESS: I'm sorry?

THE COURT: Sustained as to the common practice argument.

Go ahead.

BY MS. FONTAN:

Q. So what you are telling us, you clearly observed Mr. Lightner and Mr. --

MR. HELLICKSON: Object, as far as her leading the witness, Judge.

THE WITNESS: That is --

THE COURT: Well, I think we're just picking up where we left off. Go ahead and get to that spot, Counsel. Ask the next question.

MS. FONTAN: Thank you, Your Honor.

BY MS. FONTAN:

Q. So it was clear to you from what you observed that Mr. deJesus and Mr. Lightner were fabricating the stories; is that correct?

A. That is correct.

Q. Thank you.

MR. HELLICKSON: Objection.

THE COURT: Sustained.

Let the witness testify, Counsel.

MR. HELLICKSON: Move to strike the witness.

THE WITNESS: That was kind of a common practice, because a lot of State Attorneys many times used to come over there. They used to offer funds and stuff for people to offer information about another person's case. That was common practice back in those days.

BY MS. FONTAN:

Q. Okay.

A. They did it often.

Q. Okay. And you never observed Mr. Dailey

speaking to either one of those two?

A. Never.

Q. Okay.

A. Actually, they both --

MR. HELLICKSON: Objection, Judge, as far as not answering the question.

THE COURT: Hold on. Let me have the objection, sir, and then I'll give you an opportunity to answer.

MR. HELLICKSON: He's already answered the question. I'm objecting to him going on and not answering the question at this point.

THE COURT: Listen carefully to the question and respond to the question.

THE WITNESS: That's what I'm saying. I was not finished.

THE COURT: No need to editorialize.

Go ahead, Counsel.

BY MS. FONTAN:

Q. Did it appear to you that Mr. --

MS. FONTAN: If I may rephrase, Your Honor. I apologize.

BY MS. FONTAN:

Q. Do you have information about whether Mr. DeJesus and Mr. Lightner were giving accurate information to the State regarding Mr. Dailey?

MR. HELLICKSON: Objection to --

THE WITNESS: I do have information about that. In fact --

MR. HELLICKSON: I will have to object as far as --

THE WITNESS: -- they --

THE COURT: Hold on one second.

MR. HELLICKSON: Also, as far as hearsay.

THE COURT: That calls for a yes-or-no answer and then --

MR. HELLICKSON: And speculation, Judge.

MS. FONTAN: It does not call for speculation, Your Honor.

THE COURT: Go ahead.

MS. FONTAN: That's based on what he observed.

THE COURT: Ask your question again.

MS. FONTAN: Okay.

THE COURT: I'll rule on the objection.

BY MS. FONTAN:

Q. The question was, Mr. Smith, do you have information about whether Mr. deJesus and Mr. Lightner were giving accurate information to the State?

A. Well, what I have to say is this --

MR. HELLICKSON: Object.

THE COURT: Well --

MR. HELLICKSON: That answer is yes or no.

THE COURT: Listen to the question. If you can answer it yes or no, do so. If it needs an explanation, I will give you that opportunity to explain your yes or no answer, but we need some sort of affirmative or negative response.

THE WITNESS: Yes, sir.

THE COURT: All right.

Next question.

BY MS. FONTAN:

Q. And what was that information?

A. The information was that they were being -- in fact, they was talking with the State attorney and they were trying to --

MR. HELLICKSON: I'm going to object to it as far as hearsay.

THE WITNESS: Well, I observed it.

THE COURT: All right.

MR. HELLICKSON: He didn't observe them -- what they were saying. He may have observed them talking, but not what they were saying.

THE COURT: All right. On the hearsay objection, I will overrule it.

Go ahead. Proceed.

BY MS. FONTAN:

Q. You may proceed to explain to us what you observed and heard.

THE COURT: Heard.

THE WITNESS: Yes, sir. Because, you know, I was there and it was -- the State Attorney was there. They was talking with the State Attorney. They were offering him -- they would continue to try to seek -- ask questions which several people wouldn't even talk to them because it was just common practice, sir --

MR. HELLICKSON: Object, Judge, as far as --

THE WITNESS: The State Attorney was --

MR. HELLICKSON: -- common practice. We're talking about this specific case.

THE COURT: Sustained.

Tell us what happened on this case. What did you see or hear about this case? Who are we talking about when you say "they"?

THE WITNESS: We're talking about the two people, Mr. deJesus and Mr. Lightner. They worked in the law library. They were, like, the law clerk --

THE COURT: Uh-huh.

THE WITNESS: -- supposedly. And they would sit there and they would plot. They would -- because the State Attorney had came over offering anybody to call

them with any kind of information regarding this case or that case.

THE COURT: You're talking about a conversation between Mr. Lightner and Mr. deJesus?

THE WITNESS: Yes, sir.

THE COURT: All right.

Go ahead, Counsel.

BY MS. FONTAN:

Q. And that conversation between Mr. Lightner and Mr. deJesus, did it relate to Mr. Dailey's case?

A. Yes. They were trying to --

MR. HELLIICKSON: Object, Judge --

THE WITNESS: Trying to --

THE COURT: Overruled.

Go ahead.

THE WITNESS: They were trying to collaborate a story together as to what they were going to say when they talked to the State attorney.

BY MS. FONTAN:

Q. And you were aware that that was not true?

A. I knew it wasn't true, but I know that they were -- you know, discovered that, yes, there was -- that was a plot that they had to try to get their sentence reduced. And the State Attorney reduced their sentence as result of them, you know, fabricating their story.

I was there and I knew them, and I knew that, and that was a common -- not being disrespectful, sir, but that was just a common practice from the State Attorneys --

MR. HELLICKSON: Object, Judge --

THE COURT: Sustained.

MR. HELLICKSON: -- this particular case.

THE COURT: Go ahead, Counsel.

BY MS. FONTAN:

Q. Now --

THE COURT: We're talking about this specific case, what you saw or heard, all right?

THE WITNESS: Yes, sir.

THE COURT: All right. Go ahead.

BY MS. FONTAN:

Q. Now Mr. Smith, did police detectives come to question or speak with you regarding Mr. Dailey's case?

A. Yes. There was a person that came to see me from -- it was -- in fact, it was an officer there. There was also a State Attorney came, and then there was also an attorney previously.

Q. Okay. Now, I'm speaking specifically with your time in the county jail. Were you interviewed by police regarding Mr. Dailey's case?

A. I was asked questions which I refused to answer.

Q. Okay. And what were the circumstances under which they asked the questions and you refused to answer?

A. Well, I kind of just didn't like police officers. I didn't talk to the police that much.

Q. Did they try to speak with you in the county jail?

A. Yes, ma'am.

Q. Okay. Was it a specific room?

A. Well, yes. They would pull you outside of the cell. They had -- like -- it's like a little room over there on the side where they would sit, and you would meet with an attorney or a State Attorney or whoever, yes.

Q. Okay. And when these individuals came, did they have any materials with them?

A. Yeah, they had information about different cases.

Q. With respect to Mr. Dailey's case, did they have information regarding Mr. Dailey's case with them?

A. Again, they asked questions about -- you know, about if we knew or heard of this, that, or about this case, or knew anything about this. And I just simply -- I didn't talk to them.

Q. Did they attempt to show you any newspapers?

A. They had newspaper clippings. There was a -- when we were right there, it was on the news. On -- you

know, on the news. There was pictures. It was like -- it was a picture of the water. It's a picture of the rocks up on -- I think it was Indian Rocks Beach. They had pictures or photos where it was on the news, yes.

Q. Okay. And did they show these items to you in an attempt to ask you about the case?

A. They showed me a couple papers which, like I said, I wasn't too interested in because I really didn't enjoy speaking with them.

Q. Okay. And you indicated that -- how many detectives was it?

A. If I'm not mistaken, it was two or three. I think -- I know it was two, but I think it might have been another -- another assistant or somebody. I don't know. I know it was two, yes.

Q. Okay.

A. And they came again on another occasion, two.

Q. Okay. Now, do you know an individual by the name of Jack Percy?

A. Yes.

Q. And where did you meet that individual?

A. Well, I met that individual in the county jail. He was in a cell over there. He was talking. And, you know, in fact, one time --

MR. HELLICKSON: I will object --

THE WITNESS: -- one time he asked --

MR. HELLICKSON: -- and just answer the question --

THE COURT: Hold on one second.

The objection is asked and answered?

MR. HELLICKSON: That's correct, Judge.

THE COURT: Overruled.

Go ahead.

MR. HELLICKSON: The question was had he met Percy before? He said, Yes. And then he started going on on his own as far as other details, which wasn't asked.

THE COURT: Again, just listen carefully to the question and answer the question.

THE WITNESS: Yes, sir.

THE COURT: Don't elaborate.

Go ahead, Counsel.

BY MS. FONTAN:

Q. Now, you met Mr. Percy in the county jail, correct?

A. Yes, ma'am.

Q. And were you aware that Mr. Percy was involved in Mr. Dailey's case?

A. I wasn't at the time, but he made it known that he was -- well, he told me that --

MR. HELLICKSON: I will object, Judge, to hearsay.

MS. FONTAN: Your Honor, this is going towards Claim 1A, with respect to Mr. Jack Percy, who has an affidavit where he said that he committed this crime alone and there are prior statements where he has given in the past, he's attempted to (inaudible) with those, but there are other witnesses out there who he has confessed to.

MR. HELLICKSON: But that's hearsay, as far as Jack Percy. He can't get into the statements of Jack Percy. We're here on Dailey. It's not Mr. Percy's claim.

MS. FONTAN: Your Honor --

THE COURT: As it applies to the claim --

MS. FONTAN: Your Honor --

THE COURT: -- I will go ahead and allow it.

MS. FONTAN: Thank you, Your Honor.

THE COURT: You can argue how it applies to the claim later.

Go ahead.

MS. FONTAN: Thank you, Your Honor.

BY MS. FONTAN:

Q. What did Mr. Jack Percy tell you about Mr. Dailey's case?

A. Well, he was saying that he was in jail. That they alleged that he was a codefendant, but he also said that, you know, he committed the crime himself and he said that he did it.

Q. So he indicated that he had committed the crime by himself?

A. Yes, he --

MR. HELLICKSON: I will object, Judge, as far as --

THE COURT: Sustained.

MR. HELLICKSON: -- repeating what the answer was.

THE COURT: Go ahead.

BY MS. FONTAN:

Q. I just want to make it clear for the record what Mr. Percy told you.

A. You know, we were sitting over there talking about -- because I worked in the law library previously. He said that -- he was talking about it. He asked me what I think. And he said that -- to me he said that, you know, that was his charge and his charge alone.

He said that, Well, they think he was with me or whatever. He said that he committed this crime, yes.

Q. Okay. Thank you.

MS. FONTAN: If I may have a moment, Your Honor?

THE COURT: Yes, ma'am.

MS. FONTAN: Your Honor, I have no further questions of this witness.

THE COURT: All right.

State, do you wish to inquire?

MR. HELLICKSON: Yes, Your Honor.

May it please the Court.

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. HELLICKSON:

Q. Good morning, Mr. Smith. How are you?

A. Good morning. How are you?

Q. Good. Thank you.

Mr. Smith, you've been listed in what's called a post-conviction hearing in this case. You had actually, I think at one point, talked to the Defense team after Mr. Dailey had been convicted in this case?

A. Actually, I think I talked to the Defense team prior to him going to trial.

Q. Okay. And you also spoke to the --

A. And after, yes.

Q. -- and afterwards, the post-conviction team?

A. (No response.)

Q. Right?

A. Yes.

Q. Yes. And you were listed as a witness for the post-conviction team in this case?

A. I don't know. I don't have that information.

Q. Let me show you --

A. I should have been.

Q. Let me show you State's Exhibit No. 17 into evidence and ask you to take a look at the second page, Number 29 and Number 42 on that, if you would, please.

A. That's 29, that's my name.

THE COURT: That's a pleading from this case?

MR. HELLICKSON: That's right, Your Honor.

THE COURT: I will take judicial notice.

THE WITNESS: 29 is my name. 42 is my name on here again.

BY MR. HELLICKSON:

Q. So your name is on here twice as a witness for the Defense?

A. I don't know where that comes from, but, yeah, that's my name.

MR. HELLICKSON: Judge, no further questions at this time.

THE COURT: All right.

MS. FONTAN: Your Honor, I have no further questions of Mr. Smith.

THE COURT: All right.

(Thereupon, the witness was duly sworn on oath.)

DIRECT EXAMINATION

BY MS. SHIRLEY:

Q. Good afternoon.

Would you please state your name for the record?

A. Juan Banda.

Q. Where do you reside, Mr. Banda?

A. In Cross City CI.

MR. MARTIN: Judge, would you have him speak up, please?

THE COURT: Yes, sir.

THE WITNESS: I'm at Cross City CI.

THE COURT: Okay. Thank you. Adjust that microphone where it's comfortable to you. Pull yourself up as close as you need to be. If you can reach under and grab it, that's what you can do.

BY MR. SHIRLEY:

Q. And Mr. Banda, do you know Jack Percy?

A. Yes, ma'am.

Q. All right. When did you first meet Mr. Percy?

A. I met him in 1985 in this county jail right here.

Q. All right. And when was the next time that you saw Mr. Percy?

A. I saw Jack in -- at UCI somewhere in the early

'90s.

Q. All right. And did you speak to Mr. Percy when you saw him at UCI?

A. Yes, ma'am, I did.

Q. And did Mr. Percy, during the course of that conversation, ever say anything about Mr. Dailey?

A. Yes. He told me Mr. Dailey was innocent --

MR. MARTIN: Your Honor, I will object, as far as hearsay.

THE COURT: The objection has been made and ruled upon.

Go ahead.

MR. MARTIN: Well, is this a proffer or you are saying it's not hearsay, Judge? That's what I am trying to --

THE COURT: I will allow it into evidence.

MR. MARTIN: You'll going to allow it into evidence as non-hearsay or as hearsay?

THE COURT: Well --

MR. MARTIN: We have to be able to argue it closing, Judge --

THE COURT: -- hearsay --

MR. MARTIN: -- and that's what we're trying to figure out.

THE COURT: Well, I appreciate all of that.

It's clearly hearsay. I will allow it for purposes of this hearing, and I will reserve ruling on it until we get to that point where somebody makes it relevant.

MR. MARTIN: Well, it's not a --

THE COURT: I understand your objection, sir, very clearly, and I appreciate it, believe me. But, at this time, I'm going to reserve ruling on it.

Go ahead. There's no jury here and it's not going to be prejudicial in any way, shape, or form. Go ahead.

BY MS. SHIRLEY:

Q. Mr. Banda, just to repeat the question, did Mr. Percy, during your conversation at UCI, ever say anything about Mr. Dailey?

A. Yes. He told me Mr. Dailey was innocent of the crime that he was sentenced to death row for it.

Q. All right. And can you again tell me approximately what year that was?

A. I was at UCI, so I got there in '92, so it had to be the first part -- no, I don't think no later than '96.

Q. Okay. And when was the next time you saw Mr. Percy?

A. I saw Mr. Percy again at Jackson CI somewhere --

I think, around 2005, 2007, somewhere in there I seen him.

Q. All right. And during this time did you speak to Mr. Percy again?

A. Yes. Somewhere in late 2007 Jack came to the library, and I worked in the reference department. We had reentry and pro plan material. He came down to see what we had to offer.

Q. All right. And during this conversation with Mr. Percy in the library, did he ever mention Mr. Dailey again?

A. I did. I asked him when James' parole hearing was. He told me that James was still on death row, and I asked him, "How is that possible?"

MR. MARTIN: Your Honor, again for the record, to preserve it, I'm going to object as far as hearsay. Then we can deal with it, but unless I object I lose the objection, so it's hearsay again for the same reasons.

THE COURT: And I certainly understand the objection and I will reserve ruling on it. I will note your objection to this entire line of questioning. That's all -- unless you can establish it's not hearsay, I'm probably going to consider it, but go ahead.

MS. SHIRLEY: Yes, Your Honor.

BY MR. SHIRLEY:

Q. Mr. Banda, what did Mr. Percy say about Mr. Dailey specifically.

A. He said that he was still on death row. I asked him, "How is that possible?" He said -- I said, "You told me that he was innocent," and he confirmed again that Mr. Dailey was innocent of the crime and he was sentenced to death row for it.

Q. And have you spoken to Mr. Percy since that time at Jackson CI?

A. No, ma'am.

Q. And, again, that was approximately 2007, 2008?

A. Yes, ma'am.

Q. And there's been no communication between yourself and Mr. Percy while you've been at the county jail?

A. No, ma'am.

Q. All right. Prior to me coming to see you, Mr. Banda, last summer, had anybody else from Mr. Dailey's defense team ever come to speak to you about this?

A. No, ma'am. You were the first one.

Q. Okay. And --

MS. SHIRLEY: Your Honor, may I approach the witness?

THE COURT: You may.

BY MS. SHIRLEY:

Q. Mr. Banda, I'm showing you what's been previously marked as Defense Exhibit No. 4. Could you take a look at that?

A. (Witness complies.)

Q. And do you recognize it?

A. Yes. That's the affidavit that I signed and wrote.

Q. All right. Did you write that affidavit?

A. Yes, ma'am. That's my handwriting.

Q. All right. Can you look at page 2 for me, please?

A. (Witness complies.)

Q. Is that your signature on the bottom of page 1 and 2?

A. Yes, ma'am.

Q. All right. Is everything in that affidavit consistent with what you testified here today?

A. Yes, ma'am.

Q. All right.

MS. SHIRLEY: Your Honor, at this time I would move the affidavit into evidence again as a third-party admission of guilt, which is an exclusion to hearsay.

THE COURT: Is that a third-party admission of

guilt?

MS. SHIRLEY: Yes, Your Honor.

THE COURT: All right. It's a pleading in this case; is it not?

MR. MARTIN: No, sir. This is his affidavit. We object to the affidavit coming in. The affidavit got I assume this hearing, but he's already testified.

And her question was, "Is everything you testified to here today the same as in the affidavit?" It's hearsay, so now --

THE COURT: It's cumulative hearsay.

MR. MARTIN: Correct, so we object to Defense Exhibit No. 4 being admitted as evidence.

THE COURT: I will admit it, take it, give it credit for whatever it is, and I'll be interested in your argument, counsel --

MS. SHIRLEY: Yes, Your Honor.

THE COURT: -- about how it's not.

Go ahead.

MS. SHIRLEY: One further question.

THE COURT: It will be received into evidence as Defense Exhibit what?

MS. SHIRLEY: 4, I believe.

May I approach the witness?

THE COURT: Yes, ma'am.

MS. SHIRLEY: Yes, Your Honor. Number 4.

THE COURT: All right.

(Whereupon Defendant's Exhibit 4 for identification was received in evidence by the Court.)

MS. SHIRLEY: One further question, Your Honor. Then I'm done.

THE COURT: I hope so.

MR. MARTIN: Apparently not.

THE COURT: No, sir.

BY MS. SHIRLEY:

Q. Mr. Banda, why are you testifying here today?

MR. MARTIN: Your Honor, I object. That's not relevant.

THE COURT: Sustained.

MS. SHIRLEY: No further questions.

THE COURT: Counsel, do you have any questions for this witness?

MR. MARTIN: Just two.

THE COURT: Go ahead and ask them.

CROSS-EXAMINATION

BY MR. MARTIN:

Q. Mr. Banda, Jack Percy has never told you that he was solely responsible for the death of Shirley Boggio,

has he?

A. No, sir. He did not tell me that.

Q. In fact, at no time has Jack admitted his guilt to you?

A. No, sir. He did not.

MR. MARTIN: No further questions.

THE COURT: All right.

MS. SHIRLEY: Judge, no further questions.

THE COURT: All right. Thank you, sir. You are excused from your subpoena. All right.

(Witness excused.)

MS. SHIRLEY: Your Honor, at this time, I think it would be prudent to take for the lunch break. That way --

THE COURT: Are we all set? All right. Let's go ahead and take an hour and five minutes to 1:15. Okay?

All right. Thank you.

(Lunch Recess taken.)

State Court Survey of *Chambers* Application

State	Codified Residual Hearsay Exception Exists	***Chambers* Applied Broadly** (state courts interpret *Chambers* as requiring a holistic reliability assessment, without enumerated factors or prerequisites)	***Chambers* Applied Narrowly** (state courts limit *Chambers* to a multifactor test or requires other reliability prerequisites)
AL		*Ex parte Griffin*, 790 So. 2d 351, 353-54 (Ala. 2000)	
AK	Alaska R. Evid. 803(23), 804(b)(5)		
AZ	Ariz. R. Evid. 807	*State v. LaGrand*, 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987)	
AR	Ark. R. Evid. 803 803(24), 804(b)(5)	*Patrick v. State*, 295 Ark. 473, 479, 750 S.W.2d 391, 394 (1988)	
CA		*People v. Babbitt*, 45 Cal. 3d 660, 684-85, 755 P.2d 253, 264-65 (1988), *as modified on denial of reh'g* (Aug. 25, 1988)	
CO	Colo. R. Evid. 807		
CT	Conn. Code Evid. § 8-9		
DE	Del. R. Evid. 807	*Demby v. State*, 695 A.2d 1152, 1156-57 (Del. 1997)	
FL			*Dailey v. State,* 279 So. 3d 1208, 1218 (Fla. 2019)
GA	Ga. Code Ann. § 24-8-807	*Drane v. State*, 271 Ga. 849, 853, 523 S.E.2d 301, 304-05 (1999)	
HI	Haw. R. Evid. 803(b)(24)		
ID	Idaho. R. Evid. 803(24), 804(b)(6)		
IL			*People v. Rice*, 651 N.E.2d 1083, 1087 (Ill. 1995)
IN		*Griffin v. State*, 763 N.E.2d 450, 452 (Ind. 2002)	
IA	Iowa R. Civ. P. 5.807	*State v. Paredes*, 775 N.W.2d 554, 564 (Iowa 2009)	
KS			*State v. Brown*, 904 P.2d 985, 991 (Kan. 1995)
KY			*Walker v. Com.*, 288 S.W.3d 729, 741 (Ky. 2009)
LA		*State v. Gremillion*, 542 So. 2d 1074, 1078 (La. 1989)	

ME		*State v. Mitchell*, 2010 ME 73, 4 A.3d 478, 487 n. 3	
MD	Md. R. Evid. 5-803(b)(24)	*Foster v. State*, 297 Md. 191, 207, A.2d 986, 994 (1983)	
MA		*Com. v. Drayton*, 473 Mass. 23, 35, 38 N.E.3d 247, 258 (2015)	
MI	Mich. R. Evid. 803(24), 804(b)(7)		
MN	Minn. R. Evid. 807		
MS	Miss. R. Evid. 803(24), 804(b)(5)		
MO			*State v. Smulls,* 935 S.W.2d 9, 21 (Mo. 1996)
MT	Montana Rules of Evidence Rule 803(24), 804(b)(5)	*State v. Patterson*, 291 P.3d 556 (Mont. 2012)	
NE	Neb. Rev. Stat. Ann. §§ 27-803(23), 27-804(2)(e)		
NV	Nev. Rev. Stat. Ann. §§ 51.075, 51.315	*Fields v. State*, 220 P.3d 709, 717 (Nev. 2009)	
NH	N.H. R. Evid. 807		
NJ		*State v. Cope*, 224 N.J. 530, 552, 135 A.3d 562, 574 (2016)	
NM	N.M. R. Evid. A Rule 11-807		
NY			*People v. Thibodeau*, 106 N.E.3d 1145, 1149 (N.Y. 2018)
NC	N.C. Gen. Stat. Ann. 8C-1, 803(24), 804(b)(5)	*State v. Barts*, 321 N.C. 170, 181, 362 S.E.2d 235, 241 (1987)	
ND	N.D. R. Evid. 807		
OH			*State v. Sumlin*, 630 N.E.2d 681, 685 (Ohio 1994)
OK	Okla. Stat. Ann. tit. 12, § 2804.1	*Primeaux v. State*, 2004 OK CR 16, ¶ 50, 88 P.3d 893, 904, *overruled on other grounds by Gordon v. State*, 2019 OK CR 24, ¶¶ 50-54	
OR	Or. Rev. Stat. Ann. § 40.460; Rule 803(28), 804(3)(h)	*State v. Cazares-Mendez*, 350 Or. 491, 503-04, 256 P.3d 104, 111 (2011)	
PA			*Com. v. Bracero*, 528 A.2d 936, 940 (Pa. 1987)

RI	R.I. R. Evid. 803(24), 804(b)(5)		
SC[1]			
SD	S.D. Codified Laws § 19-19-807		
TN		*State v. Brown*, 29 S.W.3d 427, 433-34 (Tenn. 2000)	
TX		*Potier v. State*, 68 S.W.3d 657, 662 (Tex. Crim. App. 2002)	
UT	Utah R. Evid. 807		
VT		*State v. Bergquist*, 2019 VT 17, ¶ 53, 211 A.3d 946, 963 (Vt. 2019)	
VA			*Lawlor v. Commonwealth*, 285 Va. 187, 239-46 (2013)
WA			*State v. Gardner*, 534 P.2d 140, 142 (Wash. 1975)
WV	W. Va. R. Evid. 807	*State v. Jenkins*, 195 W. Va. 620, 628, 466 S.E.2d 471, 479 (1995)	
WI	Wis. Stat. Ann. §§ 908.03, 908.045(6)		
WY	Wyo. R. Evid. 803(24), 804(b)(6)		

[1] South Carolina is the only state without a published opinion considering the applicability of *Chambers* to the admissibility of hearsay or a codified residual hearsay exception.