APPENDIX A

Supreme Court of Florida
Nos. SC20-934 & SC20-1529
James Milton Dailey, Appellant,
vs.
State of Florida, Appellee.
James Milton Dailey, Appellant,
vs.
State of Florida, Appellee.
September 23, 2021

PER CURIAM.

James Milton Dailey, a prisoner under sentence of death, appeals the circuit court's orders denying in part and dismissing in part his fourth successive motion for postconviction relief and dismissing his fifth successive motion for postconviction relief, which were filed under Florida Rule of Criminal Procedure 3.851, and dismissing his motion to perpetuate the testimony of Jack Pearcy. 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 Shelly Boggio. The facts of the crime have been described 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.
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> 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.

Dailey v. State, 965 So. 2d 38, 41-42 (Fla. 2007). The three inmates testified that Dailey had admitted the killing to them individually and had devised a plan whereby he would later confess when Pearcy's case came up for appeal if Pearcy in turn would promise

not to testify against him at his own trial. *Dailey v. State*, 594 So. 2d 254, 256 (Fla. 1991). Pearcy was tried first, convicted of first-degree murder, and sentenced to life imprisonment. *Id.* He refused to testify at Dailey's subsequent trial. *Id.* Dailey presented no evidence during the guilt phase. *Id.* He was found guilty of first-degree murder, and the jury unanimously recommended death. *Id.* At sentencing, Dailey requested the death penalty, and the court sentenced him to death. *Id.*

We upheld the conviction on direct appeal, but reversed the sentence, concluding that the trial judge had failed to give weight to mitigating circumstances, and that two aggravators were unsupported. *Dailey*, 594 So. 2d at 255, 258-59. On remand, the trial court once again sentenced Dailey to death, and we affirmed. *Dailey v. State*, 659 So. 2d 246, 247, 248 (Fla. 1995). Dailey's conviction and sentence became final in 1996, when the United States Supreme Court denied his petition for a writ of certiorari. *Dailey v. Florida*, 516 U.S. 1095 (1996).

Thereafter, we affirmed the denial of Dailey's initial motion for postconviction relief 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 motion for postconviction relief, *Dailey v. State*, 247 So. 3d 390, 391 (Fla. 2018), the denial in part and dismissal in part of his second successive motion, *Dailey v. State*, 279 So. 3d 1208, 1212 (Fla. 2019), *cert. denied*, 141 S. Ct. 689 (2020), and the denial in part and dismissal in part of his third successive motion, *Dailey v. State*, 283 So. 3d 782, 787 (Fla. 2019), *cert. denied*, 141 S. Ct. 234 (2020). We also denied another petition for a writ of habeas corpus and a motion for a stay of execution. *Id.*

On December 27, 2019, Dailey filed his fourth successive postconviction motion, alleging that a 2019 declaration from Jack Pearcy is newly discovered evidence that proves that Pearcy alone murdered Boggio. Pearcy was deposed on February 25, 2020, in advance of the evidentiary hearing. At the end of the deposition, Pearcy indicated that he had answered every question, had nothing more to say, and did not want to be brought back to court to testify in Dailey's case. At the evidentiary hearing in March 2020, Pearcy again refused to testify, as he has at past postconviction evidentiary hearings involving similar claims. Neither the judge, the attorneys, nor Pearcy's mother and stepfather were able to persuade him to testify.

The trial court subsequently entered an order denying in part and dismissing in part Dailey's fourth successive motion. With regard to the Pearcy claim, the court found that Dailey did not present any admissible evidence to support his claim that Pearcy confessed to committing the murder himself even if the court were to have considered Pearcy's deposition. The court dismissed as procedurally barred Dailey's claims that former trial prosecutor Robert Heyman had knowledge of Paul Skalnik's prior child sexual assault charge but allowed Skalnik's false testimony to stand uncorrected, and that newly discovered evidence established that Heyman committed fraud upon the court.

After filing his notice of appeal of the denial of his fourth successive motion, Dailey filed a fifth successive postconviction motion. We temporarily relinquished jurisdiction for resolution of the fifth successive motion by the trial court. Dailey also filed in the trial court a motion to take a deposition to perpetuate Pearcy's testimony. After hearing argument from the

parties, the trial court entered an order dismissing Dailey's fifth successive motion and the motion to perpetuate Pearcy's testimony. The trial court found Dailey's fifth successive motion untimely and noted that Dailey still had not obtained Pearcy's testimony in an admissible form. The trial court dismissed the motion to perpetuate as moot in light of the dismissal of the fifth successive motion. Dailey now appeals the denial/dismissals of his fourth and fifth successive motions and the dismissal of his motion to perpetuate.

II. ANALYSIS

A. Heyman's "Admission"

Dailey first argues that the trial court erred in summarily denying his *Giglio*[1] claim regarding former Assistant State Attorney Heyman's notes from Dailey's 1987 trial, which he alleges prove that the State knowingly elicited false testimony from Paul Skalnik and failed to correct it, specifically, Skalnik's testimony "that his prior criminal charges were 'grand theft, counselor, not murder, not rape, no physical violence in my life.'" Dailey claims that the notes tracked the testimony of Detective Halliday, who testified after Skalnik at the trial, and had the words "sex assault(s)" crossed-out in regard to Skalnik's criminal history. Because Skalnik was arrested in 1982 on a charge of lewd and lascivious assault on a child under fourteen, for which a "no information" was subsequently filed by the same State Attorney's office that prosecuted Dailey's case, Dailey asserts that the notes and Heyman's "admission" to a reporter in 2020 that the notes were his and that they were made during Dailey's trial in 1987 prove that the State knew

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

Skalnik testified falsely about his prior charge and allowed that false testimony to stand uncorrected, in violation of *Giglio*.[2]

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." Because a postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends on the written materials before the court, its ruling essentially constitutes a pure question of law and is subject to de novo review. *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010). In reviewing a trial court's summary denial of a motion for postconviction relief, this Court accepts the allegations in the motion as true to the extent that they are not conclusively rebutted by the record. *Hodges v. State*, 885 So. 2d 338, 355 (Fla. 2004).

The trial court did not err in dismissing this claim as untimely and procedurally barred. This claim is merely a repackaging of the claim in Dailey's 2017 successive motion that *Giglio* was violated based on Skalnik's false testimony about his criminal history at Dailey's trial. In 2017, Dailey alleged "that the State failed to correct Paul Skalnik's false trial testimony

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[2] A *Giglio* claim alleges that a prosecutor knowingly presented false testimony against the defendant. *Hunter v. State*, 29 So. 3d 256, 270 (Fla. 2008) (citing *Giglio*, 405 U.S. at 153). "A *Giglio* violation is demonstrated when (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the false evidence was material." *Green v. State*, 975 So. 2d 1090, 1106 (Fla. 2008) (citing *Guzman v. State*, 941 So. 2d 1045, 1050 (Fla. 2006)). False testimony is material "if there is a reasonable possibility that it could have affected the jury's verdict." *Id.*

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*, 279 So. 3d at 1216-17. Dailey asserted "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 [assault] on a child under fourteen years of age." *Id.* at 1217.

A *Giglio* claim alleges that a prosecutor knowingly presented false testimony against the defendant. The alleged false testimony in the 2017 claim and the instant claim is the same: Skalnik testified that his charges were "grand theft, . . . not murder, not rape, no physical violence in my life." Both *Giglio* claims allege that the same testimony is false. That Dailey now knows that Heyman authored the notes does not change the fact that the alleged false testimony is the same as it was in 2017. It is also irrelevant whether Heyman had actual knowledge that Skalnik's testimony was false because that knowledge would have been imputed to Heyman even if he did not have actual knowledge. *E.g.*, *Gorham v. State*, 597 So. 2d 782, 784 (Fla. 1992) (holding that the prosecutor is charged with constructive knowledge of evidence withheld by other state agents).

Even if this claim were timely and not barred, it is without merit because information regarding Skalnik's lewd and lascivious assault charge is immaterial under *Giglio*. As we stated in affirming the denial of Dailey's 2017 claim regarding Skalnik's lewd and lascivious assault charge,

> 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 [assault] 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.

Dailey, 279 So. 3d at 1217. There is still no reasonable possibility that information regarding Skalnik's lewd and lascivious assault charge would have affected the jury's verdict. Heyman's notes have no impact on the materiality of Skalnik's testimony. Thus, Dailey cannot meet the *Giglio* materiality prong and is therefore not entitled to relief on the merits of this claim.

Dailey also argues that the trial court erred in denying his claim that Heyman's "admission" regarding his notes constitutes newly discovered evidence warranting relief. The trial court also summarily denied this claim on the basis that it is procedurally barred and that Heyman's "admission" did not qualify as newly discovered evidence.

In order to obtain relief based on newly discovered evidence, a defendant must establish: (1) that the newly discovered evidence was unknown by the trial court, by the party, or by counsel at the time of trial and it could not have been discovered through due diligence, and (2) that the evidence is of such a nature that it would probably produce an acquittal or yield a

less severe sentence on retrial. *Davis v. State*, 26 So. 3d 519, 526 (Fla. 2009) (citing *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones II*); *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991) (*Jones I*)). Newly discovered evidence satisfies the second prong of the 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 I*, 678 So. 2d at 315).

The trial court did not err in summarily denying this claim because Dailey cannot establish that Heyman's "admission" is "evidence . . . of such a nature that it would probably produce an acquittal or yield a less severe sentence on retrial." In order to constitute newly discovered evidence, the evidence must be admissible at a retrial. *Williamson v. State*, 961 So. 2d 229, 234 (Fla. 2007). The trial court correctly concluded that Heyman's "statements are not relevant to Defendant's guilt or innocence and would not be admissible at a new trial." Evidence is relevant if it tends to prove or disprove a material fact. § 90.401, Fla. Stat. (2020). That Heyman authored the notes does not tend to prove or disprove a fact material to whether Dailey committed first-degree murder. Thus, Heyman's "admission" would not be admissible at a retrial. And even assuming the "admission" were admissible at a retrial, it would not weaken the case against Dailey so as to give rise to a reasonable doubt as to his culpability.

B. Pearcy's 2019 Declaration

Next, Dailey argues that the trial court erred in denying his newly discovered evidence claim based on a declaration executed by Pearcy in December 2019, which states, "James Dailey had nothing to do with the murder of Shelly Boggio. I committed the crime

alone. James Dailey was back at the house when I drove Shelly Boggio to the place where I ultimately killed her." Prior to the evidentiary hearing on this claim, Dailey took Pearcy's deposition in February 2020. At the end of the deposition, Pearcy announced that he had nothing more to say and did not want to be brought back to court to testify in Dailey's case. At the evidentiary hearing in March 2020, Pearcy refused to testify despite numerous attempts by the judge and his family to persuade him to do so, and the trial court refused to admit the February 2020 deposition as substantive evidence.

In denying this claim after the evidentiary hearing, the trial court concluded that there is no new, admissible evidence that Pearcy confessed to committing the murder by himself even if the deposition had been admitted, because during the deposition Pearcy repeatedly denied the truthfulness of the statement in the declaration that he was responsible for the murder. The trial court also noted that in 2019, this Court held that a prior affidavit in which Pearcy claimed sole responsibility for Boggio's murder was inadmissible hearsay and inadmissible as a third-party admission of guilt under *Chambers v. Mississippi*, 410 U.S. 284 (1973). *See Dailey*, 279 So. 3d at 1213-14.

The trial court did not err in denying this claim. In the prior Pearcy affidavit referred to by the trial court, Pearcy affirmed in 2017, "James Dailey was not present when Shelly Boggio was killed. I alone am responsible for Shelly Boggio's death." *Id.* at 1213. But Pearcy also refused to testify about any substantive assertion in the affidavit at the evidentiary hearing on that claim. After admitting that he signed the affidavit, he testified that its contents were not true. *Id.* When asked to identify the untruthful statements, he

responded, "I'm not sure. There's quite a few lines on there." *Id.* During a proffer, Pearcy stated that paragraphs one and two of the affidavit—which listed his name and status as an inmate and recognized that he had been convicted of murder and sentenced to life imprisonment—were true. *Id.* When questioned about the truthfulness of each remaining paragraph, Pearcy invoked the Fifth Amendment and refused to answer, even after the court compelled him to do so. *Id.*

Following the hearing on the 2017 claim, the post-conviction court concluded that the affidavit was inadmissible hearsay and inadmissible as a third-party admission under *Chambers*, and that because Dailey had failed to provide any admissible evidence, his claim failed the first prong of the *Jones* standard for newly discovered evidence. On appeal, we "agree[d] 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'" and also that it did not "qualify as a third-party admission of guilt under *Chambers*." *Id.*

As with the 2017 claim, the trial court here properly denied relief because Dailey failed to introduce any admissible evidence to support his claim that there is newly discovered evidence that Pearcy alone committed the murder. Dailey claims that the trial court erred in ruling that Pearcy's 2020 deposition was inadmissible as substantive evidence and makes a number of arguments in support of this claim. But even if we were to assume, without deciding, that the trial court did err in refusing to admit the deposition, we would still conclude that Dailey is not entitled to relief.

During the deposition, Pearcy repeatedly denied that he was solely responsible for the murder, contrary to what he had stated in his December 2019 declaration. Pearcy repeatedly explained that he lied in the 2019 declaration in order to keep Dailey from being executed and to keep Dailey's attorneys working on the case. Pearcy said he did this because his own appeals were exhausted and he had no advocacy for himself, so he hoped that Dailey's attorneys would keep working on Dailey's case and possibly discover new evidence that would ultimately help Pearcy's case. Thus, the deposition completely invalidates the claim that Dailey sought to support by its admission—i.e., that "[t]he December 18, 2019 declaration of Jack Pearcy proves Mr. Dailey is innocent and that Jack Pearcy alone murdered Shelly Boggio."

C. "Timeline" Evidence from Pearcy's 2020 Deposition

Next, Dailey argues that the trial court erred in denying his claim that testimony Pearcy provided at his 2020 deposition that he and the victim went out drinking by themselves immediately after dropping Shaw at a phone booth constitutes newly discovered evidence that establishes that Dailey could not have been present at the time and place of the victim's death when viewed in light of other admissible evidence. The trial court summarily denied this claim as untimely; we agree.

"To be considered timely filed as newly discovered evidence, [a] successive rule 3.851 motion [i]s required to [be] filed within one year of the date upon which the claim bec[omes] discoverable through due diligence." *Rodgers v. State*, 288 So. 3d 1038, 1039 (Fla. 2019) (quoting *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008)). In his fifth successive motion, filed in July

2020, Dailey framed this claim: "During Pearcy's February 2020 Deposition, Pearcy admitted, for the first time, that he went out drinking alone with Shelly Boggio on the night she was murdered immediately after dropping his friend, Oza Shaw, at a phone booth." In a footnote to the very next sentence of his motion, Dailey wrote, "Pearcy originally referenced a solo outing with Boggio in a statement to police on June 19, 1985. *See* Pearcy June 1985 Statement, R2 8511-12." Indeed, Pearcy stated, under oath, in 1985, "And then, like I said, just [Shelly Boggio] and I left. [Dailey] stayed there and Oza [Shaw] and Gail. And [Boggio and I] went down to TI Island and went in some bar called Hank's and had a beer or whatever or a drink." And in 1993, Pearcy testified, "I had left with Shelly, and [Dailey], 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."

Summary denial of this claim was proper because the alleged new information has been known to Dailey since 1985 or 1993. To the extent that Dailey claims this evidence is "new" because Pearcy admitted going alone with the victim to Hank's in his 1985 statement, but he claimed that this trip took place before midnight and made no mention of taking Shaw to the pay phone, and in his 1993 statement, he acknowledged dropping Shaw at the pay phone and thereafter being alone with the victim for an hour to an hour and a half but made no mention of a visit to Hank's, Dailey does not explain why Pearcy could not have been asked, through the exercise of due diligence, at least after the 1993 statement, whether he and the victim visited Hank's alone after taking Shaw to the pay phone. Nor

does he explain why it could not have been inferred in 1993 from the 1985 and 1993 statements that the visit to Hank's occurred after Shaw was dropped off at the pay phone. Thus, even if this evidence could be considered new to Dailey, he has not demonstrated that he could not have discovered it in 1993 through the exercise of due diligence.

D. Motion to Perpetuate

Dailey next claims that the trial court erred in dismissing his motion to perpetuate Pearcy's testimony, which was filed in conjunction with his fifth successive motion. The trial court dismissed the motion as moot due to fact that the purpose of the deposition would have been to prepare for an evidentiary hearing on Dailey's fifth successive motion, which it had dismissed. "The decision whether to grant a motion to perpetuate testimony lies within the discretion of the trial court." *Riechmann v. State*, 966 So. 2d 298, 310 (Fla. 2007) (quoting *Cherry v. State*, 781 So. 2d 1040, 1054 (Fla. 2000)). In light of the dismissal of Dailey's fifth successive motion, which we uphold today, we find no abuse of discretion in the dismissal of Dailey's motion to perpetuate as moot.

E. Cumulative Error

Finally, Dailey claims that the trial court erred in failing to conduct a cumulative error analysis. Dailey contends that he was entitled to a cumulative analysis based on his claim that there is newly discovered evidence that Pearcy confessed to committing the murder by himself, ASA Heyman's 2020 "admission," and Pearcy's 2020 deposition.

The trial court was correct that any alleged newly discovered evidence must be admissible not only to satisfy the newly discovered evidence standard and

constitute newly discovered evidence under the law but also to warrant a cumulative review of the evidence. As discussed above, the trial court correctly concluded that any "new" claims that Pearcy committed the murder alone based on his 2019 declaration and 2020 deposition are inadmissible and therefore do not constitute newly discovered evidence or warrant a cumulative analysis. The same is true for Heyman's "admission," which would also be inadmissible at a retrial, as explained above. Because each of Dailey's claims failed, he was not entitled to a cumulative review of the evidence.

As this Court stated in Dailey's previous postconviction appeals,

> 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.

Dailey, 279 So. 3d at 1216 (Fla. 2019); *see also Dailey*, 283 So. 3d at 791. Thus, the trial court did not err here in declining to conduct a cumulative analysis.

III. CONCLUSION

For the reasons above, we affirm the trial court's orders denying in part and dismissing in part Dailey's

fourth successive motion for postconviction relief, dismissing his fifth successive motion for postconviction relief, and dismissing his motion to perpetuate testimony.

It is so ordered.

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

LABARGA, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

LABARGA, J., dissenting.

In this case, there was *no* forensic evidence linking Dailey to Boggio's murder, and a significant component of the State's case was the testimony of three inmates who were housed in the same jail as Dailey while he awaited trial. These inmates testified that Dailey admitted to Boggio's murder, and given the lack of forensic evidence, this testimony was likely essential to the jury's finding of guilt.

In her concurring opinion in *Lightbourne v. State*, 841 So. 2d 431, 443 (Fla. 2003), Justice Pariente discussed the well-known concerns surrounding the reliability of inmate testimony. "Overall, because of the substantial risk of recantation, the State's reliance on jailhouse informants to obtain convictions has the potential for impacting both the finality of convictions and the integrity of the judicial process." *Id.* at 443. While *Lightbourne* involved an inmate's recantation of trial testimony, the underlying concern is the same in Dailey's case. Inmates are commonly "willing to stretch the truth in their own self-interest at the time of trial." *Id.*

Issues surrounding the trustworthiness of inmate testimony are not novel or uncommon, nor are they unique to Florida:

> Indeed, due to the suspect nature of jailhouse testimony and the question mark such testimony has left on the reliability of Illinois' death convictions, the State of Illinois Governor's Commission on Capital Punishment has recommended that its police, prosecutors, capital case defense attorneys, and judges receive periodic training on the risk of false testimony by in-custody informants. *See* State of Illinois, Report of the Governor's Commission of Capital Punishment, at 21, 27, 28 (2002).

Lightbourne, 841 So. 2d at 443 n.10.

Although Justice Pariente (joined by Justice Shaw) concurred specially with the majority opinion in *Lightbourne* affirming the circuit court's denial of postconviction relief, she did so while noting that "[i]n this case, there was substantial independent evidence to support the finding of guilt and the imposition of the death sentence without the testimony of the informants." *Id.* at 443. For example, evidence at trial revealed that pubic hair matching Lightbourne's and semen consistent with his blood type were found on the victim's body, and that he was found in possession of a necklace belonging to the victim. *Id.* at 442. No such evidence was presented in this case. In my view, the present case lacks such "substantial independent evidence." *Id.* at 443. Rather, Dailey's conviction and sentence of death exist under a cloud of unreliable inmate testimony.

The confidence in Dailey's conviction and sentence is further compromised by the conflicting statements

of codefendant Jack Pearcy, who although he later denied it, admitted in 2019 to being solely responsible for Boggio's murder. Pearcy, who was tried first, convicted of first-degree murder, and sentenced to life imprisonment, executed a declaration where he stated, "James Dailey had nothing to do with the murder of Shelly Boggio. I committed the crime alone. James Dailey was back at the house when I drove Shelly Boggio to the place where I ultimately killed her." Majority op. at 13. Although Pearcy later refused to repeat his confession during his deposition and during the evidentiary hearing on Dailey's claims, his admission to being solely responsible for Boggio's murder, coupled with the lack of substantial independent evidence to corroborate the testimony of the jailhouse informants, sufficiently compromises Dailey's conviction and the application of the death sentence.

Ironically, Pearcy, who was convicted by a jury of the murder of Shelly Boggio and who thereafter confessed to the murder and stated that Dailey was not involved, received a life sentence, while Dailey, convicted in no small part due to the testimony of three inmates and without substantial independent evidence, is facing the death penalty.

While finality in judicial proceedings is important to the function of the judicial branch, that interest can never overwhelm the imperative that the death penalty not be wrongly imposed. Since Florida reinstated the death penalty in 1972, thirty people have been exonerated from death row. *Death Penalty Information Center*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida (last visited Aug. 2, 2021). Thirty people would have eventually been put

to death for murders they did not commit. This number of exonerations, the highest in the nation, affirms why it is so important to get this case right.

I respectfully dissent.

An Appeal from the Circuit Court in and for Pinellas County,

Pat Edward Siracusa, Jr., Judge
Case No. 521985CF007084XXXXNO

Eric Pinkard, Capital Collateral Regional Counsel, Julissa Fontán and Natalia C. Reyna-Pimiento, Assistant Capital Collateral Regional Counsel, Middle Region, Temple Terrace, Florida; Laura Fernandez, New Haven, Connecticut; Cyd Oppenheimer, New Haven, Connecticut; Seth Miller of Innocence Project of Florida, Inc., Tallahassee, Florida; Scott A. Edelman and Stephen P. Morgan of Milbank, LLP, New York, New York; and Joshua Evan Dubin of Dubin Research & Consulting, Miami, Florida,

for Appellant

Ashley Moody, Attorney General, Tallahassee, Florida, Christina Z. Pacheco, Timothy A. Freeland, and Stephen D. Ake, Assistant Attorneys General, Tampa, Florida,

for Appellee

APPENDIX B

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

STATE OF FLORIDA,

v.

JAMES DAILEY,

Person ID: 416094, Defendant.

CASE NO.: CRC85-07084CFANO

UCN: 521985CF00708XXXXN0

DIVISION: T

ORDER DENYING, IN PART, AND DISMISSING, IN PART, DEFENDANT'S SECOND SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE OF DEATH AFTER DEATH WARRANT SIGNED; DIRECTIONS TO CLERK

THIS CAUSE came before the Court upon Defendant's Second Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed, filed December 27, 2019, pursuant to Florida Rule of Criminal Procedure 3.851. Having conducted a hearing and heard the evidence presented and argument of counsel, and having considered the motions, responses, relevant portions of the record, and applicable law, the Court finds as follows:

Procedural History

On June 27, 1987, a jury found Defendant guilty of the first-degree murder of fourteen-year-old Shelly Boggio. After a penalty phase, the jury unanimously recommended death. On August 7, 1987, the Court sentenced Defendant to death. The Florida Supreme

Court affirmed Defendant's conviction on direct appeal, but struck two of the five aggravating circumstances and remanded for resentencing. *Dailey v. State,* 594 So. 2d 254 (Fla. 1991) (hereinafter, *Dailey* 1).[1] 0n January 21, 1994, the Court resentenced Defendant to death. Defendant's sentence was affirmed on appeal. *Dailey v. State,* 659 So. 2d 246 (Fla. 1995) (hereinafter, *Dailey II).* The mandate issued on or about September 22, 1995. On or about November 21, 1995, the United States Supreme Court denied Defendant's petition for writ of certiorari. *Dailey v. Florida,* 516 U.S. 1095 (1996). Defendant subsequently filed collateral motions for relief in state and federal court, each of which was dismissed or denied. *See Dailey v. State,* 279 So. 3d 1208 (Fla. 2019) (hereinafter, *Dailey V); Dailey v. State,* 247 So. 3d 390 (Fla. 2018) (hereinafter, *Dailey IV); Dailey v. State,* 965 So. 2d 38 (Fla. 2007) (hereinafter, *Dailey III). See also In re Dailey,* 949 F.3d 553 (11th Cir. 2020); *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); *Dailey v. Sec y, Fla. Dep't of Corr.,* 2008 WL 4470016 (M.D. Fla. Sept. 30, 2008).

On September 22, 2019, Governor Ron DeSantis signed a death warrant for Defendant. Defendant filed his first Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed on October 8, 2019. After a hearing, the Court entered a final order denying, in part, and dismissing,

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

in part, Defendant's motion, on October 16, 2019. On October 23, 2019, the Middle District of Florida granted a limited stay of Defendant's execution until December 30, 2019. The Florida Supreme Court affirmed this Court's order on November 12, 2019. *See Dailey v. State,* 283 So. 3d 782 (Fla. 2019) (hereinafter, *Dailey VI).* As of the date of this order, the Governor has not signed a new warrant or set a new execution date.

On December 27, 2019, Defendant filed a Second Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Death Warrant Signed. The Court held an initial status check on the motion on January 13, 2020, at which it was determined that the timeline for successive motions, rather than post-warrant motions, would apply. The State filed a response to Defendant's motion on January 16, 2020. On January 21, 2020, Defendant filed a motion to supplement and a motion to exceed the page limit, adding an additional subclaim and an additional claim to his motion. The Court granted those motions in an order issued on or about February 4, 2020, and the State filed its additional response on February 17, 2020. The Court held a case management conference pursuant to rule 3.851(1)(5) on February 20, 2020. At that hearing, the Court granted an evidentiary hearing on claim 1(A), a claim that a declaration from Jack Pearcy shows that Mr. Pearcy committed the murder by himself. The Court also permitted a deposition of Mr. Pearcy to occur prior to the hearing. The Court held that hearing on March 5, 2020. Written closing arguments were timely filed on May 18, 2020, following an extension of time due to the public health emergency caused by the COVID-19 pandemic and the departure of Defendant's lead counsel.

Evidentiary Hearing

The Court granted an evidentiary hearing on claim 1(A), which the Court held on March 5, 2020. At that hearing, Defendant called Jack Pearcy, but no witnesses testified. Despite the Court's use of agreed-upon extraordinary measures, the Court was unable to cause Mr. Pearcy to testify. First, aware that Mr. Pearcy had expressed an intent not to testify, the Court attempted to convey to Mr. Pearcy that he could .use the proceedings as an opportunity to tell his side of the story. Mr. Pearcy indicated that he testified in deposition and did not plan to give additional testimony. Next, with the agreement of the parties, the Court allowed Mr. Pearcy' s mother and stepfather to talk to him privately in an attempt to convince him to testify. They indicated that they told Mr. Pearcy of the Court's desire for him to testify, but that he continued to believe that his deposition was sufficient. Counsel for Defendant proposed letting Defendant speak with Mr. Pearcy privately or holding Mr. Pearcy in contempt. The Court declined both options, noting the State's concern with allowing the codefendants to communicate with each other and the futility of holding Mr. Pearcy in contempt when he was subject to a life sentence. The Court allowed Defendant to put Mr. Pearcy on the stand, but he gave no answers to defense counsel's questions.

Following Mr. Pearcy's refusal to testify, Defendant moved to introduce portions of Mr. Pearcy's deposition. The State objected. The Court reserved ruling on the objection and allowed Defendant to present argument regarding what portions of the deposition would demonstrate that they were entitled to relief on claim 1(A). While the Court repeatedly asked Defendant how the deposition supported claim 1(A), Defendant's argument focused largely on claims not alleged

in his motion, primarily a claim that evidence from Mr. Pearcy's deposition demonstrated that Defendant could not have been with the victim at the time of her death. Defendant did, however, argue that the Court should consider Mr. Pearcy's deposition testimony that he previously told Attorney Joshua Dubin that he committed the murder and Defendant was not involved. The State argued in response that none of the deposition testimony was new evidence, and that Claim 1(A) should be denied because Defendant failed to produce evidence to support it.

Motion for Postconviction Relief

Defendant's motion contains a newly discovered evidence claim, a cumulative analysis claim, and two claims labeled as newly discovered evidence and fraud on the court, which the Court has considered under *Giglio.*[2] In addition, Defendant argued at the evidentiary hearing that evidence not alleged in his motion is newly discovered evidence. Because Defendant's motion was clearly not filed within one year of the date the judgment became final, his claims are timely only if an exception is present. *See* Fla. R. Crim. P. 3.851(d). As Defendant claims newly discovered evidence, the relevant exception most likely applicable to his claims is set forth in rule 3.851(d)(2)(A), which applies when the facts on which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence. Public records that are continuously available through postconviction proceedings are not newly discovered evidence. *Porter v. State,* 653 So. 2d 374, 378 (Fla. 1995); *Zeigler v. State,* 632 So. 2d 48, 50 (Fla. 1993). *See also Smith v. State,* 931 So. 2d 790, 805-806 (Fla. 2006)

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

(finding that material available as a matter of public record is not "conceal[ed]" in violation of *Banks v. Dretke,* 540 U.S. 668 (2004)). Additionally, Defendant's motion is a second or successive motion. A claim in a successive motion shall be dismissed if "it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds there was no good cause for failing to assert those grounds in a prior motion." Fla. R. Crim. P. 3.851(e)(2).

Claims 1(A) & 1(B)

In claim 1(A), Defendant's motion claimed that Mr. Pearcy confessed to committing this murder by himself, and that that confession constituted newly discovered evidence. Claim 1(B) alleges that, as part of a newly discovered evidence claim, Defendant is entitled to a cumulative review of all new evidence that would be admissible at a new trial. A newly discovered evidence claim has two prongs. "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." *Dailey V* 279 So. 3d at 1212 (internal quotations and alterations omitted). Defendant has alleged the second prong separately as claim 1(B). To prove that prong, "the evidence must be of such nature that it would probably produce an acquittal on retrial." *Id.* at 1213 (internal quotations and alterations omitted). The Court "is required to consider all newly discovered evidence which would be admissible at trial." *Lightbourne v. State,* 742 So. 2d 238, 247-248 (Fla. 1999). But if the evidence is not admissible at trial, no relief is warranted regardless of whether it qualifies as newly discovered, and a cumulative analysis is not necessary. *Dailey V,* 279 So. 3d at 1213, 1216. Defendant has the burden to

establish a sufficient claim. *Long v. State,* 183 So. 3d 342, 345 (Fla. 2016).

In Defendant's motion, he alleged that a December 18, 2019 declaration from Mr. Pearcy established that Mr. Pearcy alone murdered the victim. The written declaration states that Defendant had nothing to do with the victim's murder, and that he was back at the house when Mr. Pearcy drove the victim to the place where she was killed. The State argued that the motion was procedurally barred, but conceded that an evidentiary hearing was necessary. The Court therefore granted an evidentiary hearing, at which Mr. Pearcy refused to testify as set out above.

In its arguments at the hearing and in written closing arguments, the State has asserted that the claim is untimely and that no admissible testimony was produced to show that Mr. Pearcy confessed or disavowed Defendant's involvement as alleged in Defendant's motion. Defendant's argument, however, changed radically at the evidentiary hearing and in his written closing arguments. Defendant asserted to the Court that Mr. Pearcy's deposition could still prove the instant claim. However, despite the Court's repeated questioning as to how it would do so, Defendant presented no evidence, other than references to the affidavit and contemporaneous out-of-court statements, from Mr. Pearcy's deposition showing that Mr. Pearcy confessed to committing the murder or testified that Defendant was not involved. Instead, Defendant shifted to arguing that Mr. Pearcy made a number of statements that, when viewed in light of other evidence, establish a timeline showing that it would be impossible for Defendant to have been with Ms. Boggio at the time of her death. Defendant now

argues that this evidence constitutes newly discovered evidence.

Accordingly, the Court finds as follows. First, Defendant has not presented any admissible evidence to support his claim that Mr. Pearcy confessed to committing the murder himself even if the Court considers the deposition. Because he has not done so, he is not entitled to relief or a cumulative review. *See Dailey V,* 279 So. 3d at 1216. Second, if to any extent the deposition could be used to support this claim, it is inadmissible. Finally, to the extent Defendant now argues that other evidence from Mr. Pearcy's deposition is newly discovered evidence, those claims are not properly before the Court because Defendant has not filed a motion asserting those claims.

Mr. Pearcy's Confession

With or without the deposition, there is no new, admissible evidence that Mr. Pearcy has confessed to committing the murder by himself. Mr. Pearcy did not testify at the evidentiary hearing, and all new evidence that he confessed to Attorney Dubin or in an affidavit is inadmissible hearsay. Evidence must be admissible to be newly discovered evidence. *Dailey V,* 279 So. 3d at 1212-1213. Hearsay testimony is generally not admissible absent an exception, and hearsay within hearsay is admissible only if there is an exception for each portion of the testimony. §§ 90.802, 90.805, Fla. Stat. (2019). In *Dailey V,* the Florida Supreme Court agreed with this Court that a prior affidavit from Mr. Pearcy was inadmissible hearsay. The Florida Supreme Court rejected the argument that it was admissible as a statement against interest because Mr. Pearcy does not expose himself to any additional criminal liability by accepting responsibility for the murder. *Id.* The Court also rejected the argument

that it was admissible under *Chambers v. Mississippi,* 410 U.S. 284 (1973), because the affidavit was executed long after the crime occurred, was not unquestionably against Mr. Pearcy's interest, and is of questionable truth because Mr. Pearcy has disavowed its contents. *Dailey V,* 279 So. 3d at 1213-1214.

As no live testimony was offered at the hearing, the only possible evidence for this claim is Mr. Pearcy's affidavit, Mr. Pearcy's out-of-court statements to Attorney Dubin, and Mr. Pearcy's deposition. *Dailey V* clearly forecloses admitting Mr. Pearcy's affidavit. The affidavit here is, for the purposes of admissibility, virtually identical to the 2017 affidavit. Just like the prior affidavit, this affidavit was signed long after the crime occurred and is not unquestionably against Mr. Pearcy's interest. In addition to his previous inconsistencies regarding his involvement in the crime, Mr. Pearcy again denied the truth of the statements in the affidavit in his deposition. (Ex. A: Deposition of Jack Pearcy, 26, 33, 35-37, 55-60, 69-71, 93-97, 100-101, 103, 107-110, 121, 128-129.) Mr. Pearcy's deposition did not give the State an opportunity to cross-examine him—as explained more thoroughly below, the deposition was only a discovery deposition and the State had no notice that it should cross-examine Mr. Pearcy. The same analysis applies to Mr. Pearcy's out-of-court statements to Attorney Dubin, which were made at a similar time, were also denied by Mr. Pearcy, and are not unquestionably against Mr. Pearcy's interest. The fact that Mr. Pearcy admitted to making those statements in a deposition is hearsay within hearsay—it is still inadmissible absent exceptions for both portions of the testimony. The reminder of the deposition, were it admissible, does nothing to support this claim. Again, in the deposition Mr. Pearcy repeatedly denies the truth of

his prior confessions. (Ex. A at 26, 33, 35-37, 55-60, 69-71, 93-97, 100-101, 103, 107-110, 121, 128-129.) There may be grounds for Defendant to attack Mr. Pearcy's credibility, but that does not produce any evidence that Defendant could' introduce to his benefit at a new trial. Defendant's burden is not to show that Mr. Pearcy lacks credibility. Defendant's burden is to show that Mr. Pearcy's confession is admissible, is newly discovered, and would have a reasonable probability of changing the outcome. Defendant has not done so. His motion therefore must be denied.

Admissibility of Mr. Pearcy's Deposition

Again, the Court finds that Mr. Pearcy's deposition does not support Defendant's claim. But to the extent that any portion of the deposition might be construed as supporting this claim, the Court agrees with the State that Mr. Pearcy's deposition is inadmissible hearsay. Hearsay is not admissible except as provided by statute. § 90.802, Fla. Stat. (2019). Former testimony in a deposition taken in compliance with law is admissible as an exception to hearsay when the witness is unavailable and the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by cross-examination. *Id.* at 90.804(2)(a). However, in a criminal case, a deposition is not admissible as substantive evidence when "opposing counsel is not alerted by compliance with Rule of Criminal Procedure 3.190([i])[3]that the deposition may be used at trial." *Rodriguez v. State,* 609,So. 2d 493, 498 (Fla. 1992).

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[3] The rule was renumbered from (j) to (i) in 2009. *See In re Amendments to the Florida Rules of Criminal Procedure,* 26 So. 3d 534, 539-540 (2009). The Court has referred to the rule as 3.190(i) throughout to avoid confusion, regardless of the version of the rule cited in cases.

This rule exists in criminal cases, but not civil cases, because the Florida Rules of Civil Procedure specifically allow greater latitude with use of depositions. *Id. Rodriguez* found that, because section 90.804(2)(a) requires a deposition to be "taken in compliance with law," the procedural requirements for a deposition to perpetuate testimony must be met. *Id* at 499. Accordingly, the Court must determine whether Defendant followed the proper procedures to take a deposition to perpetuate testimony in postconviction, if any exist.

Such procedures do exist, as demonstrated by Florida Supreme Court caselaw, and they are similar, if not identical, to rule 3.190(i). The Florida Supreme Court has repeatedly cited that rule and applied its requirements in reviewing orders denying depositions to perpetuate testimony in postconviction. In *Cherry v. State,* 781 So. 2d 1040, 1054-1055 (Fla. 2000), the Court held that the trial court properly denied a postconviction motion for a deposition to perpetuate testimony because the defendant failed to comply with rule 3.190(i), including the timeliness requirements of the rule. The Court reached a similar result in *Riechmann v. State,* 966 So. 2d 298, 310 (Fla. 2007), albeit also noting that rule 3.190(i) applies to trials, not postconviction proceedings. The Court noted that the request was not under oath nor accompanied by sworn affidavits as required by rule 3.190(i). Conversely, in *Hurst v. State,* 18 So. 3d 975, 1006-1007 (Fla. 2009), the Court found that the trial court abused its discretion in denying a postconviction motion to perpetuate testimony. The Court distinguished *Riechmann* because "Hurst's sworn motion met the requirements of the rule." *Id.* at 1007. Accordingly, while rule 3.190(i) does not technically apply in postconviction, these cases apply what appear to be the same requirements in postconviction cases. Even if rule 3.190(i) itself does not

apply, *Cherry, Riechmann,* and *Hurst* establish that, at a minimum, a timely motion under oath or with supporting affidavits must be filed setting out the basis for a deposition to perpetuate testimony.

In this case, Defendant did not follow the procedure described in *Cherry, Riechmann,* or *Hurst,* and consequently did not take a deposition to perpetuate testimony in compliance with applicable law. Defendant failed to give any notice that he was requesting a deposition to perpetuate testimony, and he certainly did not file a sworn motion as in *Hurst*. Attorney Dubin requested "the deposition" of Mr. Pearcy at the February 20 case management conference, without any mention of using the deposition as non-impeachment evidence in the future. (Ex. B: Case Management Conference Transcript, 7:18-24.) Former Assistant Capital Collateral Regional Counsel Chelsea Shirley indicated that one purpose of the deposition was to "streamline the questions and streamline [Mr. Pearcy's] testimony," and to make his testimony "take less time here in court." (Ex. B at 79:17-22). Unlike *Hurst,* this oral request was not a sworn motion, and had Defendant asked for a deposition to perpetuate testimony in this manner, the Court could have denied it pursuant to *Riechmann* because it should have been raised in a sworn motion. The State agreed to the deposition in this case, (Ex. B at 80:6), but the State's agreement cannot be interpreted as agreeing to a deposition to perpetuate testimony because that was never mentioned at the hearing. Defendant did not even indicate to the Court that the deposition was to perpetuate testimony, and in fact gave other reasons for wanting the deposition. The Court cannot find, in these circumstances, that the deposition was taken "in accordance with law" as it applies to depositions to perpetuate testimony.

Additionally, on the facts of this case the State did not have similar motive to cross-examine Mr. Pearcy at this discovery deposition. Even if the method Defendant used to request the deposition could be said to be proper, the State was undoubtedly unaware that this was anything but a discovery. deposition. During the deposition itself, Attorney Glenn Martin referred to the deposition as "a discovery deposition," and argued that Attorney Dubin was "abusing the discovery process." (Ex. A at 129:21-25.) Attorney Dubin did not attempt to correct him or indicate that the deposition was anything other than a discovery deposition. (Ex. A at 129-130.) As the State asserts in its written closing argument, it is a common strategy to waive cross-examination in discovery depositions to avoid alerting opposing counsel to trial (or, in this case, hearing) strategy. It was reasonable for the State to believe that this was just a discovery deposition: Defendant did not follow rule 3.190(i) or the procedure approved in *Riechmann* and *Hurst,* did not ever mention using the deposition as substantive evidence prior to the hearing, and allowed the State to proceed under the apparent belief that the deposition was for discovery. The State therefore had a strong incentive not to cross-examine Mr. Pearcy, or at least to limit cross-examination, in order to avoid divulging information about its trial strategy.

In sum, Defendant failed to follow the procedure outlined by caselaw for requesting a deposition to perpetuate testimony. Additionally, the State had no notice that the deposition might be used as substantive evidence and therefore little motive to cross-examine Mr. Pearcy. The deposition is therefore not admissible as former testimony.

Other Newly Discovered Evidence Claims

Defendant's other arguments claiming newly discovered evidence apart from a confession by Mr. Pearcy are not properly before the Court because Defendant has not filed a motion asserting such claims. Rule 3.851 contains specific procedures for resolving successive motions for postconviction relief in death penalty cases. *See* Fla. R. Crim. P. 3.851(f). Defendants are not entitled to evidentiary hearings on every claim, but must file a written motion and ask the Court for an evidentiary hearing at a case management conference. *See id.* at (f)(5)(B). The rule prohibits amendments, unless good cause is shown by filing a copy of the amendment at least 45 days prior to the evidentiary hearing. *Id.* at (f)(4). The State is entitled to a written response to any amendments. *Id.* None of these procedures were followed here. The Court granted an evidentiary hearing on a specific claim—Claim 1(A). That claim, as described in Defendant's motion itself, is, "The December 18, 2019 declaration of Jack Pearcy proves Mr. Dailey is innocent and that Jack Pearcy alone murdered Shelly Boggio." The declaration was a confession by Mr. Pearcy. Defendant successfully moved to amend his motion in January, but never moved to amend his motion with claims relating to Mr. Pearcy's deposition. Many of the arguments Defendant made at the evidentiary hearing, which attempted to show that Mr. Pearcy's statements during his deposition demonstrate that Defendant was not with the victim at the time of her death, have nothing to do with the confession in the December 18 declaration. Defendant cannot advance new claims for the first time at an evidentiary hearing. The

Court will therefore not consider those arguments in this proceeding.

Claims 1(C) and 2

In grounds 1(C) and 2, Defendant argues that newly discovered evidence demonstrates that the State knowingly failed to correct Paul Skalnik's false testimony (ground 1(C)) and committed fraud on the court (ground 2). Although these claims are labeled as newly discovered evidence and fraud on the court, they appear to advance *Giglio* claims. First, there are no arguments showing that the new evidence (a statement by a former prosecutor) would itself change the outcome at trial. Second, claims that the state knowingly presented or failed to correct false testimony are governed by *Giglio*. To prevail on a claim that the State knowingly presented or failed to correct false testimony, Defendant must allege that "(1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material." *Guzman v. State,* 868 So. 2d 498, 505 (Fla. 2003). A prosecutor is imputed constructive knowledge of evidence withheld by other state agents. *Id.* A statement is material under *Giglio* "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (internal quotations omitted).

Defendant alleges that Mr. Skalnik lied when he said that his charges, were "not rape, no physical violence in my life" because the State had previously charged him with lewd and lascivious assault on a child under 14. Postconviction counsel for Defendant indicates that they had previously possessed notes tracking Mr. Skalnik's testimony with the words "sex assault" crossed out. He alleges that former Assistant State Attorney Robert Heyman indicated that the

notes were his in a January 14, 2020 interview with ABC News. At the case management conference, counsel also argued that Attorney Heyman admitted that he knew about Mr. Skalnik's lewd and lascivious assault charge. Defendant argues that the new evidence demonstrates that the State knew about the charge. He argues that the State failed to correct Mr. Skalnik's testimony and further aggravated the issue by arguing in closing that Mr: Skalnik was more trustworthy because he committed less serious offenses. At the case management conference, Defendant also argued that depositions of Attorney Heyman and other prosecutors would be necessary to discover the new evidence.

The State argues that this claim is not timely because Defendant could have raised it at any time with due diligence. The State argues that the note's author is irrelevant because knowledge is imputed to all members of the prosecuting authority, Defendant does not allege when he received the note, and records documenting Mr. Skalnik's arrest have been available as public records since 1983. If the claim were timely, the State argues that the charge could not have been used to impeach Mr. Skalnik because an arrest report cannot be used as impeachment. Finally, the State argues that Mr. Skalnik's testimony was not false. The State argues that, in context, Mr. Skalnik had just testified that he served the maximum sentence on three of four cases, and he insinuated that the length of those sentences showed that he did not receive a good deal. Defense counsel then asked, "How bad were your charges," to which Mr. Skalnik responded, "They were grand theft, counselor, not murder, not rape, no physical violence in my life. Does that sound like a good deal?" (Ex. C: Excerpt from Appellate Record, 1158.)

Procedural Bars

The Court agrees with the State that these claims are procedurally barred. In 2017, Defendant filed a rule 3.851 motion containing a newly discovered evidence claim and a *Giglio* claim arguing that Mr. Skalnik's prior charges were newly discovered evidence, his testimony was false, and the State failed to correct it. *Dailey V,* 279 So. 3d at 1215-1217. The Florida Supreme Court held that the newly discovered evidence claim was untimely and the *Giglio* claim was without merit. These claims are, for all practical purposes, identical to Defendant's prior claims regarding Mr. Skalnik. As the State argues, Attorney Heyman's alleged admissions are irrelevant as either newly discovered evidence or under *Giglio.* As newly discovered evidence, the statements are not relevant to Defendant's guilt or innocence and would not be admissible at a new trial. Under *Giglio,* the mere fact that the State charged Mr. Skalnik is enough to impute knowledge of that charge to the prosecution. *See Guzman,* 868 So. 2d 505. Whether Attorney Heyman actually knew about the charge is irrelevant because it is not necessary to prove actual knowledge. Accordingly, these claims would be resolved in exactly the same manner as they were in 2017. As the Supreme Court ruled on the merits of the *Giglio* claim, any *Giglio* claim based on these facts is successive. Both the newly discovered evidence and *Giglio* claims are untimely. Defendant was fully aware of Mr. Skalnik's prior charge when he filed the 2017 motion containing two claims based on that charge. *See Dailey. V,* 279 So. 3d at 1215-1217. The "facts on which the claim is predicated," Fla. R. Crim. P. 3.851(d)(2)(A), are Mr. Skalnik' s prior charge and the appellate record in this case, both of which were evidently available by at least 2017. Defendant cannot revive an untimely

claim or a claim decided against him on the merits by appending it to evidence that has no impact on the outcome of the claim or the case. These claims are therefore dismissed.

Merits

Regardless, if these claims were timely they would be denied because, as the Florida Supreme Court has already held, Mr. Skalnik's prior charge is not material. When Defendant appealed the order on his 2017 motion for postconviction relief, the Florida Supreme Court found that, regardless of whether Defendant could establish the other prongs of *Giglio,* Mr. Skalnik's testimony regarding his lack of physical violence was not material. *Dailey V,* 279 So. 3d at 1217. The Court reached this conclusion assuming Defendant met the other prongs—that is, it assumed the testimony was false and that the prosecutor knew. *Id.* Accordingly, in order to prevail on this claim now, Defendant would need to show some new fact that would change the materiality of Mr. Skalnik's testimony regarding his prior charges. Attorney Heyman's notes and alleged admissions clearly have no impact on the materiality of Mr. Skalnik's testimony. Defendant argues that the notes combined with Attorney Heyman's admission show that the State knew about Mr. Skalnik's charges. But the Florida Supreme Court affirmed the denial of Defendant's. *Giglio* claim presuming that the State knew. *Id.* And, regardless, that fact is beyond dispute—the State is charged with constructive knowledge of the charge. *See Guzman,* 868 So. 2d at 505. As the Florida Supreme Court has already held, the jury was already aware that Mr. Skalnik had committed multiple crimes. *Dailey V,* 279 So. 3d at 1217. If these claims were timely, they would therefore be denied.

Accordingly, it is

ORDERED AND ADJUDGED that claims 1(A) and 1(B) of Defendant's Second Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Warrant Signed are hereby **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that claims 1(C) and 2 of Defendant's Second Successive Motion to Vacate Judgment of Conviction and Sentence of Death after Warrant Signed are hereby **DISMISSED.**

THE CLERK OF THE CIRCUIT COURT IS HEREBY DIRECTED to promptly serve a copy of this order, along with a certificate of service, upon the parties listed at the end of this order as required by Florida Rule of Criminal Procedure 3.851(f)(5)(F).

DONE AND ORDERED in Chambers in Clearwater, Pinellas County, Florida, this ___ day of May, 2020. A true and correct copy of this order has been furnished to the parties listed below.

_____

Pat Siracusa, Circuit Judge

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APPENDIX C

Supreme Court of Florida
THURSDAY, DECEMBER 2, 2021
CASE NOs.: SC20-934 & SC20-1529
Lower Tribunal No(s).:
521985CF007084XXXXNO
JAMES MILTON DAILEY, Appellant(s),
vs.
STATE OF FLORIDA, Appellee(s)

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

CANADY, C.J., and POLSTON, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.
LABARGA, J., dissents.

A True Copy
Test:

_____
John A. Tomasino
Clerk, Supreme Court

kc
Served:

TIMOTHY ARTHUR FREELAND
STEPHEN P. MORGAN
LAURA FERNANDEZ
JULISSA FONTÁN
JOSHUA EVAN DUBIN
SCOTT A. EDELMAN
STEPHEN D. AKE

CASE NOs.: SC20-934 & SC20-1529
Page Two

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NATALIA C. REYNA-PIMIENTO
SETH E. MILLER
HON. KEN BURKE, CLERK
HON. PAT EDWARD SIRACUSA, JR., JUDGE
SARA E. MACKS
KRISTI LINNE AUSSNER
GLENN MARTIN
HON. ANTHONY RONDOLINO, CHIEF JUDGE