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 Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

Petitioner James Milton Dailey uncovered exculpatory evidence that the State failed to disclose prior to trial, in violation of the rule stated in *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972). This evidence included a statement by a former prosecutor indicating that Dailey's codefendant had confessed to committing the crime. It also included a statement by a former inmate at the jail where Dailey had been housed revealing that the lead police investigator offered favorable treatment to inmates in return for testimony against Dailey; the State's case at trial hinged almost entirely on the testimony of these jailhouse informants. But the court below refused to consider this evidence, holding that the *Brady* materials should have been discovered by the defense through the exercise of due diligence and that those materials, in any event, should be analyzed in isolation and not cumulatively.

The questions presented are:

Whether a defendant advancing a *Brady* claim must demonstrate that he or she could not have uncovered the suppressed evidence through the exercise of due diligence.

Whether the materiality of a *Brady* claim must be determined by considering the probative force of the withheld evidence cumulatively and in the context of the government's entire case.

Whether the Florida Supreme Court's error in treating petitioner's *Giglio* claim as though it alleged knowing use of perjury, when it actually alleged withholding exculpatory evidence, warrants reversal.

NOTICE OF RELATED CASES

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: August 7, 1987

Direct Appeal:
Florida Supreme Court
Dailey v. *State*, 594 So. 2d 254 (Fla. 1991) (reversed death sentence)
Judgment Entered: November 14, 1991

Resentencing Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: January 21, 1994

Second Direct Appeal:
Florida Supreme Court
Dailey v. *State*, 659 So. 2d 246 (Fla. 1995)
Judgment Entered: May 25, 1995

Supreme Court of the United States
Dailey v. *Florida*, 516 U.S. 1095 (1996)
Judgment Entered: January 22, 1996

First Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: July 14, 2005

Florida Supreme Court
Dailey v. *State*, 965 So. 2d 38 (Fla. 2007)
Judgment Entered: May 31, 2007

United States District Court for the Middle District of Florida
Dailey v. *Florida Department of Corrections*, No. 8:07-cv-01897 (M.D. Fla. Apr. 1, 2011), as amended Mar. 29, 2012
Judgment Entered: April 1, 2011

United States Court of Appeals for the Eleventh Circuit
Dailey v. *Florida Department of Corrections*, No. 12-12222-P (11th Cir. July 19, 2012)
Judgment Entered: July 19, 2012

Supreme Court of the United States
Dailey v. *Crews*, 569 U.S. 961 (2013)
Judgment Entered: April 29, 2013

Second Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: April 12, 2017

Florida Supreme Court
Dailey v. *State*, 247 So. 3d 390 (Fla. 2018)
Judgment Entered: June 26, 2018

Supreme Court of the United States
Dailey v. *Florida*, 139 S. Ct. 947 (2019)
Judgment Entered: January 22, 2019

Third Postconviction Proceeding:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: March 20, 2018

Florida Supreme Court
Dailey v. *State*, 279 So. 3d 1208 (Fla. 2019), rhrg denied, SC18-557, 2019 WL 5152446 (Fla. Oct. 14, 2019)
Judgment Entered: October 3, 2019

Supreme Court of the United States
No. 19-7309, petition for certiorari filed Jan. 10, 2020
Judgment entered: pending

First Successive Motion After Death Warrant Signed:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Judgment Entered: October 16, 2019

United States District Court for the Middle District of Florida
Dailey v. *Secretary, Florida Department of Corrections*, No. 8:19-cv-02956 (M.D. Fla. Dec. 5, 2019)
Judgment Entered: December 5, 2019

Dailey v. *Florida Department of Corrections*, No. 8:07-cv-01897 (M.D. Fla. Dec. 10, 2019)
Judgment Entered: December 10, 2019

United States Court of Appeals for the Eleventh Circuit
Dailey v. *Secretary, Florida Department of Corrections*, No. 19-15147 (11th Cir.) (filed Dec. 27, 2019)
Judgment Entered: January 30, 2020

In re: James M. Dailey, No. 19-15145 (11th Cir.) (filed Dec. 30, 2019)
Judgment Entered: pending

Second Successive Motion After Death Warrant Signed:
Circuit Court of Pinellas County, Florida
State of Florida v. *James Milton Dailey*, 1985-CF-007084
Filed: December 27, 2019
Judgment Entered: pending

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PETITION FOR A WRIT OF CERTIORARI

James Milton Dailey respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court (App., *infra*, 1a-17a) is reported at 283 So.3d 782. The relevant order of the Florida Circuit Court (App., *infra*, 18a-46a) is not reported.

JURISDICTION

The Florida Supreme Court entered judgment on November 12, 2019. On January 26, 2020, Justice Thomas extended the time to file a petition for a writ of certiorari to March 1, 2020. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

STATEMENT

In the years since petitioner James Dailey was convicted of capital murder and sentenced to death in 1987, substantial new evidence has come to light showing that he is innocent. His codefendant Jack Pearcy has repeatedly confessed to committing the crime and has made additional statements exonerating Dailey; the Florida Supreme Court's refusal to consider those statements is addressed in Dailey's pending petition for certiorari in No. 19-7309, *Dailey* v. *Florida* ("*Dailey* Pet.").

This petition addresses an *additional* set of exculpatory materials that the State should have, but did not, disclosed to Dailey under the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972). This evidence includes: (1) testimony from a former prosecutor assigned to Dailey's case stating that he had been informed by law enforcement sources that Pearcy confessed to having committed the murder after a failed sexual encounter with the victim; and (2) evidence by someone who had been incarcerated with Dailey indicating that the lead police investigator obtained crucial testimony from jailhouse informants by promising them favorable treatment if they would incriminate Dailey.

The Florida Supreme Court's holding that this evidence could not be considered was premised on a clear misunderstanding of *Brady* and *Giglio*. The court held that *Brady* is not violated if the suppressed evidence could have been discovered independently by the defendant—but this due diligence requirement, which amounts to a "prosecutor may hide, defendant must seek" rule, is precluded by *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004), a decision the court below did not address. The Florida court misapplied the requirements of *Brady* and *Giglio* in other respects as well, errors so plain that summary reversal on those points is warranted. Because the courts are divided on the application of a due diligence requirement in circumstances such as those here, and because the decision below will produce a shocking and manifest miscarriage of justice if not corrected, this Court should grant review.

A. Factual background

1. Much of the factual and procedural history of this case is set out in the pending petition for certiorari in No. 19-7309, *Dailey* v. *Florida*, which arises out of a separate post-conviction proceeding. Rather than duplicate that presentation, we refer to the background discussion in that petition, focusing here on the matters that specifically bear on the issues presented in this petition.

Dailey and Pearcy were prosecuted for the murder of fourteen-year-old Shelly Boggio in 1985. Pearcy was tried first. The jury found him guilty and recommended a life sentence with the possibility of parole after 25 years. *Dailey* Pet. 4.

At Dailey's trial, there was conflicting testimony about whether Pearcy and Boggio were alone together during the time that Boggio was killed. Pearcy's girlfriend, Gayle Bailey, testified that Pearcy, Boggio, and Dailey left Pearcy's home together during that period; in contrast, a friend of Pearcy's, Dwaine "Oza" Shaw, testified that Pearcy and Boggio left together *without* Dailey. There were no eyewitnesses to Boggio's murder, no physical evidence placed Dailey with Boggio at the time or location of her death, and no forensic evidence tied Dailey to the crime. *Dailey* Pet. 2-3.

The linchpin of the government's case against Dailey was the testimony of three jailhouse informants—James Leitner, Pablo DeJesus, and Paul Skalnik—who claimed that he had confessed to them that he committed the murder. Skalnik offered particularly inflammatory testimony, asserting that Dailey had told him that "the young girl kept staring at [me], screaming and would not die." *Dailey* Pet. 3-4. The prosecutor emphasized this informant testimony at

closing, referring to it at least a dozen times and quoting Skalnik's graphic account at least six times. The prosecutor also assured the jury that the informants had been fully transparent about the agreements the State made with them in return for their testimony. *Dailey* Pet. 3-4 & n.5.

After this presentation, the jury convicted Dailey, recommending that he be sentenced to death. The trial judge accepted the recommendation. Although the Florida Supreme Court set aside the sentence on direct appeal due to erroneous jury instructions, the trial court re-imposed the death sentence on remand and the Florida Supreme Court affirmed the sentence on appeal. *Dailey* Pet. 4-5. Dailey's subsequent attempts to obtain state and federal post-conviction relief have been unsuccessful. *Dailey* Pet. 5.[1]

2. Since Dailey's conviction, substantial evidence has come to light that calls his guilt into serious question and indicates that it was Pearcy who murdered Boggio—and that Pearcy acted alone.

a. In Dailey's initial state postconviction proceeding, he presented evidence from Oza Shaw that Pearcy and Boggio left Pearcy's home together, without Dailey, during the time window during which Boggio died; and that Pearcy returned home *without Boggio* later that evening.[2] Because Shaw had not previously testified that Pearcy returned home alone after having been out with Boggio, the State suggested on

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[1] Since the filing of the petition in No. 19-7309, the Eleventh Circuit has denied Dailey relief. *In re Dailey*, 949 F.3d 553 (11th Cir. 2020).

[2] Additional evidence confirmed that Pearcy and Boggio were alone during the period that she died. See *Dailey* Pet. 8-10.

cross-examination that Shaw's account was a recantation that was not worthy of belief, a position accepted by the Florida courts. *Dailey* Pet. 7-8.

But in Dailey's second post-conviction petition, filed in 2017, he presented a report from the Indian Rocks Beach police showing that Shaw had given the same account just after the crime in a tape-recorded interview with law enforcement personnel. The Florida Supreme Court nevertheless held that the State did not violate the rule of *Giglio*, which precludes both the State's knowing use of false testimony and the State's suppression of exculpatory evidence that undermines the credibility of prosecution witnesses. The court reasoned that Shaw's testimony was not false and that the State's misleading "recantation" advocacy through impeachment questions directed at Shaw did not violate *Giglio*. *Dailey* Pet. 8.

b. Pearcy himself has admitted to being solely responsible for Boggio's death or otherwise has affirmed Dailey's innocence at least four times. *Dailey* Pet. 11-13. The Florida Supreme Court's refusal to consider this evidence on the ground that it is hearsay is the subject of Dailey's other currently pending petition for certiorari, No. 19-7309.

c. Substantial new evidence discredited the linchpin jailhouse informant testimony against Dailey.

This evidence showed that the testimony of the jailhouse witnesses was procured under very unusual circumstances: They first came forward 13 months after Dailey's detention, when lead detective John Halliday—just a week after Pearcy's jury declined to recommend the death penalty in his case—pulled all the inmates from Dailey's jail pod into a small room and showed them newspaper articles recounting details of

the crime. None of the 15 inmates Halliday interviewed relayed any incriminating statements from Dailey. The three who ultimately came forward did so only *after* Halliday's jailhouse visit, and all claimed that Dailey made his incriminating statements sometime *after* that visit. *Dailey* Pet. 21-23.

The evidence further revealed that informants DeJesus and Leitner colluded in an effort to come up with incriminating testimony. *Dailey* Pet. 19-20.

And the evidence showed that informant Skalnik—who has since been reported to have been a serial liar and perpetual grifter who made a career of testifying against fellow inmates in return for favors from the state, including in *four* capital cases[3]—committed perjury when he denied being offered or otherwise expecting favorable treatment in exchange for his testimony against Dailey. *Dailey* Pet. 16-19.

3. This petition addresses several additional pieces of exculpatory material that have been uncovered by Dailey.

a. The first is evidence provided by James Slater, a retired attorney who had worked for the Pinellas County State Attorney's office at the time of Boggio's murder. He submitted an affidavit stating that, while in the state attorney's office, he "worked on the investigation of [Boggio's] death and resulting prosecution

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[3] Pamela Colloff, *He's a Liar, a Con Artist and a Snitch. His Testimony Could Soon Send a Man to His Death,* ProPublica (Dec. 4, 2019), https://tinyurl.com/ufsroh9. Recent press accounts report that Skalnik boasted he had "placed 34 individuals in prison, including four on death row." *Id.* In just a six-year period, he testified in 37 trials, despite being dubbed a "con man extraordinaire" by police. *Ibid.*

of Jack Pearcy." R3 560-62.[4] The affidavit added that Slater "remember[ed] [Boggio's] body was found near Indian Rocks beach, floating in the water, and she was nude. I was told she had knife wounds." *Ibid.* And it continued: "Law enforcement told me that Pearcy attempted to have sex with the victim but that Pearcy couldn't perform. The victim began teasing Pearcy. Pearcy became irate and stabbed the victim." *Ibid.*

At an evidentiary hearing, Slater testified that everything in his affidavit accurately reflected statements he had made to Dailey's post-conviction counsel. R3 1438. He also testified that he had been assigned to assist law enforcement on the Boggio case, that he had a general recollection of the case, and that this recollection included someone in law enforcement telling him about Pearcy's unsuccessful attempt to have sex with the victim and subsequent commission of the murder. R3 1426-27, 1444-45, 1454-55. And he testified that he was "positive that those statements" were made to him. R3 1455-56.

Slater also offered more equivocal testimony, stating that he no longer was sure that the Boggio case was the one to which the confession related. R3 1445, 1449, 1451. He testified, however, that at some point between the filing of his affidavit and the time of the evidentiary hearing he was contacted by at least two current and one retired assistant state's attorneys (R3 1446-47), and that after this contact he felt "tugged in two directions" and no longer was comfortable speaking to defense counsel in the absence of a representative of the State. R3 1449. In addition, an investigator for the defense testified that he was present at Slater's

[4] "R3" refers to the record on this appeal.

home when Slater signed his affidavit; that Slater clearly remembered the Boggio case and shared only what he could remember; that Dailey's counsel wrote the affidavit using only words spoken by Slater; that Slater was offered the opportunity to alter any statements in the affidavit; and that Slater read the affidavit before signing it and indicated he knew what he was signing at the time. R3 1462-63, 1465-66. There is no doubt that other details in the affidavit, including the location and description of Boggio's body, match those of the Boggio case.

b. Second, Dailey presented an affidavit from Edward Coleman, who had been incarcerated in Pinellas County Jail with Dailey and Pearcy. As recounted by the court below, Coleman "alleged that Detective John Halliday pulled him into a private interview room on two separate occasions." App., *infra*, 9a. On the first, Halliday asked Coleman "if Dailey or Pearcy discussed their cases with other inmates" and "instructed him 'to listen carefully and try to get information.'" *Ibid.* "On the second occasion, Coleman alleged, Detective Halliday had newspaper articles about Boggio's murder, directed him to look for specific details about the case, and promised to reduce his charges if he shared any information." *Id.* at 9a-10.

B. Proceedings below

Dailey presented arguments deriving from this new evidence in a motion for post-conviction relief that he filed on October 8, 2019, a month before his then-scheduled execution date.[5] He maintained that the State's failure to disclose this information, all of

[5] The execution was later stayed and, as of this writing, has not been rescheduled.

which had been known to a prosecutor or to law enforcement personnel prior to trial, violated *Brady* or *Giglio*. The circuit court granted Dailey's request for an evidentiary hearing regarding Slater's evidence, but denied such a request regarding the evidence presented by Coleman. It then denied Dailey's motion on the merits as to the evidence provided by both witnesses. App., *infra*, 27a-42a.

The Florida Supreme Court affirmed. App., *infra*, 1a-17a. Insofar as is relevant here,[6] the court rejected Dailey's argument that "newly discovered evidence proves the State committed *Brady* and *Giglio* violations." *Id*. at 5a.

The court first held that "Dailey has failed to state a *Brady* claim based on Slater's testimony." App., *infra*, 8a. As to this, the court opined that it was "left with inconsistent statements from Slater"; "[b]ecause Slater was not certain that the statements at issue 'had anything to do with' Pearcy's case, Dailey has not demonstrated the existence of any exculpatory evidence that would have created a reasonable probability of a different verdict." *Id*. at 9a.

The court also concluded "that Dailey has failed to state a newly discovered evidence claim." App., *infra*, 9a. The court observed "that Slater was listed as a witness at Dailey's trial." *Ibid*. And, the court continued, "Dailey neglects to explain why he could not have discovered the information to which Slater testified either prior to trial or at some point during the decades

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[6] The court also addressed additional claims regarding the arbitrariness of the execution, the denial of a request for witness access to Dailey's execution, the denial of a request for public records, and the denial of habeas relief. Those claims are not repeated here.

that followed. Accordingly, his claim is untimely." *Ibid.*

The court also rejected Dailey's *Giglio* claim regarding Coleman's testimony. In the court's view, "Dailey has not identified any false testimony presented during his trial, much less alleged that the State knew of its falsity or proved that any such statement was material. Accordingly, he is not entitled to relief." App., *infra*, 11a. See also *ibid.* (claim regarding Coleman untimely because Dailey did not explain why the witness had previously been unavailable).

Finally, the Florida Supreme Court rejected Dailey's contention that the circuit court "erred in failing to consider whether, when the allegations presented in this postconviction proceeding are considered cumulatively with admissible evidence developed in prior postconviction proceedings, he is entitled to a new trial." App., *infra*, 12a. In the court's view, "[g]iven that his newly discovered evidence claims were correctly rejected as untimely and that he failed to establish a *Brady* violation, no such cumulative analysis was required." *Ibid.*

REASONS FOR GRANTING THE PETITION

The record in this case now reveals that the State's repeated disregard of its constitutional disclosure obligations fatally tainted the verdict. But the Florida Supreme Court refused to correct those errors, misapplying this Court's doctrine and contributing to significant confusion in the lower courts about the nature of the governing rule. That holding would call for review under any circumstance. And it is particularly troubling when the uncorrected errors produced a sentence of death. Especially because "the newly revealed

evidence suffices to undermine confidence in [Dailey's] conviction" (*Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam)), review by this Court is warranted.

I. A *Brady* violation may occur even if the defendant could have discovered the suppressed evidence through the exercise of "due diligence."

The court below held that Dailey's *Brady* claims were foreclosed because he failed to show that he could not have discovered them earlier. That conclusion was wrong. Whether this due diligence requirement is imposed as a gloss on *Brady* or through application of a state limit on the submission of newly discovered evidence, it is impermissible for a State to force a defendant to look beyond the State's assurance that it has complied with *Brady*'s disclosure requirements. Yet the Florida Supreme Court is not alone in applying a due diligence test for a defendant to state an enforceable *Brady* claim: A deepening split has emerged among lower courts on this question. The Court should grant review to resolve that conflict and make clear that such a requirement is "not tenable" as a matter of due process. *Banks* v. *Dretke*, 540 U.S. 668, 695 (2004).

A. The defendant may rely on the government's assurance that exculpatory material has been disclosed.

1. In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused * * * violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). And in *Banks*, the Court affirmed that *Brady* is first and foremost a disclosure obligation imposed

on the prosecution. See 540 U.S. at 696. *Banks* thus flatly rejected the "notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id*. at 695. Instead, the defense is entitled to presume that "public officials have properly discharged their official duties" when they say they have. *Id*. at 696. Any contrary requirement would perversely declare that the "prosecutor may hide, defendant must seek." *Ibid*. Such a rule, the Court emphasized, is "not tenable in a system constitutionally bound to accord defendants due process" (*ibid*.); a defendant "cannot be faulted for relying on" the representation that *Brady* material has been disclosed. *Id.* at 693 (citing *Strickler* v. *Greene*, 527 U.S. 263, 283-84 (1999)). See also *Kyles* v. *Whitley*, 514 U.S. 419, 439-40 (1995).

Below, Dailey properly invoked this Court's clear instruction in *Banks*, arguing that, "when officers of the court for the defense ask officers of the court for the State whether they have *Brady* material, and the answer is no, the lawyers for the defense should not be forced to assume that the prosecutors are simply lying." Initial Br. of Appellant at 21, 2019 WL 5431196, *Dailey* v. *State*, 283 So.3d 782 (Fla.). But the Florida Supreme Court wound back the hands of the clock, reasoning as though *Banks* had never been decided. For it to consider the evidence central to Dailey's *Brady* claims, the court began, he had to establish not only that the evidence was unknown "by the trial court, by the party, or by counsel at the time of trial," but also that he or his counsel "*could not have known [of it] by the use of diligence*." App., *infra*, at 5a (citing *Jones* v. *State*, 709 So. 2d 512, 521 (Fla. 1998))

(emphasis added). Under the Florida court's rule, regardless of whether prosecutors withheld potentially exonerating evidence to which Dailey had a constitutional right, unless he "explains why he could not have discovered the information * * * prior to trial or at some point during the decades that followed," his claims are barred. App., *infra*, at 9a. The court below rejected the *Brady* claims relating to each piece of evidence cited by Dailey on this ground. App., *infra*, 9a, 10a-11a, 12a.

In reaching this conclusion, the Florida court applied its pre-*Banks* approach, using a four-prong test to determine compliance with the rule of *Brady*, requiring the defendant to show:

> (1) That the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence *nor could he obtain it himself with any reasonable diligence*; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Jones, 709 So. 2d at 519 (emphasis added). See also, *e.g., Robinson* v. *State*, 707 So. 2d 688, 693 (Fla. 1998); *Hegwood* v. *State*, 575 So. 2d 170, 172 (Fla. 1991).

The Florida Supreme Court's approach is not unique to this case. In only the last three terms, the court has repeatedly declined to consider *Brady* violations based on a defendant's lack of "diligence." See, *e.g.*, *Bogle* v. *State*, No. SC17-2151, 2019 WL 6904538 (Fla. Dec. 19, 2019); *Jimenez* v. *State*, 265 So. 3d 462

(Fla. 2018); *Thomas* v. *State*, 260 So. 3d 226 (Fla. 2018).[7]

2. In addition to invoking its due diligence precedent, the court below rested its denial of Dailey's *Brady* claims on a state procedural rule. In finding those claims "untimely," the court below held:

> Dailey neglects to explain why this information could not have been discovered prior to his trial or at some point during the subsequent decades of postconviction litigation. *See* Fla. R. Crim. P. 3.851(e)(2)(C)(iv). Accordingly, he is not entitled to relief.

App., *infra*, at 12a. But this is simply a codified due diligence requirement, demanding a "statement of the reason why the witness or document was not previously available." Fla. R. Crim. P. 3.851(e)(2)(C)(iv). Elsewhere, the language of the rule mirrors the now-abrogated fourth prong that Florida uses in *Brady* analysis:

> No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation * * * unless it alleges: 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* * * * .

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[7] For a time after this Court's holding in *Banks*, the Florida Supreme Court appeared to have abandoned the four-prong *Brady* analysis. See, *e.g.*, *Mordenti* v. *State,* 894 So. 2d 161, 169-71 (Fla. 2004). But the court's more recent decisions have been clear in applying a due diligence requirement.

Fla. R. Crim. P. 3.851(d)(2)(A) (emphasis added). For the reasons already noted, however, such a requirement of defendant due diligence in the *Brady* context is irreconcilable with this Court's constitutional holding in *Banks*.

That the Florida court justified its denial of *Brady* relief on a state rule of criminal procedure does not insulate it from this Court's review—or from *Banks*' constitutional requirement. To the contrary, the Court has long been clear that state procedural rules incompatible with the requirements of due process may not stand as a bar to relief. See, *e.g., Reece* v. *Georgia*, 350 U.S. 85 (1955); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

Accordingly, the Court should grant review to clarify that state rules requiring defendant due diligence may not, under the logic of *Banks*, be applied in the context of *Brady* claims.

B. The courts of appeals and state courts of last resort are divided on whether *Brady* claims may be rejected for failure to exercise due diligence.

Despite this Court's clear holding in *Banks*, federal and state courts alike are deeply divided over whether *Brady* material that the prosecution had a constitutional obligation to disclose may nevertheless be barred from consideration by application of a defendant due diligence rule. This conflict is long-standing and widely acknowledged, even after *Banks*: "The Supreme Court has not explicitly addressed and state and federal courts are split on this 'due diligence' question." *Biles* v. *United States*, 101 A.3d 1012, 1023 n.10 (D.C. 2014). In a rigorous examination, Professor

Kate Weisburd has explained that "the defendant due diligence rule developed in a somewhat haphazard way: Some lower courts took one phrase out of context, and other lower courts borrowed language from outdated cause and prejudice analysis." Kate Weisburd, *Prosecutors Hide, Defendants Seek*: *The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 U.C.L.A. L. Rev. 138, 153 (2012). This "circuitous history * * * helps explain why there is such divergence among courts in the definition and application of the rule." *Ibid.*

1. Six circuits and several state courts of last resort follow* Banks *in rejecting a due diligence rule for* Brady *violations.

Six circuits, and numerous state courts of last resort, consistently abide by the touchstones this Court set out in *Banks*.

Following *Banks*, the **Sixth Circuit** overruled its former endorsement of the due diligence rule. The court interpreted *Banks* as a "rebuke[] * * * for relying on such a due diligence requirement to undermine the *Brady* rule." *United States* v. *Tavera*, 719 F.3d 705, 711 (6th Cir. 2013). The court added that *Banks* "should have ended [the lower courts'] practice" of diluting the *Brady* rule by "favoring the prosecution with a broad defendant-due-diligence rule." *Id.* at 712. The Sixth Circuit now interprets *Brady* as "requir[ing] the State to turn over *all* material exculpatory and impeachment evidence to the defense," and not merely "*some* evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs." *Barton* v. *Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 468 (6th Cir. 2015). *Tavera* and *Barton* mark a sharp about-turn in the Sixth Circuit's case law.

Prior to *Tavera*, that court applied an expansive due diligence requirement that precluded application of *Brady* to any evidence "not wholly within the control of the prosecution." *Coe* v. *Bell*, 161 F.3d 320, 344 (6th Cir. 1998).

The **Ninth Circuit** concurs in rejecting a due diligence requirement as irreconcilable with *Brady*. In *Amado v. Gonzalez*, for instance, that court granted relief to a defendant who was entitled to "rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce," whether or not defense "counsel could have found the information himself." 758 F.3d 1119, 1136 (9th Cir. 2014). Similarly, in *Gantt* v. *Roe*, the Ninth Circuit reversed the district court's conclusion that "the evidence was not 'suppressed' within the meaning of *Brady*, because the defense could and should have discovered it itself." 389 F.3d 908, 912 (9th Cir. 2004). Instead, citing this Court's clear instruction in *Banks*, Judge Kozinski emphasized for the court that the defendant "was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation." *Id.* at 913. Underscoring the point, the court observed that no diligence requirement could "absolve the prosecution of its *Brady* responsibilities." *Ibid.*

Before the **Tenth Circuit,** the government expressly argued that the prosecution's failure to disclose exculpatory evidence did not violate *Brady* because the defendant either independently knew or should have known of the information. But the court dismissed this argument, clarifying that "the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's

knowledge." *Banks* v. *Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995). Indeed, Judge Stephen Anderson's opinion for the court in *Reynolds* highlighted that the "fact that defense counsel 'knew or should have known' about the * * * information * * * is *irrelevant* to whether the prosecution had an obligation to disclose [the evidence]." *Id* (emphasis added). See also *United States* v. *Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999) (defendant's knowledge of evidence might be salient for a materiality analysis but "whether a defendant knew or should have known of the existence of exculpatory evidence is irrelevant to the prosecution's obligation to disclose the information").

In *In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887 (D.C. Cir. 1999), the **D.C. Circuit** rejected the "government's argument that it did not breach a disclosure obligation" with respect to certain information that was "otherwise available through 'reasonable pre-trial preparation by the defense.'" *Id.* at 896. Although the government argued that the defendant "should have subpoenaed the involved officers themselves" to obtain police agreements with a confidential informant, the court emphasized that "the prosecutor is responsible" for disclosing favorable evidence known to the police. *Id.* at 897 (quoting *Strickler*, 527 U.S. at 275 n.12). Since *In re Sealed Case*, which overturned circuit law on the question, in the D.C. Circuit "*Brady* does not excuse the government's disclosure obligation where reasonable investigation and due diligence by the defense could also lead to discovering exculpatory evidence." *United States* v. *Nelson*, 979 F. Supp. 2d 123, 133 (D.D.C. 2013).

The **Second Circuit** held in *Lewis* v. *Connecticut Commissioner of Correction*, 790 F.3d 109 (2d Cir. 2015), that the state court's imposition of "an affirmative 'due diligence' requirement" was impermissible as it "plainly violated clearly established federal law under *Brady* and its progeny." *Id.* at 121-122 (quotation marks omitted). The court acknowledged its prior decisions holding that "'[e]vidence is not 'suppressed' [for *Brady* purposes] if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'" *Id.* at 121 (quoting *DiSimone* v. *Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)). But as the court explained, this requirement "speaks to facts already within the defendant's purview" based on the defendant's *actual knowledge*, not "those [facts] that might be unearthed" through an exercise of due diligence. *Id.*

Finally, the en banc **Third Circuit** recently held that "*Brady's* mandate and its progeny are entirely focused on prosecutiorial disclosure, not defense counsel's diligence." *Dennis* v. *Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 290 (3d Cir. 2016) (en banc). In reconciling years of internal circuit conflict on a due diligence requirement,[8] the decision specifically called attention to this Court's instruction in *Banks,* noting that "defense counsel is entitled to presume that prosecutors have discharged their official duties" and that "the duty to disclose under *Brady*

[8] Compare, *e.g.*, *Wilson* v. *Beard*, 589 F.3d 651 (3d Cir. 2009) (there is no due diligence requirement for a *Brady* claim) with *Grant* v. *Lockett*, 709 F.3d 224, 230-31 (3d Cir. 2013), and *United States* v. *Georgiou*, 777 F.3d 125, 140 (3d Cir. 2015) (government has *not* committed a *Brady* violation if the defendant could have obtained the evidence through reasonable due diligence).

is absolute—it does not depend on defense counsel's actions." *Id.* at 290 (internal citations and quotation marks omitted).

Several state courts of last resort also have adopted a rule that comports with *Banks*, plainly rejecting a requirement of defendant diligence where *Brady* material should have been disclosed by prosecutors.

The **Michigan** Supreme Court recently expressly rejected a diligence requirement as a clear departure from *Brady*. *People* v. *Chenault*, 845 N.W.2d 731 (Mich. 2014). In that case, the court reversed the lower court's ruling denying the defendant a new trial because his counsel had not exercised due diligence in obtaining videotapes of exculpatory interviews that cast doubt on the recollection of an eyewitness. *Id.* at 734-35. The Michigan Supreme Court declined to follow contrary pre-*Banks* decisions of the Fifth and Eleventh Circuit, concluding that "[n]one of these cases * * * provides a sufficient explanation for adding a diligence requirement to the Supreme Court's three-factor *Brady* test." *Id.* at 736-37. Other state courts of last resort in accord on declining to enforce a defendant diligence rule for *Brady* claims include: **Massachusetts**, *Commonwealth* v. *Tucceri*, 589 N.E.2d 1216, 1221-22 (Mass. 1992); and **Maryland**, *State* v. *Williams*, 896 A.2d 973, 992 (Md. 2006). See also **Indiana**, *Prewitt* v. *State*, 819 N.E.2d 393, 407 (Ind. Ct. App. 2004); and **Missouri**, *State* v. *Parker*, 198 S.W.3d 178, 193 (Mo. Ct. App. 2006).

2. Six courts of appeals and four state courts of last resort in addition to the Florida Supreme Court continue to recognize a due diligence exception to Brady*'s disclosure obligations.*

In contrast, six other federal courts of appeals and four state courts of last resort, like the Florida Supreme Court, will not recognize a *Brady* violation when the defendant could have discovered the withheld information through the exercise of due diligence, even after this Court's decision in *Banks*.

The **First Circuit** emphasizes that "*Brady* does *not* require the government to turn over information which, *with any reasonable diligence*, the defendant can obtain himself." *United States* v. *Cruz-Feliciano*, 786 F.3d 78, 87 (1st Cir. 2015) (emphasis added) (quotations omitted). Citing pre-*Banks* caselaw, the First Circuit found that "evidence is not suppressed * * * if the defendant either knew, or *should have known*, of the essential facts permitting him to take advantage of [it]." *Ibid.* (citing *Ellsworth* v. *Warden*, 333 F.3d 1, 6 (1st Cir. 2003)) (alterations omitted).

So too in the **Fourth Circuit**, where defendants must demonstrate not only that the evidence was "known to the government but not to the defendant," but *also* that it did not "lie[] in a source where a reasonable defendant would have looked." *United States* v. *Catone*, 769 F.3d 866, 872 (4th Cir. 2014) (internal quotation marks omitted) (holding that information contained in Department of Labor files was not *Brady* material).

In the **Fifth Circuit**, *United States* v. *Bernard*, 762 F.3d 467 (5th Cir. 2014), applied a due diligence

rule in the context of capital defendants. The case involved federal inmates who, following affirmance of their convictions for capital murder and sentences of death, filed motions to vacate and set aside their sentences on the basis of multiple undisclosed police interviews with two key government witnesses at trial. *Id*. at 480. Because statements the witnesses made in the interviews—related to their serious mental illnesses, drug use, and prior convictions—would have provided key impeachment evidence, the defendants argued, the prosecution was under a *Brady* obligation to disclose it. *Id*. at 481. The court rejected the argument. "A petitioner's *Brady* claim fails," it held, "if the suppressed evidence was discoverable through reasonable due diligence." *Id*. at 480 (quotation and citation omitted). Because defense counsel could have called *other* witnesses who knew of the key impeachment facts, the court found, the lack of diligence in doing so precluded the *Brady* claims. *Id*. at 481-82.

In *Petty* v. *City of Chicago*, the **Seventh Circuit** established a two-prong test for establishing whether evidence has been suppressed for *Brady* purposes that includes the defendant's demonstration that "the evidence was not otherwise available to a defendant through the *exercise of reasonable diligence*." 754 F.3d 416, 423 (7th Cir. 2014) (citing *Collier* v. *Davis*, 301 F.3d 843, 850 (7th Cir. 2002)).

The **Eighth Circuit**, too, has continued to hold since *Banks* that the *Brady* right is "limit[ed]" in that "it does not cover information available from other sources." *United States* v. *Sigillito*, 759 F.3d 913, 929 (8th Cir. 2014) (internal quotation marks omitted).

Finally, in the **Eleventh Circuit,** a formal *four*-prong *Brady* test continues to be the rule, explicitly

requiring defendant due diligence for any *Brady* claim to be cognizable. See, *e.g., LeCroy* v. *Sec'y, Fla. Dep't of Corr.*, 421 F.3d 1237, 1268 (11th Cir. 2005) ("To establish that he suffered a *Brady* violation, the defendant must prove that * * * (2) the defendant did not possess the evidence *and could not have obtained it with reasonable diligence* * * * .") (emphasis added).

Some state courts impose the same rule. **Connecticut** holds that evidence is not considered to have been suppressed where it "could have been discovered through reasonably diligent research." *State* v. *Giovanni P.*, 110 A.3d 442, 457 (Conn. App. Ct. 2015) (citing *State* v. *Simms*, 518 A.2d 35 (Conn. 1986)). Other states are in accord: **Georgia,** *Freeman* v. *State*, 672 S.E.2d 644, 647 (Ga. 2009); **Mississippi**, *Davis* v. *State*, 43 So. 3d 1116, 1123 (Miss. 2010); **Montana**, *State* v. *Parish*, 241 P.3d 1041, 1044 (Mont. 2010); and **Pennsylvania**, *Commonwealth* v. *Ligons*, 971 A.2d 1125, 1146 (Pa. 2009).

C. The due diligence question is a recurring and significant one that warrants the Court's attention.

The need for resolution of this conflict is acute. As a general matter, "[t]here is an epidemic of *Brady* violations abroad in the land." *United States* v. *Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting). Among these cases, those involving the due diligence requirement present an issue that is notable for its persistence and importance. Each year, the lower courts impose the due diligence rule on myriad criminal defendants. See Kathleen Ridofli et al., *Material Indifference: How Courts are Impeding Fair Disclosure in Criminal Cases* 30 (2014), https://ti-

nyurl.com/vwvu9pw. This case is a paradigmatic example of how burden-shifting of this sort deprives defendants of key exculpatory evidence.

This case also is emblematic of the damage that *Brady* violations can inflict on the integrity of the criminal justice system. The Court has often made clear that *Brady* rests on a view of "the prosecutor as the representative * * * of a sovereignty * * * whose interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (citations omitted). But the due diligence rule runs counter to this aspiration, as criminal defendants invariably lack the State's ability to process and obtain exculpatory evidence. See Weisburd, 60 U.C.L.A. L. Rev. at 175.[9]

Unsurprisingly, *Brady* violations such as the imposition of a due diligence rule go hand-in-hand with wrongful convictions. See, *e.g.*, James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1850, 1864 n.79 (2000) (finding that *Brady* violations were one of "the two most common errors" leading to reversals of death sentences, accounting for almost one-fifth of such reversals). And such violations erode the public's trust

[9] The problem is compounded in Florida by a rule that withholds from capital defendants, unlike all other criminal defendants and the general public, recourse to the State's otherwise liberal document production and public records provisions. Florida Rule of Criminal Procedure 3.852 allows for record requests in capital cases only after a death warrant is signed, but under Rule 3.851 those record requests must be relevant to pre-death warrant proceedings.

in the rule of law. This case is an example of that pernicious effect: it has, rightly, been widely recognized as an example of justice miscarried.[10]

II. The court below misapplied both the *Brady* requirement that evidence be considered cumulatively and the clear requirements of *Giglio*.

The Florida court also made further errors in its application of *Brady* and *Giglio*. It refused to consider the suppressed evidence cumulatively and in the context of *all* the evidence in the case, as this Court has expressly required. And it simply disregarded a key holding of *Giglio*. Had the Florida court applied the doctrine correctly, it would have been required to set aside Dailey's conviction.

A. The court below erred in not considering the suppressed evidence cumulatively and in context.

In addition to holding that the *Brady* claims in this case were barred because they could have been uncovered earlier through defense efforts, the court below ruled that a *Brady* claim had not been established because, as a consequence of Slater's professed uncertainty about whether the exculpatory statements he had been told related to this case, "Dailey has not demonstrated the existence of any exculpatory evidence that would have created a reasonable probability of a different verdict." App., *infra*, 9a. The court then went on to reject Dailey's argument that his *Brady* evidence should be considered cumulatively

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[10] See, *e.g.*, *Bishops Urge Stay of Execution, Note 'Strong Evidence' Inmate is Innocent*, CATHOLIC NEWS SERVICE (Oct. 22, 2019), https://tinyurl.com/srfjo94; Scott Martelle, Opinion, *A Florida Death Row Case Indicts the Entire Capital Punishment System*, L.A. TIMES (Dec. 5, 2019), https://tinyurl.com/tb7lmhj.

with other exculpatory evidence developed in prior post-conviction proceedings: "Given that [Dailey's] newly discovered evidence claims were correctly rejected as untimely and that he failed to establish a *Brady* violation, no * * * cumulative analysis was required." *Id*. at 12a.

But that analysis gets the necessary inquiry backwards: it is impossible to determine whether a *Brady* violation has occurred without *first* looking at the potential *Brady* materials cumulatively with other suppressed evidence and contextually with the other evidence in the case.

Under *Brady*, failure to disclose exculpatory evidence requires reversal of a conviction when that evidence was "material." *E.g.*, *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999). The Court articulated the definition of materiality in *United States* v. *Bagley*: Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." 473 U.S. 667, 682 (1985). The defendant "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted," so long as confidence in the outcome is "undermine[d]." *Wearry*, 136 S. Ct. at 1006 (citation omitted).

The Court also has made clear *how* to determine whether evidence is material. The suppressed *Brady* evidence "must be evaluated in the context of the entire record"; "[i]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient [to undermine confidence in the outcome]." *United States* v. *Agurs*, 427 U.S. 97,

112-13 (1976). In *Kyles* v. *Whitely*, the Court added that materiality also "turns on the cumulative effect of all such evidence suppressed by the government." 514 U.S. at 421.

This principle is reflected in the Court's most recent *Brady* cases: The Court's decision whether suppressed evidence was material often turns on the relative strength of the entirety of the evidence against the defendant. Compare *Wearry*, 136 S. Ct. at 1006-07 (nondisclosed evidence material where "[t]he State's trial evidence resembles a house of cards"), with *Turner* v. *United States*, 137 S. Ct. 1885, 1893-95 (2017) (nondisclosed evidence pointing to a single attacker was immaterial when "virtually every witness to the crime itself agreed * * * [the victim] was killed by a large group of perpetrators").

The Florida Supreme Court ignored this principle, expressly holding that "no such cumulative analysis was required." App., *infra*, 12a. This error of law determined the outcome; as discussed below (at 30-34), the requisite cumulative analysis would require setting aside the verdict.

B. The Florida Supreme Court misapplied *Giglio*.

The Florida Supreme Court also erred in holding that Coleman's testimony did not show that the State violated *Giglio*. The court below misunderstood either *Giglio* itself or Dailey's invocation of the *Giglio* doctrine. In either case, its holding was wrong.

1. *Giglio* held that one prosecutor's knowledge should be imputed to the government even if another prosecutor tries the case. 405 U.S. at 154. The Court subsequently made clear that this rule also applies to the police, holding that "the individual prosecutor has

a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437. This holding is applicable to two related, but distinct, lines of due process cases.

First, *Giglio* applies to the doctrine that the government may not make knowing use of perjured testimony or allow perjured testimony to go uncorrected. See *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). Therefore, under *Giglio*, if one prosecutor knows that a witness's testimony is false, the government's failure to correct that testimony violates due process whether or not the specific prosecutor trying the case knows of the falsity. See *Giglio*, 405 U.S. at 153-54.

Second, *Giglio* also applies to the *Brady* line of cases requiring the government's disclosure of evidence favorable to the defendant. Under *Giglio*, if one prosecutor is in possession of material impeachment evidence, the government must disclose that evidence even if the prosecutor trying the case is unaware of it. See *Giglio*, 405 U.S. 153-55. In *Giglio* itself, both types of claims (use of perjury and failure to disclose exculpatory material) were at issue. *Id.* at 155.

2. Here, the Florida Supreme Court treated Dailey's claim regarding the Coleman testimony as though it alleged knowing use of perjured testimony. In fact, however, Dailey's actual claim arising from the Coleman testimony was that the State *failed to disclose* exculpatory testimony.

Dailey argued below that "Coleman's testimony provided for the very first time direct proof that Halliday was promising to reduce inmates' charges if they provided him with the information he was seeking." Initial Brief of Appellant at 39, 2019 WL 5431196,

Dailey v. *State*, 283 So.3d 782 (Fla.). Detective Halliday, of course, would have known that he made these promises, and his knowledge is imputable to the prosecution. Yet, as Dailey argued below, "as in *Giglio*, the State in this case failed to disclose [this] impeachment evidence regarding the State's key witnesses." *Id.* at 41.

The Florida court, however, rejected Dailey's *Giglio* claim because "Dailey has not identified any false testimony presented during his trial, much less alleged that the State knew of its falsity." App., *infra*, 11a. That was a non sequitur: Dailey alleged suppression, not perjury.[11] Here too, as we show below, this error was material.

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

When analyzed in the manner directed by this Court's precedent, it is manifest that there is a "reasonable likelihood" that the suppressed evidence "could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (citations and internal quotation marks omitted).

1. The State's case against Dailey was notably weak. The only evidence that Dailey could have been at the scene when the crime was committed was offered by Bailey, Pearcy's girlfriend, and was directly

[11] This error may have been driven by the State's mischaracterization of Dailey's claim as a *Napue-Giglio* claim, stating in its brief below: "nothing Dailey has alleged shows that the prosecutor presented or failed to correct false testimony that the prosecutor knew was false." Answer Brief of Appellee at 38-39, 2019 WL 5492018, *Dailey* v. *State*, 283 So.3d 782 (Fla.).

contradicted by Shaw's account that Pearcy and Boggio left Pearcy's house *without* Dailey. There is no direct evidence that Dailey was involved in Boggio's killing: The State offered no physical evidence tying him to the crime, no eyewitness testimony, no forensic evidence, and no motive. As the trial prosecutor has acknowledged, "[i]t was a circumstantial case, it's not like there was an upstanding citizen eyewitness to the case * * * [s]o speculation is all we have as to what happened." *Dailey* Pet. 3 n.4.

That left the case against Dailey to rest substantially on the evidence of jailhouse informants, who offered graphic and compelling testimony that Dailey confessed to the crime. But that evidence is an alarmingly weak reed on which to sustain a capital conviction. The testimony of jailhouse informants is notoriously unreliable.[12] Here, the testimony—that Dailey floridly confessed to the crime to three inmates more than a year after his incarceration, but just after Detective Halliday made known that he was looking for evidence against Dailey—is little short of preposterous on its face. And the most inflammatory of this evidence was provided by Skalnik, who has been revealed to be a serial prevaricator.

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[12] *See, e.g.* Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, N.Y. Times Magazine (Dec. 4, 2019), https://tinyurl.com/wc8d3a8; Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* 3 (2004), https://tinyurl.com/yd7peept (finding the jailhouse informant testimony was used in 45.9% of documented wrongful death row convictions); see also *State* v. *Arroyo*, 973 A.2d 1254 (Conn. 2009) (requiring a special credibility jury instruction when informant testimony is used).

2. Against this background, any of the individual exculpatory *Brady* materials unearthed by Dailey "is sufficient to 'undermine confidence' in the verdict" (*Wearry*, 136 S. Ct. at 1006 (citation omitted))—and that certainly is true when the evidence is viewed cumulatively.

First, Slater's evidence both indicates that Pearcy confessed to the crime and, in its account of an embarrassingly unsuccessful sexual encounter, provides a compelling account of Pearcy's motive, one supported by evidence that Pearcy had known Boggio for some time and had danced with her on the evening of the murder. See *Dailey* Pet. 1-2 & n.1. This evidence might well have moved the jury: courts "have long recognized that '[t]he absence or presence of a motive renders the alleged fact less or more probable,' such that the lack of motive evidence operates as a distinct disadvantage to the State and a corresponding advantage to the defense regarding the issue of whether the accused committed the charged crime." *State* v. *Addison*, 87 A.3d 1, 78 (N.H. 2013). And motive "is a factor that often points to who may have committed the crime." *United States* v. *Roux*, 715 F.3d 1019, 1024 (7th Cir. 2013).

Consequently, even assuming that the force of Slater's affidavit is undermined (even undermined substantially) by the reservations he subsequently expressed about whether the information he had been given by "law enforcement" related to the Boggio murder, that evidence would have materially undermined the State's case. "Even if the jury—armed with all of this new evidence—*could* have voted to convict [Dailey], [the Court can] have no confidence that it *would*

have done so." *Wearry*, 136 S. Ct. at 1007 (citation omitted).

Second, Coleman's testimony that Detective Halliday promised to reduce inmates' charges in exchange for evidence against Dailey raises doubt about the credibility of the jailhouse informant testimony. And "[t]he State's trial evidence resembles a house of cards, built on the jury crediting" that testimony "rather than [Dailey's] alibi." *Wearry*, 136 S. Ct. at 1006. Here, too, there is every reason to expect that the jury would have been affected by this evidence, had it been available. See *id.* at 1007 (juror who found informant testimony credible "might have thought differently had she learned that [the witness] may have been motivated to come forward * * * by the possibility of a reduced sentence on an existing conviction"); *United States* v. *Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."). See also *Smith* v. *Cain*, 565 U.S. 73, 76 (2012) (evidence impeaching a witness is material when the witness's testimony is the only evidence linking the defendant to the crime).

Third, the *Brady* evidence described above would have gotten synergy had the jury also been informed about the report of the Indian Rocks Beach police, which documented that Oza Shaw contemporaneously supported Dailey's alibi; Shaw indicated that Pearcy and Boggio left Pearcy's home together without Dailey, and that Pearcy returned home *alone*. This evidence adds force to Slater's account of the crime.[13]

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[13] Dailey raised a *Brady* claim about the Indian Rocks Beach police report in his Second Consecutive Motion for Post-Conviction

Finally, the suppressed evidence tells the story that Dailey tried, but did not have the evidence, to present at trial. It shows that Pearcy alone killed Boggio, after leaving Dailey at home. It shows that Pearcy had a motive for the crime. It shows law enforcement agents knew this but, likely frustrated that Pearcy had escaped a death sentence, pursued Dailey anyway. And it shows that, to build a case against Dailey, the police gave jailhouse informants an incentive to lie. In its totality, this new evidence surely "could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (citations and internal quotation marks omitted).

D. Given the clear nature of the errors committed below, summary reversal is warranted.

The recurring and consequential legal questions presented here warrant review of this case on the merits. Alternatively, the manner in which the Florida Supreme Court "egregiously misapplied settled law" also would make summary reversal appropriate. *Wearry*, 136 S. Ct. at 1007.

As the Court recently noted, it does "not sh[y] away from summarily deciding fact-intensive cases where, as here," the error committed below is clear.

Relief. See *Dailey* v. *State*, 279 So. 3d 1208, 1215-16 (2019). The Florida Supreme Court rejected the claim both on due diligence grounds and because it "would not probably produce an acquittal upon retrial." *Id.* at 1216. Although the materiality of the police report, in isolation, is not before the Court in this petition, for the purposes of cumulative analysis its impact may be considered. See*, e.g.*, *Tompkins* v. *State*, 980 So. 2d 451, 459 (Fla. 2007) (considering the cumulative effect of the current *Brady* claim with the effect of those brought in prior motions for post-conviction relief.).

Wearry, 136 S. Ct. at 1007 (identifying at least eight such cases). And in particular, summary reversal of the judgment in a capital case "is hardly unprecedented" when the "circumstances so warrant." *Id.* at 1008. That is for good reason: "When a defendant's life is at stake, the Court has been particularly sensitive to insure [*sic*] that every safeguard is observed." *Gregg* v. *Georgia*, 428 U.S. 143, 187 (1976). See also *Ring* v. *Arizona*, 536 U.S. 584, 605-06 (2002) (defendants in capital cases must be given highest level of protection to guard against error). This solicitude is warranted because "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976).

Indeed, *Wearry*, where the Court granted such relief in a case alleging *Brady* violations, bears striking similarities to the circumstances here. In that capital case, the Court summarily reversed after finding that "the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively * * *." 136 S. Ct. at 1007. The Florida court made the same error. In both cases, the prosecution relied on incarcerated informants who had every reason to lie. *Ibid*. In both cases, the prosecution suppressed evidence that undermined the credibility of its star witness. *Id*. at 1005. In neither case did the State "present[] physical evidence at trial" linking the defendant to the crime. *Id.* at 1003. And in this case, as in *Wearry*, "[t]he State's trial evidence resembles a house of cards" that collapses when any of the State's questionable evidence is removed. *Id.* at 1006. The Court should intervene here as it did in *Wearry* and set the conviction aside.

CONCLUSION

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

Respectfully submitted.

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