No. 19-7309

In the Supreme Court of the United States

JAMES MILTON DAILEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

In 1987, Petitioner James Dailey was convicted of murdering a 14-year-old girl and sentenced to death. Dailey's codefendant, Jack Pearcy, was also convicted for his role in the murder and sentenced to life in prison.

In 2017, Pearcy signed an affidavit stating that he committed the crime alone. That affidavit contradicted a sworn statement Pearcy made one month after the murder, in which he explained in detail how Dailey killed the victim during a rape. It also departed from multiple other statements that Pearcy has made over the years, which state and federal courts have repeatedly rejected as a basis for postconviction relief. As the Eleventh Circuit recently explained, Pearcy "cannot seem to make up his mind about whether he killed [the victim]," "which makes his affidavits unreliable for many of the same reasons recanting trial witnesses are unreliable."

Notwithstanding those problems, the state postconviction court held an evidentiary hearing to consider Pearcy's 2017 affidavit. At the hearing, Pearcy testified that the statements in the affidavit are *not* true. In light of that disavowal and certain other "peculiar" circumstances, the trial court found that the affidavit is "hearsay of an exceptionally unreliable nature," which need not be admitted under *Chambers v. Mississippi*, 410 U.S. 284 (1973). Accordingly, the court denied Dailey's motion to vacate his conviction. The Florida Supreme Court unanimously affirmed.

The question presented is: Whether the Florida Supreme Court erred in applying *Chambers v. Mississippi*, 410 U.S. 284 (1973), to the facts of this case.

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STATEMENT OF THE CASE

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

They then went to Pearcy's house. *Id.* Shaw and Pearcy's girlfriend stayed there for the rest of the night, but Dailey and Pearcy took Shelly back out. *Id.* They drove her "to a deserted beach." *Dailey v. State*, 659 So. 2d 246, 246 (Fla. 1995). Over the course of the evening, Dailey had made advances on Shelly and tried to dance with her, but she rebuffed him. *Dailey*, 594 So. 2d at 258; *see also In re Dailey*, 2020 WL 486260, at *5 (11th Cir. Jan. 30, 2020). Shelly was a fourteen-year-old in the seventh grade; and Dailey was thirty-eight years old. *Dailey*, 659 So. 2d at 246; *Dailey v. Sec'y, Fla. Dep't of Corrs.*, 2019 WL 6716073, at *2 (M.D. Fla. Dec. 10, 2019); Arrest Affidavit, *State v. Dailey*, No. 1985-CF-007084 (Fla. Cir. Ct. Feb. 12, 1986).

After taking Shelly to the deserted beach, "Dailey tortured her with a knife" and "attempted to sexually assault her." *Dailey*, 659 So. 2d at 246-47; *see Dailey v. Sec'y, Fla. Dep't of Corrs.*, 2011 WL 1230812, at *16 (M.D. Fla. Apr. 1, 2011) (summarizing trial court's factual findings and determining that the findings are

"supported by the record"), *amended in part, vacated in part on other grounds*, 2012 WL 1069224 (M.D. Fla. Mar. 29, 2012). When Shelly fought back, Dailey "stabbed [her] over thirty times." *Id.* He then "grabbed [her] and threw her into the waterway." *Id.* "He choked her and held her head under water until she quit struggling and died." *Id.* Shelly's naked body was left floating in the water. *Dailey*, 594 So. 2d at 256.

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

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

Hours after the murder, Dailey, Pearcy, Shaw, and Bailey all left St. Petersburg and went to Miami, "without any forewarning or planning." *Dailey*, 2020 WL 486260, at *7. "Dailey was acting bizarre" the morning after the murder; "he was unusually quiet and he spoke alone with Pearcy in hushed tones." *Id.* Dailey spent only a single night in Miami before taking a bus to Arizona. *Id.*

In June 1985, a month after the murder, Pearcy gave a 40-page sworn statement to police. *Dailey*, 2019 WL 6716073, at *2. He "explained in detail how

Dailey butchered and drown[ed] the 7th-grade girl during a rape." *Id.* His account was "consistent with physical facts of the case, even down to the vomit that he emitted upon seeing the slaughter, which was found the next day near where the victim bled." *Id.*; *see id.* at *2 n.2 (noting that the "Medical Examiner testified that the vomit did not match the contents of [Shelly's] stomach").

2. Dailey's Trial. The State tried and convicted Pearcy for his role in the murder and then tried Dailey. *Dailey*, 594 So. 2d at 256. It offered testimony from people who saw Dailey, Pearcy, and Shelly the night of the murder, including Shaw and Bailey. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9. Shaw and Bailey testified that they saw Dailey and Pearcy when they returned from the beach. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9. Dailey and Pearcy entered the house together, without Shelly, and Shaw and Bailey both noticed that Dailey's pants were wet. *Dailey*, 965 So. 2d at 42; *Dailey*, 2011 WL 1230812, at *9.

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

trials," and "[o]ne of Pearcy's notes expressly implicates Dailey as [Shelly's] murderer, consistent with Pearcy's [1985 sworn] statement." *Id.*

In accord with their scheme, Pearcy refused to testify at Dailey's trial. *Dailey*, 594 So. 2d at 256; Order, *State v. Dailey*, No. 1985-CF-007084 (Fla. Cir. Ct. Jan. 27, 1987) (holding Pearcy in contempt for refusing to testify).

Dailey presented no evidence during the guilt phase of the trial, and the jury found him "guilty of first-degree murder and unanimously recommended" the death penalty. *Dailey*, 594 So.2d at 256. "At sentencing, Dailey requested the death penalty and the court complied." *Id.* Based on the evidence presented during the guilt and penalty phases, the court found, beyond a reasonable doubt, that Dailey's motive for taking Shelly to the deserted beach was sexual battery. *Id.* at 258.

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

The trial court on remand "resentenced Dailey to death after finding three aggravating and numerous mitigating circumstances." *Dailey*, 659 So. 2d at 247. It found that he had a prior violent felony, that he killed Shelly during a sexual

battery, and that the murder was heinous, atrocious, or cruel. *Id.* at 247 n.3. Those aggravating circumstances, the court concluded, outweighed the mitigating circumstances, which included, among other things, that Dailey "served in the Air Force and saw duty in Vietnam on three occasions." *Id.* at 247 n.4, 248.

The Florida Supreme Court unanimously affirmed Dailey's death sentence, *id.* at 248, and this Court denied his petition for a writ of certiorari on January 22, 1996. *Dailey v. Florida*, 516 U.S. 1095 (1996).

4. First and Second State Postconviction Motions. In Dailey's initial state postconviction motion, he raised 15 claims, including a claim that new evidence from Pearcy and Shaw entitled him to relief and an ineffective-assistance claim. *Dailey*, 965 So. 2d at 42-43, 45. The state trial court held multiple evidentiary hearings, and at them, Dailey offered a 1993 statement from Pearcy and testimony from Shaw. *Id.* at 43, 45. In the affidavit, Pearcy contradicted his 1985 sworn statement to police and asserted that neither he nor Dailey was ever at the beach with Shelly. *Id.* at 45–46; App. 344a-53a. When called to the stand, however, Pearcy invoked the Fifth Amendment and refused to acknowledge the veracity of his new statement (PCR V4/537). Shaw also changed his story—he recanted his trial testimony and testified that on the night of the murder he did not in fact see Dailey return from the beach with Pearcy. *Dailey*, 965 So. 2d at 45–46.

The trial court denied Dailey's postconviction motion "after briefing, a legal hearing, and five evidentiary hearings." *Dailey*, 2019 WL 6716073 at *2. The court "ruled that Pearcy's [affidavit] was uncorroborated hearsay" and that "Shaw's latest

version of events was unreliable" and "would be unlikely to produce an acquittal on retrial." *Dailey*, 965 So. 2d at 45–46.

The Florida Supreme Court affirmed. *Id.* at 41. In his 1993 statement, the court noted, Pearcy did not admit to the murder of Shelly or the commission of any other crime. *Id.* at 46. In addition, the court stressed, "Pearcy has had numerous opportunities to testify on Dailey's behalf, and has repeatedly declined to do so." *Id.* The court agreed with the trial court's ruling that Shaw's recantation was unreliable: "Nearly twenty years had passed between the night of the murder and Shaw's appearance at the evidentiary hearing," and the trial court was correct to conclude that "Shaw's recollection of events at the time of trial [was] more likely to be accurate." *Id.* But even accepting Shaw's most recent version of events, the Court concluded that new evidence would probably not produce an acquittal on retrial in light of the other evidence in the case. *Id.*

The court also rejected Dailey's claim that his counsel was ineffective for failing to call Dailey to testify. If called to testify, Dailey would have told the jury that his pants were wet the night of the murder because he and Pearcy had played frisbee in the water. *See Dailey*, 2020 WL 486260, at *7 & n.10. At the postconviction "evidentiary hearing, counsel explained that [this] story . . . was likely to be rejected by the jury and would damage [Dailey']s credibility." *Dailey*, 965 So. 2d at 47. That was "a reasonable tactical decision," the Court concluded, and not deficient performance. *Id.*

Dailey later filed a second state postconviction motion, seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), but the Florida Supreme Court denied relief. *Dailey v. State*, 247 So. 3d 390, 391 (Fla. 2018).

5. First Federal Habeas Proceeding. In his first federal habeas proceeding, Dailey raised a series of due process, Confrontation Clause, sentencing, ineffective-assistance, and Eighth Amendment claims. *Dailey*, 2011 WL 1230812 at *4–28. The district court denied all the claims, concluding that Dailey failed to prove any "constitutional errors in his underlying conviction and sentence" and that "any arguable error was harmless based on the facts and the record." *Id.* at *2.

Dailey sought to appeal the decision, but the district court denied him a certificate of appealability. *Dailey v. Sec'y, Fla. Dep't of Corr.*, 2012 WL 1069224, at *8 (M.D. Fla. Mar. 29, 2012). Dailey's claims, the court determined, were neither "debatable" nor "adequate to deserve encouragement to proceed further." *Id.* (quotation marks omitted).

Like the district court, the Eleventh Circuit denied Dailey's application for a certificate of appealability. *Dailey v. Sec'y, Fla. Dep't of Corrs.*, No-12222-P (11th Cir. July 19, 2012).

6. Death Warrant, Stay of Execution, and Rule 60 Motion. On September 25, 2019, Governor Ron DeSantis signed Dailey's death warrant, setting his execution for the week of November 4, 2019. *Dailey*, 2020 WL 486260, at *1 n.2. Dailey then returned to federal district court, moved for appointment of new counsel (the Capital Habeas Unit of the Office of the Federal Public Defender), and

requested a temporary stay of execution to afford his new counsel time to review his case. *Dailey v. Sec'y, Fla. Dep't of Corrs.*, 2019 WL 5423314, at *1 (M.D. Fla. Oct. 23, 2019). The district court granted the stay. *Id.* It took "no position on any potential habeas application that Dailey's new counsel might file" but determined that "it is in the interests of a just and fair system for . . . counsel to have . . . time to review and present habeas issues" for Dailey. *Id.* at *2.

Thereafter, Dailey filed a Rule 60 motion seeking to vacate the judgment in his first federal habeas proceeding. *Dailey*, 2019 WL 6716073 at *1. He claimed that he "was denied a fair and complete collateral, habeas review," entitling him to a new opportunity to "marshal and restate evidence from th[e] lengthy 34-year old record to cast doubt upon the verdict." *Id.* The district court concluded, however, that "[j]ustice does not . . . require" reopening the "sound federal habeas judgment." *Id.* at *4. Dailey's motion, the court found, relied on a "selective portrayal of the record," ignoring, among other things, Pearcy's 1985 sworn statement and the "damning trial testimony" from the jail inmates, which was "backed up" by inculpatory notes written "in Dailey and Pearcy's hand" *Id.* at *2.

By the time the district court issued its decision, Dailey's death warrant had lapsed. *Dailey*, 2020 WL 486260 at *1 n.2. A new warrant has not yet issued. *Id.*

7. Application to File Second Federal Habeas Petition. In recent months, Dailey sought leave to file a second federal habeas petition, one raising an actual innocence claim. *Id.* at *1. He again relied on out-of-court statements from Pearcy (an affidavit from 2017 and another from 2019) and on Shaw's revised

account of the night of the murder. *Id.* at *6-7. Pearcy's affidavits departed from all his prior statements—for the first time in the 30 years since Shelly's murder, he claimed that he alone is responsible for the murder. *Id.* at *7.

A three-judge panel of the Eleventh Circuit unanimously denied Dailey's application for leave to file a second or successive habeas petition. The panel rejected Dailey's actual innocence claim for three independent reasons. First, Dailey had already raised an actual innocence claim in earlier proceedings, and his most recent application merely recycled that already-rejected claim. *Id.* at *2. Second, Dailey did not make a "prima facie showing" of a constitutional violation tethered to his actual innocence claim. *Id.* at *3. Third, Dailey's new evidence did not demonstrate "a reasonable likelihood" that he was actually innocent. *Id.* at *4-5. Of particular relevance here, the panel concluded that the Pearcy's affidavits were unreliable. *Id.* at *6-7. Pearcy, the court explained, "cannot seem to make up his mind about whether he killed [Shelly] or not, which makes his affidavits unreliable for many of the same reasons recanting trial witnesses are unreliable." *Id.* at *7.

8. Third State Postconviction Motion. Dailey's third motion for state postconviction relief underlies this proceeding. App. 20a (referring to motion as a "second successive motion to vacate judgments of conviction and sentence"). In the motion, Dailey brought a newly-discovered-evidence claim based on an April 20, 2017 affidavit from Pearcy. App. 25a;[1] *Dailey*, 279 So. 3d at 1212. The affidavit is

[1] Dailey also raised other newly-discovered-evidence claims that are not at issue here. The Florida Supreme Court concluded that they are procedurally barred, and Dailey's petition does not challenge that ruling. *See Dailey v. State*, 279

one of the same affidavits that the Eleventh Circuit considered—Pearcy states in it that Dailey was not present when Shelly was killed and that Pearcy alone is responsible for her death. App. 25a, 342a; *Dailey*, 2020 WL 486260 at *7.

A. Evidentiary Hearing. Although the state trial court already held an evidentiary hearing (in Dailey's first state postconviction proceeding) to consider a purportedly exculpatory statement from Pearcy, the court granted Dailey another evidentiary hearing here. App. 23a, 355a. At it, Dailey called Pearcy to testify to the averments in his 2017 affidavit. *Dailey*, 279 So. 3d at 1213. In the affidavit, Pearcy stated: "I am available to testify at an evidentiary hearing and, if I am called to do so, I would testify consistently with this affidavit." App. 343a. But on the stand Pearcy renounced the affidavit, testifying that the averments are not true. *Id.* at 366a ("[Defense Counsel]: And are the statements in the affidavit true?" [Pearcy]: No."). Pearcy then invoked the Fifth Amendment. *Dailey*, 279 So. 3d at 1213. At Dailey's request, the trial court expressly and repeatedly instructed Pearcy to answer questions asked by Dailey's counsel. App. 370a, 373a-374a. Pearcy refused.

The trial court noted that this was "a rather unique situation," in that Dailey "filed an affidavit" from Pearcy and was "using that as a basis to seek some legal remedy," but Pearcy was "refus[ing] to acknowledge the truthfulness of every

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So. 3d 1208, 1212–16 (Fla. 2019); Pet. i. Similarly, the Florida Supreme Court rejected Dailey's *Brady*, *Giglio*, and actual innocence claims, including claims under the Fifth, Eighth, and Fourteenth Amendments, *Dailey*, 279 So. 3d at 1212, 1218, and Dailey does not ask this Court to review those rulings, *see* Pet. i.

meaningful assertion" in the affidavit. *Id.* at 376a. Nevertheless, the trial court accepted the affidavit as a proffer and took its admissibility under advisement rather than outright excluding it.[2] *Id.* at 27a, 367a.

On cross-examination, Pearcy admitted that he did not provide Dailey's counsel with the information set forth in his affidavit; instead, the already-completed affidavit was given to him. *Id.* at 378a. Dailey's counsel had come to see Pearcy "right after" Pearcy's most recent parole hearing. *Id.* at 379a. Pearcy was not "real sure exactly how" he came to sign the affidavit; he speculated that Dailey's counsel "may have had" the already typed and completed affidavit "laying on the desk" at the time they met, and Pearcy "may have asked" Dailey's counsel "if you wanted me to sign that or something." *Id.* at 381a.

B. Trial Court Order. After the hearing, the trial court issued a 21-page order denying Dailey relief. *Id.* at 20a. In light of the "peculiar" circumstances of the case, including Pearcy's testimony that his own affidavit was not true, the court found that the affidavit is "hearsay of an exceptionally unreliable nature," which does not qualify as a statement against interest and is not the kind of statement required to be admitted under *Chambers*. *Id.* at 28a-29a. The court therefore found the affidavit inadmissible and held that Dailey's claim based on the affidavit fails

[2] During the hearing, Dailey also offered testimony from Juan Banda and Travis Smith, both of whom were incarcerated with Pearcy. Banda testified that Pearcy told him Dailey is innocent, but Banda also stated that Pearcy had never taken responsibility for Shelly's murder. App. 26a, 412a. Smith testified that Pearcy told him Pearcy had committed the crime. *Id.* at 26a–27a, 408a, 418a–19a.

because he did not "prove the existence of any newly discovered evidence" warranting relief. *Id.* at 30a.

The court explained in detail its ruling on Pearcy's affidavit. *See id.* at 27a-30a. First, it concluded that the affidavit is inadmissible under Florida law because it is hearsay and satisfies no hearsay exception. *Id.* at 27a-28a. Dailey asserted that the affidavit is a statement against interest because it might have resulted in a perjury charge or adversely affected Pearcy's prospects for obtaining parole. *Id.* But the court rejected those arguments. *Id.* Pearcy, the court stated, was "already serving a life sentence for the murder in this case." *Id.* In addition, "Pearcy's failure to answer counsel's questions after the Court compelled him to do so exposed Pearcy to being held in direct criminal contempt and his sworn testimony that 'quite a few lines' of [his own] affidavit are not true exposed him to prosecution for perjury." *Id.* "Pearcy's nonchalant demeanor at the evidentiary hearing, admission that portions of his affidavit are not true statements, and refusal to testify after being compelled to do so indicate that Pearcy is not genuinely concerned about exposing himself to minor criminal liability related to his testimony." *Id.*

Second, the court determined that *Chambers v. Mississippi*, 410 U.S. 284 (1973) is inapplicable. *Id.* at 29a. Dailey argued that under *Chambers*, the court had to override Florida's hearsay rules and admit the affidavit as a matter of due process. *Id.* at 27a. But the court concluded that due process does not require the admission of such "exceptionally unreliable" hearsay evidence. *See id.* at 29a-30a. In making that determination, the court considered the same reliability factors

consulted in *Chambers* and found that none of them supported admission of Pearcy's affidavit:

- The affidavit is not a spontaneous statement made shortly after the crime occurred, because Pearcy executed it "approximately thirty years after the offense."

- The affidavit's averments are "not corroborated"—"[t]o the contrary, Pearcy testified that portions of the affidavit [a]re not true, which discredits his own statement."

- The affidavit is not unquestionably against Pearcy's interests, because "Pearcy has already been tried, convicted, and sentenced to life for Shelly Boggio's murder," and "Pearcy exposes himself to no criminal or civil liability by confessing to her murder now."

- Finally, "the facts and circumstances of this case prompt[ed] the Court to highly question the veracity of" Pearcy's affidavit, and "Pearcy's refusal to testify as to any meaningful assertion in the affidavit demonstrates that he is unavailable for cross-examination as to the truthfulness of the affidavit."

Id. at 29a–30a (citing *Bearden v. State*, 161 So. 3d 1257 (Fla. 2015)).

C. Florida Supreme Court Decision. The Florida Supreme Court affirmed. *Dailey*, 279 So. 3d at 1208. It agreed that Pearcy's affidavit is inadmissible hearsay and that *Chambers* does not apply. *Id.* at 1213-1214. Dailey argued that the trial court erred in finding *Chambers* inapplicable, because evidence exists which corroborates the affidavit.[3] *Id.* But the Court found that even putting aside corroboration, the other relevant factors under *Chambers* "weigh heavily in favor of excluding the affidavit," and moreover, Pearcy's testimony

[3] In his principal brief to the Florida Supreme Court, Dailey raised no argument that *Bearden* is at odds with *Chambers*. App. 113a-123a.

supports the trial court's determination that the affidavit is "exceptionally unreliable."[4] *Id.* (quotation marks omitted).

9. Other Pending Proceedings. Dailey is currently litigating three other postconviction proceedings. First, the federal habeas proceeding in which he filed a Rule 60 motion is still pending. *See* Docket Sheet, *Dailey v. Sec'y, Fla. Dep't of Corrs.*, No. 07-1897 (M.D. Fla.). Second, he is litigating a fourth state postconviction motion. The state trial court denied that motion, the Florida Supreme Court affirmed, and Dailey is petitioning this Court for certiorari. *See Dailey v. State*, 283 So. 3d 782, 786 (Fla. 2019); Application to Extend Time, *Dailey v. Florida*, No. 19A827 (U.S. Jan. 21, 2020). Third, Dailey is litigating a fifth state postconviction motion in trial court. *See* Motion to Vacate Conviction and Sentence of Death at 1, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Dec. 27, 2019). The motion raises a newly-discovered-evidence claim based on Pearcy's 2019 affidavit. *Id.* at 7-8. On February 21, 2020, the trial court scheduled an evidentiary hearing to consider the claim. Notice of Hearing, *Dailey v. State*, No. 1985-CF-007084 (Fla. Cir. Ct. Feb. 21, 2020). The hearing is set for March 5, 2020. *Id.*

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[4] Dailey asserts in his petition for a writ of certiorari that the Florida Supreme Court "inexplicably" failed to address his argument that the trial court should have "considered and admitted under *Chambers*" out-of-court statements that Pearcy made to Travis Smith and Juan Banda. App. 29a n.15. But Pearcy did not raise a claim based on those statements in his postconviction motion. *See id.* at 296a–302a. Instead, he relied on the statements only to corroborate Pearcy's affidavit. *See id.* at 407a (Dailey counsel arguing during the evidentiary hearing that Smith's testimony is relevant to Pearcy's affidavit). Consistent with that line of argument, the Florida Supreme Court addressed the statements when considering the affidavit. *Dailey*, 279 So. 3d at 1214.

REASONS FOR DENYING THE PETITION

I. The decision below does not contravene this Court's holding in *Chambers v. Mississippi*.

In the proceedings below, the lower courts unanimously concluded that Pearcy's 2017 affidavit is "hearsay of an exceptionally unreliable nature." App. 6a. That fact-intensive conclusion does not warrant this Court's review; and, even if it did, the record amply supports the lower court's finding. Thus, Pearcy's 2017 affidavit is not admissible under any conceivable interpretation of *Chambers*. For that reason, and based on additional considerations set forth below, Petitioner fails to show that the decision below conflicts with this Court's precedents.

A. As a threshold matter, Petitioner misconstrues *Chambers*.

A key premise of Dailey's petition is that the Due Process Clause of the Fourteenth Amendment, as construed by this Court in *Chambers*, "compels courts to admit reliable and material third-party statements" into evidence in post-conviction proceedings, "even if [those statements] would otherwise be barred" by the applicable rules of evidence. Pet. i; *see id.* at 23-26. As *Chambers* itself makes clear, and as more recent cases from this Court confirm, that premise is mistaken.

1. *Chambers* addressed whether a criminal trial satisfied the requirements of due process. 410 U.S. at 285. The defendant, Chambers, was charged with murdering a policeman. *Id.* Five months after the murder (but before the trial), a man named McDonald "gave a sworn confession that he [McDonald] shot" the officer. *Id.* at 287. In addition, one witness stated that he saw McDonald shoot the officer; and another testified that he saw McDonald "immediately after the shooting

with a pistol in his hand." *Id.* at 289. There was also evidence that McDonald had admitted responsibility for the murder on three other occasions in private conversations with friends. *Id.* at 289, 292-93, 298.

At trial, McDonald repudiated his sworn confession and testified that he did not commit the shooting. *Id.* at 291. McDonald's guilt was a key part of Chambers's defense at trial, *id.* at 289; but Chambers "was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination," because the State did not call McDonald to the stand and a Mississippi evidence rule precluded a party from impeaching his own witness, *id.* at 295; *see id.* at 291-92. In addition, evidence from three other witnesses who claimed to have heard McDonald's confession was deemed inadmissible hearsay. *Id.* at 292-93.

This Court held that "the exclusion of this critical evidence, *coupled with* the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." *Id.* at 302 (emphasis added); *see id.* at 290 n.3 (explaining that the Court "accept[ed]" Chambers's claim, which rested "on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense" at trial). To the extent that the Court's holding was based in part on the exclusion of certain exculpatory hearsay evidence, the Court stressed that those "hearsay statements . . . were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Id.* at 300; *see id.* at 300-01 (discussing four factors).

Chambers did not, as Petitioner claims, establish a broad new rule that courts must always admit "reliable and material" evidence (Pet. i.; *see id.* at 23-26)—no matter when such evidence is offered, and regardless of whether reasonable considerations support the application of evidentiary rules prohibiting the admission of such evidence. *See Chambers*, 410 U.S. at 302–03 ("[W]e establish no new principles of constitutional law"). Instead, the Court "h[e]ld quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." *Id.* at 303.

2. This Court's subsequent cases confirm the limited scope of *Chambers*'s holding. In *Montana v. Egelhoff*, the defendant advanced the same reading of *Chambers* as Dailey, asserting that *Chambers* and its progeny prohibit state courts from excluding "competent, reliable evidence." 518 U.S. 37, 53 (1996) (plurality op.) (quotation marks omitted). But the Court rejected the argument and concluded that *Chambers* established no new rule. *Id.* Instead, it "was an exercise in highly case-specific error correction," and its holding—"if one can be discerned from such a fact-intensive case—is certainly not that a defendant is denied a fair opportunity to defend against the State's accusations whenever critical evidence favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Id.* at 52-53 (quotation marks omitted).

Two years after *Egelhoff*, in *United States v. Scheffer*, this Court reiterated that *Chambers* is limited to its facts, stating: "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case . . . . [It] therefore

does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence." 523 U.S. 303, 316 (1998) (quoting 410 U.S. at 302-03).

Chambers thus did not articulate a broad new rule holding that a state postconviction court must admit evidence whenever such evidence is deemed reliable and material; nor did *Chambers* hold that "newly discovered evidence" of the kind at issue in this case is "reliable and material" for purposes of any such new rule of constitutional law.

B. The decision below does not conflict with *Chambers*.

Dailey asserts that this Court should grant certiorari because the Florida Supreme Court's decisions in this case and in *Bearden* deny Florida defendants due process protection that *Chambers* guarantees. But that argument relies on Dailey's inaccurate reading of *Chambers*. *Bearden* and the decision below track *Chambers*'s fact-intensive analysis.

As explained above, *Chambers* held that a defendant was denied a fair trial based on the cumulative effect of multiple evidentiary rulings, which significantly undermined Chambers's ability to mount an effective defense at trial. 410 U.S. at 302. In the part of its opinion addressing the exclusion of certain exculpatory hearsay, the Court stressed that, under the circumstances, the confessions were trustworthy and thus "within the basic rationale of the [hearsay] exception for declarations against interest." *Id.* at 302; *see id.* at 300. The circumstances that the Court found material were (1) each confession "was made spontaneously to a close

acquaintance shortly after the" crime, (2) each confession "was corroborated by some other evidence in the case," (3) each confession "was in a very real sense self-incriminatory and unquestionably against interest," and (4) "if there was any question about the truthfulness of the" confessions, the declarant "was present in the courtroom[,] under oath[, and] could have been cross-examined by the State, and his demeanor and responses weighed by the" fact-finder. *Id.* at 300–01; *see also Green v. Georgia*, 442 U.S. 95, 96–97 (1979) (finding *Chambers* applicable where a confession was made "spontaneously to a close friend," "ample" evidence corroborated it, it "was against interest," and the declarant testified in a related proceeding).

Bearden and the decision below hew to this analysis, recognizing that *Chambers* had identified "four factors *relevant to determining* whether a third party's hearsay confession may be admitted as substantive evidence." App. 7a (emphasis added); *see Bearden*, 161 So.3d at 1264-66. Petitioner characterizes *Bearden* and the decision below as setting forth a "rigid, factor-based approach" (Pet. 28), but the decisions simply track *Chambers*'s fact-specific holding. *See Scheffer*, 523 U.S. at 316.

Even if Petitioner's broad reading of *Chambers* were correct, he is wrong to assert that the courts below "refused to even consider" (Pet. 22-23) reliable evidence that he is actually innocent. Based on the facts of the case, including Pearcy's "nonchalant demeanor" when he repudiated his own affidavit at the evidentiary hearing, the trial court found that "Pearcy's affidavit is hearsay of an exceptionally

unreliable nature," App. 28a, 29a, and the Florida Supreme Court agreed. App. 6a. Accordingly, the courts below did not conclude that "critical" and "reliable" exculpatory evidence should be disregarded "without any regard for corroboration" (Pet. 23). Rather, they ruled that, on the facts of this case, *Chambers* does not require the admission of Pearcy's "exceptionally unreliable" 2017 affidavit, notwithstanding the allegedly corroborating evidence on which Petitioner relied. *See* App. 6a-8a, 29a-30a.

II. Review is not warranted to resolve a conflict among the lower courts.

A. This case is a poor vehicle for resolving any purported conflict.

Petitioner cites a host of cases for the proposition that the decision below conflicts with the decisions of other federal and state courts. Pet. 30-34. Notably, however, Petitioner does not claim that any of those decisions would have required admission of the evidence at issue here. *See id.* And for good reason: As Petitioner sees it, the cases that conflict with the decision below construe *Chambers* to stand for "the fundamental principle" that "a statement that is material to the defense must be admitted *if it is reliable* in light of all relevant circumstances." Pet. 31 (emphasis added); *see id.* at 30-34. Even if those cases so held, the state postconviction court in this case found that Pearcy's affidavit is "exceptionally

unreliable." App. 6a (emphasis added). Thus, this case is a poor vehicle for resolving the conflict Petitioner posits.

B. This Court has already clarified the meaning of *Chambers*.

Several decades ago, some confusion arguably existed concerning the scope of *Chambers*. *See, e.g.*, *Patrick v. State*, 750 S.W.2d 391, 393 (Ark. 1988) (observing that "[t]he response by state and federal courts to . . . *Chambers* [has] been mixed"). Since then, however, this Court has repeatedly affirmed the limited holding of *Chambers*. *See, e.g.*, *Scheffer*, 523 U.S. at 316.

The Court has also clarified the scope of state authority to adopt evidentiary rules implicating the right of a criminal defendant to a fair trial. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Scheffer*, 523 U.S. at 308. "This latitude, however, has limits." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). In particular, "[t]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Id.* (quotation marks omitted). "This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused *and* are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (emphasis added; quotation marks omitted). As *Holmes* makes clear, *Chambers* is best understood as a specific application of those general principles. *See id.* at 324, 325-26 (including *Chambers* in discussion of cases providing

"illustrations of 'arbitrary' rules, *i.e.*, rules that excluded important defense evidence but that did not serve *any* legitimate interests") (emphasis added).

Those principles cannot be reconciled with Petitioner's broad and unqualified assertion that, under *Chambers*, any "statement that is material to the defense must be admitted if it is reliable in light of all relevant circumstances," Pet. 31. For example, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury," *Holmes*, 547 U.S. at 326, even if such evidence is "material" and "reliable."

C. Petitioner fails to show a conflict warranting this Court's review.

Since *Egelhoff* and *Scheffer*, this Court has repeatedly denied petitions for certiorari which claim that a split exists over *Chambers*. *See, e.g.*, *Chappell v. Cudjo*, 569 U.S. 1013 (2013); *Wynne v. Renico*, 131 S. Ct. 2873 (2011); *Johnson v. Mullin*, 128 S. Ct. 2933 (2008); *Thomas v. Tennessee*, 126 S. Ct. 1475 (2006); *Biernat v. United States*, 125 S. Ct. 817 (2004). Dailey's claim that a conflict exists is similarly unavailing.

Federal and state courts applying *Chambers* tend to look to the reliability factors underlying that decision, just like the Florida Supreme Court. That is unsurprising. Applying *Chambers* more broadly would put the courts at odds with

Scheffer, *Egelhoff*, and *Chambers* itself. *See Scheffer*, 523 U.S. at 316; *Egelhoff*, 518 U.S. at 53; *Chambers*, 410 U.S. at 302-03.

1. Federal court decisions. Petitioner asserts that federal courts applying *Chambers* conduct a broader, more holistic analysis than the Florida Supreme Court, one unmoored from the specific circumstances presented in *Chambers*. Pet. 30-31. In support of that argument, Petitioner selectively quotes or paraphrases general language from the courts' decisions, *see* Pet. 30-31 & n.16, overlooking that they, like the decision below, tend to focus on whether the circumstances presented are sufficiently similar to those in *Chambers*.

- *Hodge v. Mendonsa*, 739 F.3d 34, 42 (1st Cir. 2013) (rejecting defendant's claim because the out-of-court statements "contrast[ed] sharply with the multiple confessions at issue in *Chambers*");

- *Bowman v. Racette*, 661 F. App'x 56, 59 (2d Cir. 2016) (denying relief because the evidence was "self-serving[] and not against penal interest"; the evidence was not "spontaneous or contemporaneous"; and only "modest corroboration" existed);

- *Staruh v. Superintendent Cambridge Springs SCI*, 827 F.3d 251, 259-62 (3d Cir. 2016) (noting that *Chambers* is limited to its facts and comparing the excluded evidence to the evidence in *Chambers*);

- *Huffington v. Nuth*, 140 F.3d 572, 584-85 (4th Cir. 1998) (denying relief after concluding that the excluded evidence was "[u]nlike the statements at issue in *Chambers*");

- *Turpin v. Kassulke*, 26 F.3d 1392, 1397 (6th Cir. 1994) (rejecting defendant's claim after concluding that, "[t]he facts here differ materially from those set forth in *Chambers*");

- *Kubsch v. Neal*, 838 F.3d 845, 862 (7th Cir. 2016) ("Only if all of the factors the [*Chambers*] Court has specified, and we have described, come together must the [challenged] evidence rule yield.");

- *Cudjo v. Ayers*, 698 F.3d 752, 755 (9th Cir. 2012) (granting relief because "[t]he facts in *Chambers* are materially indistinguishable from the facts in this appeal");

- *Hancock v. Trammell*, 798 F.3d 1002, 1027 (10th Cir. 2015) (citing *Chambers* in passing for the proposition that, "[i]n some cases," the due process "right to present a theory of the defense" at trial "requires the court to allow evidence that would otherwise be inadmissible," and citing circuit precedent limiting that right to circumstances in which evidence "is reliable and exclusion would significantly undermine the fundamental elements of the defense");

- *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1247 (11th Cir. 2017) (rejecting due process claim because "Pittman's case is far from 'materially indistinguishable' from *Chambers*");

- *United States v. North*, 910 F.2d 843, 908 (D.C. Cir. 1990) (recognizing that "*Chambers* limited itself to its own facts and circumstances," and rejecting defendant's claim because the facts were distinguishable from *Chambers*).

2. State court decisions. Petitioner similarly asserts that various state courts perform a "holistic" analysis of the "overall reliability and materiality" of hearsay evidence, putting the courts at odds with the Florida Supreme Court. Pet. 29. But the state court decisions that Petitioner cites do not support that claim. Several of them do not even apply *Chambers*, and those that do are consistent with the decision below.

First, four of the decisions do not apply *Chambers*—they either grant relief under state law or deny relief, finding that the offered evidence had a threshold deficiency and did not implicate due process concerns. *See State v. Cope*, 224 N.J. 530, 554-55 (N.J. 2016) (finding a third party's prior statement and prospective testimony admissible under New Jersey evidentiary rules); *State v. Gremillion*, 542 So. 2d 1074, 1078-79 (La. 1989) (stating that defendants have "a constitutional right to present a defense" under Article I, § 16 of the Louisiana Constitution, and finding

that under Louisiana precedent, that right was violated); *People v. Babbitt*, 755 P.2d 253, 264–65 (Cal. 1988) ("[B]ecause defendant's evidence failed to meet the threshold requirement of relevance, its exclusion pursuant to section 352 did not implicate any due process concerns."); *State v. Patterson*, 291 P.3d 556, 559 (Mont. 2012) (finding that the defendant's due process arguments were plainly deficient and performing no analysis of *Chambers*).

Second, of the decisions that apply *Chambers*, virtually all hew to its fact-intensive analysis and find a due process violation only when the circumstances presented are sufficiently similar to *Chambers*:

- *Commonwealth v. Drayton*, 38 N.E.3d 247, 259 (Mass. 2015) (noting that *Chambers* is a fact-intensive decision and analyzing the "similarities between the circumstances at issue . . . and those involved in *Chambers*");
- *Demby v. State*, 695 A.2d 1152, 1158 (Del. 1997) (considering the same factors as the Florida Supreme Court and granting relief because the out-of-court statements "were made within a few weeks after" the crime, "self-incriminatory," and corroborated by other evidence);
- *Drane v. State*, 523 S.E.2d 301, 305 (Ga. 1999) (finding no due process violation where no independent evidence corroborated the hearsay evidence and the declarant was unavailable for cross-examination);
- *Fields v. State*, 220 P.3d 709, 716 (Nev. 2009) (denying relief because the excluded hearsay was not contemporaneous, was not against penal interest, and suffered from other deficiencies);
- *Foster v. State*, 464 A.2d 986, 997 (Md. 1983) (finding a due process violation because the out-of-court statement "was made spontaneously" and contemporaneously; it was "corroborated by other evidence"; and the declarant was "present in the courtroom, under oath, and was available for cross-examination");
- *Griffin v. State*, 763 N.E.2d 450, 452-53 (Ind. 2002) (limiting *Chambers* to its facts and criticizing the dissent for its "more generous application of *Chambers*");

- *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002) (en banc) (finding no due process violation because the circumstances were distinguishable from *Chambers*);

- *Primeaux v. State*, 88 P.3d 893, 904 (Okla. 2004) (stating that *Chambers* "was based on the facts and circumstances" presented; distinguishing the defendant's case from *Chambers*; and denying relief);

- *State v. Barts*, 362 S.E.2d 235, 241 (N.C. 1987) (affording defendant relief because the excluded statements were "decidedly against penal interest and were made spontaneously," and the declarant was "on the witness stand and subject to cross-examination");

- *State v. Bergquist*, 211 A.3d 946, 963 (Vt. 2019) (excluding evidence because the circumstances were distinguishable from *Chambers*);

- *State v. Brown*, 29 S.W.3d 427, 434–35 & n.15 (Tenn. 2000) (finding due process violation where the excluded hearsay was corroborated, it fit within a hearsay exception, and the declarant was in the courtroom and available for cross-examination);[5]

- *State v. Cazares-Mendez*, 256 P.3d 104, 117-20 (Or. 2011) (finding that *Chambers* applied where the out-of-court statements "were made shortly after the murder, and . . . were spontaneous"; the statements were "against [the declarant]'s interest"; the statements were corroborated; and the declarant was available to testify);

- *State v. LaGrand*, 734 P.2d 563, 571 (Ariz. 1987) (excluding evidence because the circumstances were distinguishable from *Chambers*);

- *State v. Mitchell*, 4 A.3d 478, 487 n.3 (Maine 2010) (same);

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[5] In a footnote, the *Brown* majority nominally rejected the dissenting opinion's explanation that "*Chambers* has been limited to its facts." *Brown*, 29 S.W.3d at 434 n.13. But the footnote appears to be dicta and, in any event, does not put *Brown* in conflict with the decision below. The evidence in *Brown*, unlike Pearcy's affidavit, shared similarities with the evidence in *Chambers*. *See id.* at 434-35 & n.15. In addition, *Brown* acknowledged that "*Chambers* requires fact-specific, case-by-case application," and explained that, in its view, *Chambers* was not limited to its facts because it held, more broadly, that "a defendant has a constitutional right to present a defense." *Id.* at 434 n.13. The decision below is consistent with those principles.

- *State v. Paredes*, 775 N.W.2d 554, 567 (Iowa 2009) (applying "a multifactored test" to assess the reliability of hearsay evidence).

Some older state court decisions purported to rely on *Chambers* in overriding a state evidentiary rule even though the circumstances presented bore little resemblance to *Chambers*. *See Patrick v. State*, 750 S.W.2d 391 (Ark. 1988); *State v. Jenkins*, 466 S.E.2d 471 (W. Va. 1995); *Ex parte Griffin*, 790 So. 2d 351 (Ala. 2000). Properly understood, however, even those decisions do not support Petitioner's claim that a conflict currently exists between Florida and other states.

Patrick and *Jenkins* predate *Egelhoff* (1996) and *Scheffer* (1998). Before *Egelhoff* and *Scheffer*, confusion existed about the scope of *Chambers*'s holding, leading some state courts to apply *Chambers* broadly. *See Patrick*, 750 S.W.2d at 393 (stating in 1988 that, "[t]he response by state and federal courts to . . . *Chambers* [has] been mixed"). Those precedents, now outmoded, do not support a finding that a conflict currently exists.

Nor does *Griffin*. It relied on not only *Chambers* but also long-standing state precedent, so it does not support Petitioner's claim that some states apply *Chambers* more broadly than Florida. Instead, it is merely an example of state law buttressing federal protections. *See* 790 So. 2d at 353–55 (applying *Chambers* and "Alabama [precedents that] have long recognized the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime").[6]

[6] Moreover, even if *Griffin* can be read as applying *Chambers* broadly, it does not create a conflict that warrants review. *Griffin* did not mention *Egelhoff* or

At any rate, none of the cases Petitioner cites supports the proposition that *Chambers* requires the admission of "exceptionally unreliable" (App. 6a, 29a) hearsay as a basis for challenging a conviction that has already become final on direct review, and Petitioner does not assert otherwise. Thus, Petitioner fails to show that the decision below conflicts with the holding of any other lower court.

* * *

In sum, Petitioner asks this Court to resolve a purported disagreement between the lower courts, so as to make clear "the fundamental principle" that "a statement that is material to the defense must be admitted if it is reliable in light of all relevant circumstances." Pet. 31. But this Court has already rejected the claim that the Constitution embodies any such broad and unqualified principle; that principle—even if it were the law—would not help Petitioner here; lower state and federal courts, consistent with this Court's repeated pronouncements that *Chambers* "specifically confined its holding to the 'facts and circumstances' presented in that case," *Scheffer*, 523 U.S. at 316, analyze *Chambers* claims by carefully considering the factors on which that decision was based; and, perhaps most importantly, Petitioner does not and cannot assert that any lower court has ever held that "exceptionally unreliable" hearsay (App. 6a, 29a) must be admitted as a basis for challenging a conviction that has already become final on direct review. Accordingly, granting the petition in this case would not resolve any

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Scheffer, much less explain why those precedents do not foreclose an expansive reading of *Chambers*. Therefore, to the extent that *Griffin* embraces such a reading, it should be disregarded as an outlier.

genuine conflict among the lower courts, even if some of those courts employ varying formulations of applicable constitutional principles.

III. Under any reading of *Chambers*, the decision below is correct.

At bottom, Petitioner asks this Court to decide whether the Florida Supreme Court's application and analysis of *Chambers* "violated the United States Constitution *in Dailey's case*." Pet. 22 (emphasis added). Eight judges have already addressed that case-specific question; all eight agree on the result. Petitioner offers no persuasive reason for the Nation's court of last resort to conduct that fact-intensive analysis anew.

At any rate, the courts below correctly applied *Chambers* to the "peculiar set of circumstances" (App. 29a) present here. Petitioner asserts that the courts below refused to consider "reliable" and exculpatory evidence. To the contrary, those courts concluded that "Pearcy's affidavit is hearsay of an exceptionally unreliable nature." App. 6a, 29a. The record supports that conclusion, as does a comparison to the circumstances this Court stressed in *Chambers*.

First, "each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred." *Chambers*, 410 U.S. at 300. In this case, on the other hand, Pearcy perfunctorily signed a statement prepared by an unidentified third party; he made that statement to Dailey's post-conviction counsel, not to a close acquaintance; and he signed the affidavit 32 years after the murder. App. 378a, 381a.

Second, "each" of McDonald's multiple confessions was meaningfully corroborated by other evidence in the case, including "McDonald's sworn confession, the testimony of an eyewitness to the shooting," and "the testimony that McDonald was seen with a gun immediately after the shooting." *Chambers*, 410 U.S. at 300. That is not the case with Pearcy's affidavit. The sworn statement Pearcy made near the time of the murder inculpated rather than exonerated Dailey; and that statement was "consistent with physical facts of the case, even down to the vomit that [Pearcy] emitted upon seeing the slaughter." *Dailey*, 2019 WL 6716073 at *2. No eyewitness to the murder corroborated Pearcy's 2017's account of what happened; to the contrary, the only eyewitness who testified at the postconviction hearing—Pearcy himself—testified under oath that the purportedly exculpatory statements in the affidavit were *not* true.

Third, *Chambers* addressed the exclusion of a third-party confession that "was in a very real sense self-incriminatory and unquestionably against interest," 410 U.S. at 301, because McDonald had not yet been charged with, and could still have been convicted of, the murder for which he admitted responsibility; but Mississippi's hearsay exception for declarations against interest was limited "only to declarations against *pecuniary* interest." 410 U.S. at 299 (emphasis added). In contrast, Pearcy's affidavit was made while he was "already serving a life sentence for the murder in this case," and the state trial court concluded that his declaration did not further expose him to any civil or criminal liability. App. 28a.

Fourth, even "if there was any question about the truthfulness of the extrajudicial statements" at issue in *Chambers*, McDonald was available to testify and "could have been cross-examined by the State." 410 U.S. at 301. In this case, "questions about the truthfulness of [Pearcy's] affidavit" arose for a host of reasons, including Pearcy's subsequent testimony that the contents of his own affidavit "were false"; "[b]ut Pearcy's persistent invocation of the Fifth Amendment caused him to be unavailable for cross examination." *Dailey*, 279 So. 3d at 1214. Given those "facts and circumstances," the state postconviction court was right "to highly question the veracity" of Pearcy's belated and conclusory affidavit. App. 29a. At a minimum, due process did not require the court to treat such "exceptionally unreliable" hearsay, *id.*, as a basis for relitigating the validity of a 30-year-old conviction, *see Dailey*, 279 So. 3d at 1214.

Even if this Court were to grant review, it would find itself in the position of addressing a fact-intensive ruling where there is no reasonable argument that the lower court's ruling as to reliability was flawed. And while Petitioner contends that Pearcy's affidavit is corroborated by evidence, the alleged corroboration consists of two inmates who purportedly heard Pearcy *say* that Petitioner was innocent. The postconviction court properly found such testimony to be unreliable and inadmissible hearsay once Pearcy repudiated his own affidavit. Moreover, the reliability of Petitioner's alleged corroboration is undermined by Pearcy's many

other statements in which he blamed Petitioner for the victim's death—statements that directly conflict with those contained in his repudiated affidavit.[7]

Other factors also distinguish this case from *Chambers*. The state court in *Chambers* precluded the defendant from meaningfully confronting McDonald at trial. 410 U.S. at 296 n.8. In this case, the state court not only did not bar Petitioner from cross-examining Pearcy; it expressly and repeatedly instructed Pearcy, at Petitioner's request, to answer questions posed by Petitioner's counsel. App. 370a-371a, 373a-374a.

Petitioner argues that reversal is required under *Chambers* because Pearcy's affidavit is "sufficiently reliable." Pet. 23-26. At bottom, that is a challenge to a factual finding—the state trial court's finding that the affidavit is not credible, which the court made after an evidentiary hearing in which it heard testimony from Pearcy about the affidavit. *See* App. 29a; *Hernandez v. New York*, 500 U.S. 352, 368 (1991) (noting that "issues of credibility" are "factual determinations"); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 28-29 (1961) (recognizing that a determination about the reliability of evidence is a factual determination).

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[7] *See, e.g.*, *Dailey*, 2019 WL 6716073 at *2 (Pearcy saw Dailey kill the victim and was sickened); DA V3/335-40 (Pearcy helped carry Shelly into the water and stabbed her, but Dailey held her under the water until she drowned). Moreover, "the day Pearcy is said to have signed the new affidavit" claiming sole responsibility for Shelly's murder, the *Tampa Bay Times* reported that it received a written reply from Pearcy in which he stated that "Dailey killed Shelly by himself." Dan Sullivan, *As James Dailey faces execution, co-defendant says, 'I committed the crime alone.'*, https://www.tampabay.com/news/florida/2019/12/27/ james-dailey-faces-execution-soon-now-co-defendant-says-i-committed-the-crime-alone/ (last visited Feb. 24, 2020).

Petitioner seeks to set aside that finding, admit the affidavit, and continue litigating his newly-discovered-evidence claim on remand.[8] This Court, however, does not grant certiorari when "the asserted error consists of [an] erroneous factual finding[.]" *See* Sup. Ct. R. 10.

* * *

In sum, "*Chambers* specifically confined its holding to the 'facts and circumstances' presented in that case," *Scheffer*, at 523 U.S. at 316, and the courts below did not contravene *Chambers* by considering those "facts and circumstances" in assessing Petitioner's *Chambers* claim. In addition, this Court should not grant review to decide the doubly fact-intensive question whether the Florida Supreme Court erred in applying *Chambers*'s fact-specific holding to the facts of this case; and, even if such case-specific error correction supplied a valid ground for seeking this Court's review, the record amply supports the lower courts' unanimous conclusion that Pearcy's 2017 affidavit is "hearsay of an exceptionally unreliable nature," App. 6a, and thus not admissible under any conceivable interpretation of *Chambers*.

[8] On remand, Petitioner would have to establish the second prong of Florida's test for newly discovered evidence—that the affidavit "would probably produce an acquittal on retrial." *See Rutherford v. State*, 926 So. 2d 1100, 1107 (Fla. 2006). The State argued below that Petitioner cannot meet that prong and that the prong is therefore an alternative basis for denying him relief. App. 321a–323a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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