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
Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

CHELSEA R. SHIRLEY
Counsel of Record
KARA R. OTTERVANGER
JULISSA R. FONTÁN
Capital Collateral Regional Counsel
Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel.: (813) 558-1600
E-Mail: shirley@ccmr.state.fl.us

LAURA FERNANDEZ
127 Wall Street
New Haven, Connecticut 06511

CYD OPPENHEIMER
155 West Rock Ave.
New Haven, Connecticut 06515

SETH MILLER
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, Florida 32301-26

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REPLY BRIEF FOR PETITIONER

This case presents an important and urgent question about the constitutional protections afforded under *Chambers v. Mississippi*, 410 U.S. 284 (1977). As Mr. Dailey's certiorari petition explained, the question presented is dividing and sewing confusion among lower courts nationwide, and could result in Mr. Dailey's wrongful execution absent this Court's intervention. The State of Florida nevertheless opposes certiorari in this case, raising two principal arguments: (1) *Chambers* is limited to its facts, which makes the Florida Supreme Court's four-factor test—allowing for relief only in cases factually similar to *Chambers*—inherently correct, and (2) the lower-court division described in the petition is overstated because all jurisdictions agree that *Chambers* is limited to its facts.

As this reply explains, the State's arguments mischaracterize the state of the law. The majority of jurisdictions actually agree that *Chambers* is not limited to its facts, and correctly require a case-specific assessment of overall reliability and materiality. Florida, however, remains part of a small group of outliers that apply a restrictive test, requiring similarity to the facts of *Chambers* itself, without due regard for overall reliability. This Court should grant certiorari to address whether Florida's outlier approach is wrong under *Chambers* and the Due Process Clause, and to give clear guidance to lower courts regarding a criminal defendant's federal constitutional right to present certain material and reliable exculpatory hearsay. The State's arguments for denying the petition should not persuade the Court.[1]

[1] The Court should note that on March 2, 2020, Mr. Dailey filed a separate petition for writ of certiorari in this Court seeking review of a different Florida Supreme Court judgment. *See Dailey v. Florida*, No. 19-1094 (response currently due April 6, 2020); *Dailey v. State*, -- So. 3d --, 2019 WL 5883509 (Fla. Nov. 12, 2019) (decision below in 19-1094). Because the separate petition in No. 19-1094 raises distinct but related issues to the petition at issue here, the Court may find it appropriate to consider the two petitions together.

I. Contrary to the State's View, There is a Broad Split Over Whether *Chambers* Requires an Overall Reliability Analysis Under the Due Process Clause

The State fails to recognize the well-developed split among lower courts regarding a criminal defendant's federal constitutional right to have certain exculpatory hearsay considered under the Due Process Clause and *Chambers*. As the petition explains, Pet. 30-34, the majority of jurisdictions understand *Chambers* to require a showing that such evidence is reliable and material to the defense. Those jurisdictions look at all relevant indicia of reliability, without requiring the proffered statement to mirror the specific statement at issue in *Chambers*. On the other hand, Florida is one of a handful of outliers that imposes a multifactor admissibility test that compares the features of proffered hearsay to the specific features of the evidence in *Chambers*.

The State's brief in opposition (BIO) asserts that no such split exists, nor could exist, because any lower-court confusion regarding *Chambers* was resolved by *Montana v. Egelhoff*, 518 U.S. 37 (1996) (plurality op.), and *United States v. Scheffer*, 523 U.S. 303 (1998). Those cases, according to the State, foreclose any argument that *Chambers* articulated constitutional principles that apply outside of the specific fact pattern at issue in *Chambers* itself. BIO 17-18, 21-23, 27-28. Below, Mr. Dailey explains why the State's description of *Egelhoff* and *Scheffer* is wrong, and how the State overlooks the ongoing split among lower courts on *Chambers*.

A. *Egelhoff* Was a Plurality, *Scheffer* Addressed the Inapposite Issue of Polygraphs, and Neither Case Supports the State's Restrictive Reading of *Chambers*

The State wrongly attempts to present the plurality opinion in *Egelhoff* as if it were binding precedent. BIO 27-28 n. 6 (describing the *Egelhoff* plurality opinion as "precedent" that "foreclose[s] an expansive reading of *Chambers*"). In reality, the plurality was actually the minority view because Justice Ginsburg, who provided the fifth vote, explicitly rejected its articulation of the due process implications. *See Egelhoff,* 518 U.S. at 57 (Ginsburg, J., concurring

in the judgment); *see also* E. Imwinkelried, *A Defense of the Right to Present Defense Expert Testimony: The Flaws in the Plurality Opinion in United States v. Scheffer*, 69 Tenn. L. Rev. 539, 562 n. 30 (2002) (examining Justice Ginsburg's views in her *Egelhoff* concurrence). Thus, Justice Ginsburg, "who concurred in the judgments on the narrowest grounds," supplied the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Kubsch v. Neal*, 838 F.3d 845, 857 (7th Cir. 2016) (en banc) (acknowledging the plurality status of *Egelhoff* in finding that the Indiana Supreme Court's resolution of a *Chambers* claim was an unreasonable application of this Court's clearly established precedent) *cert. denied* 137 S. Ct. 2161.

The State's argument that *Scheffer* restricted *Chambers* to its facts is also misplaced. In that case, this Court held that polygraph evidence could be excluded in military court-martial proceedings because such evidence did not "implicate any significant interest of the accused." 523 U.S. at 316-17. But *Scheffer* was based on the *sui generis* nature of the polygraph instrument, which this Court found reasonable for the military to categorically deem "unreliable evidence." *Id*. at 313. Here, the petition does not assert any constitutional right to present "unreliable evidence" like a polygraph examination. This Court's brief mention of *Chambers* in *Scheffer*, *id*. at 316, only remarked that *Chambers* did not grant a freestanding right of a defendant to present any "favorable evidence," regardless of reliability. *Scheffer*'s reference to *Chambers* did not limit *Chambers* to its facts and did not elevate the *Egelhoff* plurality to a majority. *See* E. Imwinkelried, *supra*, 69 Tenn. L. Rev. at 562 ("Although *Scheffer* was rendered only two years after *Egelhoff*, none of the opinions in *Scheffer* even bothered to cite *Egelhoff*. Thus, the Justices are now in apparent agreement that *Egelhoff* is irrelevant to the question of the scope of the accused's constitutional right to surmount evidentiary restrictions limiting his or her ability to present a defense.").

The State's BIO outright ignores other Supreme Court authority cited in the petition (at p. 25) that is not reconcilable with the State's narrow reading of *Chambers*. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 950 n. 6 (2010) (describing *Chambers* as establishing a generally applicable rule that "reliable hearsay evidence," if "relevant," should not be "excluded by rote application of a state hearsay rule"); *Fry v. Pliler*, 551 U.S. 112, 124 (2007) (Stevens, J., concurring in part) (noting that *Chambers* was not undercut by *Scheffer*); *see also Israel v. McMorris*, 455 U.S. 967, 970 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari) (acknowledging a defendant's due process right under *Chambers* to not be "preclude[d] from introducing exculpatory evidence necessary to his defense" despite hearsay rules).

Most notably, the State's contention that *Chambers* is limited to its facts is belied by the fact that two years after *Chambers*, this Court granted relief in *Green v. Georgia*, 442 U.S. 95 (1979), and found an altogether different hearsay statement to be admissible as a matter of federal due process because it was "highly relevant" with "substantial reasons . . . to assume its reliability." *Id*. at 97. Under the State's understanding of *Chambers*, the confession in *Green* would be inadmissible. *See id*. (finding statement reliable, in part, because "the State considered the testimony sufficiently reliable to use it against [the declarant]" in the declarant's separate trial). The Court found that hearsay admissible without engaging in a fact-based comparison to the confession in *Chambers*, despite the material differences between the facts of the two cases.

B. The State's Confusion Over This Court's Precedent, and the Split Among Lower Courts Over *Chambers*, Actually Strengthens the Case for Certiorari

Although the State advocates denying review, the State's own confusion about the meaning of this Court's *Chambers* precedent is actually a compelling reason in favor of granting certiorari here. As noted above, and in the petition itself, the State is not the only one confused. *See* Pet. 30-34. Lower courts are divided and in disarray about the meaning and scope of *Chambers*. Contrary

to the State's assertion, BIO 23-27, the majority of the lower courts actually reject the State's view that *Chambers* was limited to its facts, and Florida is among a minority of outliers.

The State mistakenly insists that the cases cited in the petition do not conflict with Florida's approach because those cases focus on "whether the circumstances presented are sufficiently similar to those in *Chambers,*" BIO 23, or grant relief only if the circumstances are "sufficiently similar to *Chambers*," BIO 25. The petition accurately describes the majority view among jurisdictions, *see* Pet. 30-34 & Pet.App. 420a-422a, which is that *Chambers* and due process require assessing reliability of exculpatory hearsay based on all relevant circumstances, regardless of whether the proffered evidence has features that neatly align with the evidence at issue in *Chambers*. Of course, in explaining why a particular piece of evidence is or is not sufficiently reliable, courts may compare it to evidence from prior cases, like the confession in *Chambers*. But this is an unremarkable convention of legal writing; it is not a legal test, and it does not purport to require the proffered evidence to be on all-fours with *Chambers*. Rejecting this reading of *Chambers*, Judge Posner described the argument the State advances here as "silly" because "the Supreme Court does not sit to decide cases that will control only cases having identical facts." *Rivera v. Director*, 915 F.2d 280, 282 (7th Cir. 1990) (Posner, J. for unanimous panel).

The petition lays out (at 30-31 n. 16 & Pet.App. 420a-422a) various formulations for the *Chambers* rule as stated by the majority of states and federal circuits. That rule assesses reliability holistically, without singling out any particular factor that happened to have been relevant in *Chambers*. The State selectively quotes portions of those cases' reasoning, BIO 23-24, to suggest misleadingly that a similarity to *Chambers* is a legal requirement. Of course, there are outlier jurisdictions (namely, the Eighth and Fifth Circuits, plus multiple state courts including Florida, *see* Pet. 31 & 33) that agree with the State's view that a *Chambers* claim requires the proffered

evidence to bear the particular hallmarks of the actual *Chambers* evidence.[2] But the majority view, as illustrated in the petition, is to simply rely on all relevant circumstances. *See, e.g.*, *Drane v. State*, 265 Ga. 255, 257 (1995) ("While *Chambers* and *Green* offer examples of trustworthiness, the trial court's consideration is not limited to them").

Two examples in particular reveal how the State mischaracterizes the test used by the majority of courts to attempt to show that Florida is not an outlier. First, the State cites the following quote from *Kubsch*, 838 F.3d at 862: "Only if all of the factors the [*Chambers*] Court has specified, and we have described, come together must the [challenged] evidence rule yield." BIO 23. But the State omits the context: after noting that *Chambers* involved four circumstances that made its confession reliable, the Seventh Circuit did not conclude it was bound by the same case-specific facts. In *Kubsch*, the state court had refused to admit a videotaped interview of an eyewitness (after the witness stated that they no longer had an independent recollection of the murder). *Id*. at 853. Unlike *Chambers*, the witness in *Kubsch* was unavailable and the statement was neither spontaneous nor against the witness's interest. Yet on the whole, the Seventh Circuit found that the videotaped interview was the strongest evidence of Kubsch's actual innocence and it was overall reliable, so much that the Indiana Supreme Court was unreasonable in failing to admit it under *Chambers*. *Id*. at 860. Had that nonspontaneous videotaped interview been proffered in Florida, it would have been inadmissible because it would have failed the restrictive four-factor test the Florida Supreme Court has adopted. *Cf. Gardner v. State*, 194 So. 3d 385, 389 (Fla. 2d

[2] The State does not dispute Mr. Dailey's characterization of the jurisdictions that constitute the minority. Notably, the Fifth Circuit, in rejecting the majority position and finding that "*Chambers* and *Green* stand for the limited proposition that certain egregious evidentiary errors may be redressed by the due process clause," also erroneously relied on the plurality opinion in *Egelhoff* as if it were binding precedent. *See Little v. Johnson*, 162 F.3d 855, 859–60 (5th Cir. 1998). Thus, even apart from the split as to the correct legal test, there is a continuing split on the issue of whether the *Egelhoff* plurality has the force of law.

DCA 2016) (refusing to admit a deposition transcript under the four-factor *Chambers* test, despite "recogniz[ing] that it is an awkward fit" to use that test for a sworn deposition).

Likewise, the State selectively quotes from *Com. v. Drayton*, 38 N.E.3d 247, 259 (Mass. 2015) (*Drayton I*) for the proposition "that *Chambers* is a fact-intensive decision and analyzing the 'similarities between the circumstances at issue … and those involved in *Chambers*.'" BIO 25. But this is wrong; *Drayton I* states that the rule in *Chambers* is that a hearsay statement "will be admissible, despite its failure to fall into any of our traditional hearsay exceptions, provided that the defendant establishes both that it "[i]s critical to [the defendant's] defense" and that it bears "persuasive assurances of trustworthiness." *Id*. at 258. Ultimately, after remand, the evidence in *Drayton*—an affidavit by a dying cancer patient executed eighteen months after trial—was admitted under *Chambers* because it was reliable and material to the defense. *See Com. v. Drayton*, 96 N.E.3d 163 (Mass. 2018) (*Drayton II*). If *Drayton* was a Florida case, the evidence would be inadmissible because the declarant was unavailable, the statement was not spontaneous, it was not against the declarant's interest, and it was not close in time to the crime.

There is a robust split among courts as to the correct approach to *Chambers*, and the Florida four-factor test that was applied in this case is an outlier approach. This Court should grant certiorari to resolve whether courts analyzing *Chambers* should assess overall reliability in light of all relevant circumstances, or whether reliability is established only if the proffered evidence factually mirrors the statement in *Chambers* itself. *Cf. Illinois v. Gates*, 462 U.S. 213, 234 (1983) (granting certiorari to require that reliability of anonymous tips be assessed through "all the various indicia of reliability" instead of a two-pronged reliability test this Court had previously imposed).

II. This Case is a Suitable Vehicle to Address the Conflicting Interpretations of *Chambers*, and This Court's Intervention is Necessary to Prevent Mr. Dailey's Wrongful Execution

The State raises no jurisdictional impediment to this Court granting certiorari review in Mr. Dailey's case to decide whether the *Chambers* test used in Florida and in several other jurisdictions violates the United States Constitution. Rather, the State raises a single putative vehicle problem, asserting that "[u]nder any reading of *Chambers*, the decision below is correct." BIO 29. Yet in making this argument, the State relies on the very same four-factor analysis that is at the core of the question presented. BIO 29-32 (arguing that the codefendant's statement does not fit each of the four features of the hearsay statement in *Chambers*). In fact, the petition explains why under a correct *Chambers* analysis—*i.e.*, a reliability inquiry untethered from the four features that happened to be at play in *Chambers* itself—the trial court would likely have found the third-party confession to be sufficiently reliable to be admissible notwithstanding any contrary state hearsay rules. Pet. 35-38. Absent Florida's four-factor test, Mr. Dailey could argue that the greater weight of the evidence corroborates the confession because the physical evidence points to only one killer, because Jack Pearcy was the sole person with the motive and opportunity to kill Boggio, and because he was the last person to be seen with her alive and he was alone with her exactly during the timeframe the medical examiner determined her to have been killed. *See id.* And Pearcy's subsequent refusal to testify, as well as the manner of his Fifth Amendment invocation, revealed his consciousness of guilt, bolstering the reliability of the underlying confessions that he did not want to talk about. The State does not address this reliability analysis. BIO 29-32.

The State also cautions this Court against taking certiorari to wade into fact-intensive issues of reliability and credibility. BIO 32-33 (citing *Hernandez v. New York*, 500 U.S. 352, 368 (1991), and *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 28-29 (1961), and Sup. Ct.

R. 10). But that is not what the petition asks this Court to do. The Court need not delve into the twelve-thousand page postconviction record to decide whether Pearcy's affidavit is reliable under a correct *Chambers* analysis. Rather, this Court may simply review whether Florida's four-factor test to screen *Chambers* claims violates the federal Constitution, and if this Court so finds, the Court can remand the case for further proceedings for a correct *Chambers* analysis. Certiorari review to correct an erroneous legal test is consistent with this Court's practice when confronting a simple question of law that is intertwined with a complex factual record. *See, e.g., Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018) (vacating a judgment that applied an incorrect legal test for CJA ancillary funding and remanding to conduct a fact-intensive analysis under the correct standard); *Moore v. Texas,* 137 S. Ct. 1039, 1053 (2017) (vacating a judgment that applied an incorrect test for intellectual disability under the Eighth Amendment and remanding to conduct a fact-intensive analysis under the correct standard).[3]

On remand, of course, the State will be free to argue that Pearcy's confession would not change the outcome at a retrial. BIO 33 n. 8. But that does not detract from the worthiness of this case as a vehicle to address the *Chambers* issue. In any event, the petition explains (and the State does not dispute) that, under state law for assessing prejudice from new evidence, Florida courts must consider the totality of all evidence proffered, *including evidence previously deemed as untimely or otherwise procedurally barred,* in determining whether a piece of evidence (*i.e.*, Pearcy's confession) would likely result in an acquittal. *See* Pet. 38-39 (citing *Hildwin v. State*, 141 So.3d 1178, 1184 (Fla. 2014)). And the record in this case contains additional significant

[3] A review of the Florida Supreme Court's legal test for *Chambers* admissibility is also appropriate because, as the petition notes, additional proceedings are ongoing in the trial court concerning Pearcy's subsequent declaration to killing Boggio alone that he executed after the mandate issued in the current case. *See* Pet. iv (notice of related cases) & Pet. 37 & n. 19.

exculpatory evidence that had previously been barred on procedural grounds, *see* Pet. 6-22, 38-39, but that would be admissible for purposes of assessing the likely outcome of a new trial with Pearcy's confession. This "total picture," *Hildwin*, 141 So.3d at 1184, would include, among other things, a dramatically altered timeline of the night of Shelly Boggio's death that puts Pearcy alone with her for a significant period of time during the window when the medical examiner determined she had died, as well as a thorough discrediting of the jailhouse informant testimony, *see* Pet. 17-23, 39, without which the State's case against Mr. Dailey cannot survive even sufficiency review under *Jackson v. Virginia*, 443 U.S. 307 (1979).

This is a compelling case to review the *Chambers* question presented and give Mr. Dailey a meaningful chance to obtain a new trial based on Pearcy's confession to being the sole perpetrator of the murder. Because this is a capital case implicating actual innocence, it is an especially appropriate candidate for this Court's exercise of its limited certiorari jurisdiction. *See Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that certiorari was granted because "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case[.]") (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)).

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

/S/ Chelsea R. Shirley
CHELSEA R. SHIRLEY
Counsel of Record
KARA R. OTTERVANGER
JULISSA R. FONTÁN
Capital Collateral Regional Counsel
Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Tel.: (813) 558-1600
E-Mail: shirley@ccmr.state.fl.us

LAURA FERNANDEZ
127 Wall Street
New Haven, Connecticut 06511

CYD OPPENHEIMER
155 West Rock Ave.
New Haven, Connecticut 06515

SETH MILLER
Innocence Project of Florida, Inc.
1100 E Park Ave
Tallahassee, Florida 32301-2651

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