IN THE SUPREME COURT OF FLORIDA

JAMES MILTON DAILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC19-1780
L.T. Number 1985-CF-007084

DEATH WARRANT SIGNED
EXECUTION SCHEDULED
November 7 at 6:00 p.m.

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on direct appeal will be referred to as "DAR V_/_" followed by the appropriate volume number and page number; the record of the initial postconviction proceedings will be referred to as "PCR V_/_" with the appropriate volume and page number; and the record for the second, successive postconviction motion is not indexed by volume numbers, therefore it shall be referred to as "2PCR p. _" with the indicated page number. The record from the instant successive 3.851 proceeding (SC19-1780) will be referenced as "3PCR p. _."

STATEMENT OF THE CASE AND FACTS

On June 27, 1987, Appellant, James Milton Dailey, was convicted of first-degree murder for the brutal murder of fourteen-year-old, Shelley Boggio. Boggio's nude body was found floating in water near Indian Rocks Beach after she had been stabbed over thirty times, choked, and drowned to death. Following the penalty phase of trial, the jury unanimously recommended death. The trial court sentenced Dailey to death, finding five aggravating factors and no mitigating circumstances. This Court affirmed the conviction on direct appeal, but remanded the case for resentencing after striking

two aggravating factors. *Dailey v. State*, 594 So. 2d 254, 255 (Fla. 1991). Dailey was subsequently resentenced to death, and this Court affirmed his sentence. *Dailey v. State*, 659 So. 2d 246, 248 (Fla. 1995).

Dailey filed his initial postconviction motion, and after an evidentiary hearing spanning several dates in 2003 and 2004, his motion was denied on July 20, 2005. This Court affirmed the denial of postconviction and habeas relief. *Dailey v. State/McDonough*, 965 So. 2d 38 (Fla. 2007).

Following his state court proceedings, Dailey sought relief in federal court by filing a petition for writ of habeas corpus, which was denied. *Dailey v. Sec'y, Florida Dep't of Corr.*, 2012 WL 1069224 (M.D. Fla. Mar. 29, 2012). The Eleventh Circuit Court of Appeals denied Dailey's certificate of appealability on July 19, 2012.

On January 9, 2017, Dailey returned to circuit court and filed a successive motion for postconviction relief that raised claims pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The circuit court summarily denied the motion, and this Court affirmed the denial of relief, finding that *Hurst* did not apply retroactively to Dailey's sentence of death that

became final in 1996. *Dailey v. State*, 247 So. 3d 390, 390–91 (Fla. 2018).

Dailey also filed a second successive motion for postconviction relief based on "newly discovered evidence" and *Giglio v. United States*, 405 U.S. 150 (1972). After an evidentiary hearing on Dailey's "newly discovered evidence" claims, postconviction relief was denied on all of Dailey's claims.

Dailey appealed to this Court, and while the appeal was pending, Governor Ron DeSantis signed Dailey's death warrant on September 25, 2019. Dailey's execution is scheduled for November 7, 2019. On October 3, 2019, this Court issued its opinion affirming the circuit court's denial of postconviction relief on Dailey's second successive postconviction motion. *Dailey v. State,* SC18-557, 2019 WL 4865855 (Fla. Oct. 3, 2019).

On October 8, 2019, Dailey filed his third successive motion for postconviction relief, raising four claims. The circuit court granted an evidentiary hearing on a portion of Dailey's newly discovered evidence claim and *Brady v. Maryland,* 83 S. Ct. 1194 (1963), claim relating to former prosecutor James Slater. The evidentiary hearing was held October 14, 2019, and Dailey presented testimony from former Assistant State Attorney,

James Slater, as well as Colin Kelly, an investigator for Dailey's postconviction counsel. Their testimony is summarized below:

James Slater

James Slater, a retired attorney, testified that he worked for the Pinellas County State Attorney's Office from 1981-1985, and after he left, he was in private practice for about thirty years. 3PCR p. 1425. While he was at the State Attorney's Office, he worked on homicide cases. During direct examination, Slater was asked if he was assigned to work on a case involving the investigation of Shelley Boggio's death. He stated, "I can't answer that with assurity (sic) because I don't remember the name of the victim. So that name does not connect with me." 3PCR pp. 1426, 1451. Upon being asked if he was assigned to the prosecution of Jack Pearcy, Slater stated,

> In the sense that I was on duty, you probably know the State Attorney's Office, they have an assistant on duty 24/7 to assist law enforcement. I happened to be on duty the day that the young lady's body was found, and I was called out to the scene to represent the State and to help them in whatever way I could.

Slater responded to the crime scene, and he testified that, to the best of his recollection, that was the extent of his involvement with the case. 3PCR pp. 1426-27, 1429. He believed that was his "complete and only involvement in the case." 3PCR

p. 1429. The only exception to that is after he left the State Attorney's Office to work in private practice, he recalled being subpoenaed for the case and testifying during a motion hearing. 3PCR pp. 1429-30.

Slater was aware of Jack Pearcy, but he could not recall whether he was a named suspect. 3PCR p. 1433. Slater acknowledged that his affidavit stated that he was involved in the resulting prosecution of Jack Pearcy, but he explained that his only involvement was arriving at the murder scene and later testifying at a motion hearing. 3PCR p. 1443. Slater was asked if he remembered law enforcement telling him that Pearcy attempted to have sex with the victim and that Pearcy could not perform. Slater stated, "In my definition of law enforcement including the State Attorney's Office, I cannot tell you of any specific individual or source of that information. I just had a general 34-year-old recollection that that's what this case was about." 3PCR pp. 1444-45. His recollection further included that the victim teased Pearcy and that he stabbed her. 3PCR p. 1445. He admitted, "[t]he longer I think about it, the less I can connect that type of motivation to anybody involved in that case. Quite frankly, I don't know if I had gotten confused with

another case because I was prosecuting so many at that time." 3PCR p. 1445.

After Slater signed the affidavit and prior to the hearing in this case, members of the State Attorney's Office called Slater to determine if he had signed the affidavit and to confirm the contents of the affidavit. 3PCR pp. 1447-48. Prior to the hearing, Slater told Dailey's counsel he was no longer comfortable speaking with her alone, and that he felt like he was being tugged in two different directions. 3PCR p. 1448.

During cross-examination, Slater testified that he left the office about three months after the murder, and after leaving the office, he had no contact with law enforcement about the case. 3PCR p. 1450. He has not really thought about this case for the last thirty-four years other than having nightmarish memories of the victim's body. 3PCR p. 1451. He did not know of anyone who had been identified as being connected to the victim while he was at the crime scene. 3PCR pp. 1451-52. He further did not recall a killer being identified at the crime scene. 3PCR p. 1452. He has no recollection of this murder case other than going to the scene and the one hearing he attended. 3PCR p. 1452.

Slater admitted that he did not actually write his affidavit at issue in this case, but it was read to him. 3PCR p. 1454. He had volunteered the information about law enforcement telling him that Pearcy attempted to have sex with the victim but that Pearcy could not perform; the victim teased Pearcy, and he became irate and stabbed the victim. 3PCR p. 1454. He admitted that he does not know who made the statement to him, when it was made, or where he was when the statement was made. 3PCR p. 1455. He further did not remember the conversation that was taking place when the statement was made or the context of how the individual relayed the information. 3PCR p. 1455. He feels that he was positive that those statements were made, but he cannot connect them to this case or even determine if it was about this case. 3PCR p. 1456. He explained,

> When I signed the affidavit, I had a general overall feeling that that's what this entire case was about. But, again, as I had two weeks to think it through and try and recall on my 34 year memory, I cannot in any way—I can't place that statement to this case by any particular person, which makes me question whether it had anything to do with this case.

3 PCR pp. 1456-57.

Collin Kelly

Kelly, a CCRC investigator and notary, testified that he is investigating Dailey's case. 3PCR pp. 1460-61. He went with

Attorney Chelsea Shirley to visit Slater. 3PCR p. 1461. According to Kelly, they discussed with Slater his role in the investigation of Shelley Boggio's murder. 3PCR p. 1462. Slater appeared to recall the case, and he provided information about his role in the case. 3PCR p. 1462. According to Kelly, Slater stated the he remembered working on the case for a couple of months, but then he left the state and went into private practice. 3PCR p. 1462. They asked Slater whether he would be willing to sign the affidavit, and he agreed. 3PCR p. 1463. As a notary, Kelly is not allowed to notarize a document signed by anyone under obvious distress, under the influence, or having trouble recollecting. 3PCR pp. 1464-65. Kelly witnessed Chelsea Shirley create the affidavit and then it was read to Slater. 3PCR p. 1465. Slater also read the affidavit and signed it. 3PCR pp. 1466.

Following the evidentiary hearing, the court entered an order on October 16, 2019, denying relief on all of Dailey's clams. 3PCR pp. 1030-48. This appeal follows.

Dailey filed his initial brief on October 21, 2019. He also filed a motion for stay of execution. The State's Answer Brief addresses the claims in Dailey's answer brief as well as his motion for stay of execution.

SUMMARY OF THE ARGUMENT

Issue I: It was proper for the lower court to summarily deny Dailey's untimely claims relating to clemency and the Governor's warrant selection process, as the separation of powers doctrine prevents courts from interfering and second-guessing the executive decisions of the Governor. *Muhammad v. State*, 132 So. 3d 176, 199-200 (Fla. 2013); *Carroll v. State*, 114 So. 3d 883, 887-88 (Fla. 2013); *Valle v. State,* 70 So. 3d 530 (Fla. 2011).

Issue II: Dailey's claims involving James Slater, Edward Coleman, and Michael Howsare are untimely, procedurally barred, and/or meritless. It was entirely proper for the lower court to summarily deny the claims relating to Coleman and Howsare, as they were untimely and the evidence at issue, even if true, would have no impact on Dailey's trial. While Dailey was given an evidentiary hearing regarding Slater, Slater's testimony did not amount to any newly discovered evidence or *Brady* material. Instead, Slater revealed that his role in the case was limited to responding to the crime scene, he could not recall any details surrounding the alleged statement he heard from law enforcement, and he could not confirm whether the statement related to this case or whether it was just his own general

impression of what the case was about. Competent, substantial evidence supports the lower court's finding that this evidence was not credible. Dailey has failed to provide any reason for this Court to reverse the lower court's well-reasoned rulings.

Issue III: The lower court followed well-established precedent from this Court when summarily denying Dailey's claim that his length of time on death row violates the Eighth Amendment.

Issue IV: The trial court acted within its sound discretion in denying Dailey's requests for additional public records from the State Attorney's Office, Florida Department of Corrections, Florida Department of Law Enforcement, the Eighth District Medical Examiner's Office, the Florida Commission on Offender Review, the Pinellas County Sheriff's Office, the Office of the Attorney General, and the Office of the Governor. Dailey failed to establish that the documents would lead to a colorable claim for relief; the denial of his requests was within the trial court's discretion.

Issue V: Dailey is not entitled to additional execution witnesses, nor is he entitled to equip his witnesses with phones

and materials that are restricted by the Department of Corrections. Courts do not manage state execution practices and prison policies. The circuit court properly denied this claim, and this Court should affirm the denial of relief.

STANDARD OF REVIEW

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

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

ARGUMENT

ISSUE I

THE LOWER COURT PROPERLY DENIED DAILEY'S CLAIM REGARDING HIS EXECUTION BEING ARBITRARY, AS IT WAS PROCEDURALLY BARRED AND MERITLESS.

In his first claim, Dailey argues that his execution would be so arbitrary that it would violate the Fifth, Eighth, and Fourteenth Amendments. He specifically takes issue with the Governor's warrant selection process, and he reiterates his previously alleged and litigated actual innocence claims, claiming that execution of an innocent person would be violative of his rights.

Dailey's Claim Is Untimely and Procedurally Barred.

The circuit court properly found Dailey's actual innocence and clemency claim to be untimely and procedurally barred. Notably, Dailey's actual innocence claim was based entirely on claims that were previously raised in Dailey's second successive motion for postconviction relief, and those claims have already been rejected by the circuit court and this Court. *Dailey v. State*, SC18-557, 2019 WL 4865855 (Fla. Oct. 3, 2019). The clemency portion of this claim is based on Dailey's assertion that he should be able to present his evidence of "actual innocence" to the clemency board. The circuit court aptly found

that "this claim should have been brought once [Dailey] discovered the evidence he claims should be considered at a new clemency proceeding, which was discussed in his previous motion filed more than one year ago." The trial court's rulings require affirmance. *See* Fla. R. Crim. P. 3.851(d)(2).

With regard to the warrant-selection portion of Dailey's claim, the circuit court found that the argument challenging the timing of the warrant while a postconviction proceeding was pending was timely raised, as the facts within this claim could not have been discovered until the warrant was actually issued. The court properly found the remainder of the facial challenges to the clemency and warrant process untimely and procedurally barred. Dailey certainly could have challenged the Governor's warrant selection process on direct appeal or in a prior postconviction proceeding.

Notably, none of the arguments raised within this first claim were based on the timeliness exception for filing a successive postconviction motion under rule 3.851. Fla. R. Crim. P. 3.851(d)(2). While Dailey now alleges that his claim was timely, he failed to provide any argument below to justify how these arguments were properly raised within his third successive motion.

The Trial Court Properly Found Dailey's Challenge to the Governor's Warrant Selection Process Meritless Based on this Court's Precedent.

Under this sub-claim, Dailey complains that the lower court misinterpreted his argument. He alleges that he argued below that there must be some criteria for the Governor to have discretion in the warrant selection process, and that he was not necessarily challenging the Governor's discretion being arbitrary. However, that is exactly what Dailey argued. He claimed that "the determination of who lives or dies in Florida is made by a single person. Granting the governor such unfettered discretion has in practice established an arbitrary selection process to determine who lives and dies." 3PCR p. 502. While Dailey did mention that there "are no limits to cabin executive discretion, there are no guidelines for the selection process, and the entire process is cloaked in secrecy," he did not elaborate further or specifically allege that the Governor needs to have a written policy or process in place for warrant selection, as he appears to be arguing now. To the extent that Dailey is raising this new argument for the first time on appeal, this argument is not preserved. *Bryant v. State*, 901 So. 2d 810, 822 (Fla. 2005) ("In order to preserve an issue for appeal, the issue 'must be presented to the lower court and the

specific legal argument or grounds to be argued on appeal must be part of that presentation.'") (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

Nevertheless, the lower court properly denied this claim as meritless based on this Court's established precedent. *See, e.g. Hannon v. State*, 228 So. 3d 505, 509 (Fla. 2017); *Gore v. State*, 91 So. 3d 769, 780 (Fla. 2012); *Valle v. State*, 70 So. 3d 530 (Fla. 2011); *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009); *see also Carroll v. State*, 114 So. 3d 883, 887 (Fla. 2013) (rejecting a claim alleging "that the Governor's power to select which death row prisoner for whom he will sign a death warrant is arbitrary, without standards, and without any process for review, thus rendering the death penalty unconstitutional."). Dailey has failed to provide any valid reason for this Court to depart from its sound precedent.

Florida law provides the Governor with sole discretion in the warrant selection process. § 922.052 (2), Fla. Stat. (2019). Florida courts should not interfere with the executive function of the Governor's warrant selection process. *Muhammad v. State*, 132 So. 3d 176, 199-200 (Fla. 2013) ("it is not this Court's prerogative to inquire into the basis on which the Governor signed any individual death warrant"); *see also Bundy v. State*,

497 So. 2d 1209, 1211 (Fla. 1986)(“the principle of separation of powers requires the judiciary to adopt an extremely cautious approach in analyzing questions involving this admitted matter of executive grace.”). The role of the court is not to second-guess the Governor’s decision in determining when to sign a death warrant. *Valle v. State*, 70 So. 3d 530, 551–52 (Fla. 2011). Nor is it the court’s role to interfere with the manner in which the Governor determines that a death warrant should be signed. *Id*. at 551.

With regard to Dailey’s extremely brief argument that “clemency provided no backstop to wrongful execution,” the lower court properly denied Dailey’s challenges to his clemency as procedurally barred, untimely, and meritless, as the granting of clemency falls under the Governor’s discretion, and this Court has consistently found the Governor’s clemency process is not unconstitutional. *Johnston v. State*, 27 So. 3d 11, 24 (Fla. 2010); *Marek v. State*, 14 So. 3d 985, 998 (Fla. 2009); *see also Pardo v. State*, 108 So. 3d 558, 568 (Fla. 2012) (explaining that this Court will not generally second-guess the executive branch’s determination that clemency is not warranted). To the extent that Dailey may be arguing that he was entitled to an updated clemency investigation prior to the signing of his death

warrant, this Court has firmly rejected such arguments. *See Pardo v. State*, 108 So. 3d 558 (Fla. 2012). Accordingly, the lower court properly denied this claim, and this Court should affirm the denial of relief.

Dailey has Never Established that he is Actually Innocent, and the Lower Court Properly Denied the Portion of this Claim Re-raising his "Actual Innocence" Claims from his Second Successive Motion for Postconviction Relief.

In his next sub-claim, Dailey challenges his execution, claiming that he is actually innocent. Notably, in his motion at issue filed below, he merely re-iterated the claims previously raised and rejected in his second successive motion for postconviction relief. *See Dailey v. State,* SC18-557, 2019 WL 4865855 (Fla. Oct. 3, 2019). He did not provide any "new evidence" under this section that would warrant the lower court reviewing his claim. Given that the lower court, and this Court, have already denied his previously alleged "actual innocence" claims, it was proper for the lower court to dismiss them as untimely and procedurally barred. *Hendrix v. State*, 136 So. 3d 1122, 1125 (Fla. 2014) ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being re-litigated in a successive motion."); *Grossman v. State*, 29 So. 3d 1034, 1042 (Fla. 2010) ("Grossman's contention that his constitutional rights were violated when the original

postconviction court summarily denied his ineffective assistance claim is merely an impermissible attempt to resurrect that ineffective assistance claim, the summary denial of which was affirmed by this Court.").

Now on appeal, Dailey presents a claim that is markedly different from the one presented to the lower court. Notably, Dailey's entire argument relating to this sub-section below was based on allegations in which Dailey believed showed that he was actually innocent. Here, Dailey appears to be raising an entirely new challenge to Florida's procedures for reviewing actual innocence claims. While Dailey's arguments to the lower court completely disregarded the fact that they were all untimely and procedurally barred, Dailey now asks this Court to excuse all the procedural bars and time bars to his previously raised and rejected "actual innocence" claims. Not only is this argument unpreserved because it was never raised in his third successive motion for postconviction relief, but it is also untimely, procedurally barred, and insufficiently pled.

Dailey merely claims that this Court should overlook all of the procedural bars in his case due to the "consequential errors" and "constitutional errors" in his case, without providing any explanation as to what those alleged errors were.

The Florida Rules of Criminal Procedure involve strict requirements of what type of claim can be raised in a successive postconviction motion and when it can be raised. Fla. R. Crim P. 3.851 (d)(1), (e)(2). Dailey is in no way excused from following the rules of procedure. Even if this Court could somehow excuse all the procedural bars involved with his claim in his second and third motions for postconviction relief, not one of those claims raised actually shows that Dailey is innocent of the murder. Dailey has provided absolutely no basis for this Court to reverse the lower court's summary denial of relief. The lower court's ruling should be affirmed.

ISSUE II

THE LOWER COURT PROPERLY DENIED DAILEY'S "NEWLY DISCOVERED EVIDENCE," *BRADY*, AND *GIGLIO* CLAIMS RELATING TO JAMES SLATER, EDWARD COLEMAN, AND MICHAEL HOWSARE.

Under this claim, Dailey raises several arguments related to alleged newly discovered evidence, *Brady*, and *Giglio v. United States*, 92 S. Ct. 763 (1971). All of his claims arise from him filing affidavits attached to his third successive motion for postconviction relief from James Slater, Edward Coleman, and Michael Howsare. The lower court summarily denied Dailey's claims regarding Coleman and Howsare. After holding an

evidentiary hearing on Dailey's claim relating to Slater, the court ultimately denied relief.

Dailey's Claim Relating to James Slater is Untimely

Dailey filed an affidavit from James Slater attached to his third successive motion for postconviction relief, which stated that Slater used to work at the State Attorney's Office, and he was called to the scene when the victim's body was found. The affidavit states, "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." 3PCR p. 561. While the State argued that this claim was untimely, the court granted an evidentiary hearing "in an abundance of caution due to the allegations in this claim and so that the vague testimony in Slater's affidavit could be developed." 3PCR p. 1038.

The court ultimately found, however, that Dailey's claim was untimely. The court noted that Dailey presented no evidence or allegations showing that he could not have ascertained the evidence earlier. "In fact, the evidence shows that he could have." 3PCR p. 1038. The State had shown that Slater was listed

as a witness for Dailey's trial in 1986,[1] and Dailey never contested that. Thus, there is no reason why Dailey's counsel could not have spoken to Slater earlier to acquire the information that he now alleges is newly discovered and *Brady*. Notably, Slater testified during the evidentiary hearing that while he was working in private practice (after leaving the State Attorney's Office), he was subpoenaed for this case and he recalled testifying during a motion hearing. 3 PCR pp. 1429-30. Dailey's counsel had plenty of notice and opportunity to speak with Slater regarding his involvement in this case. This claim was properly denied as untimely. Fla. R. Crim. P. 3.851(d)(2); *see also Jimenez v. State*, 997 So. 2d 1056 (Fla. 2008) ("To be considered timely filed as newly discovered evidence, the successive rule 3.851 motion was required to have been filed within one year of the date upon which the claim became discoverable.").

Dailey, however, spends many pages of his brief arguing that this information could not have been discovered by him pursuant to *Brady*, because it was the State's obligation to disclose it. Dailey misleads this Court by saying that the State

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[1] When Slater was listed as a witness, he was in private practice at the time.

“concealed the true perpetrator’s confession” and he claims that he could not have known about “this confession by Pearcy.” Brief at 20. The State questions how Dailey’s counsel can ethically make such arguments when they are not only unsupported by the record, but they have been disproven. Slater never testified that the statement he may have heard involved a confession from Slater. As will be shown below, any “evidence” coming from Slater could not possibly be classified as *Brady* material, or newly discovered evidence for that matter.

The trial court properly determined that this claim was untimely, because the minimal information gleaned from Slater by Dailey’s postconviction counsel could have been discovered earlier had Dailey’s counsel spoken to him sooner. The lower court’s ruling requires affirmance. Fla. R. Crim. P. 3.85l(d)(2); *see also Riechmann v. State*, 966 So. 2d 298, 307 (Fla. 2007) ("In short, the record is clear that the defense had long been aware of Veski's role in the case, including his claims of pressure from the prosecution. However, no legal justification for failing to assert this claim at an earlier time was offered to the trial court below to overcome the procedural bar for claims raised in successive postconviction motions."); *White v. State*, 964 So. 2d 1278, 1285 (Fla. 2007)

(agreeing with the circuit court's conclusion that White "failed to specifically explain why his proposed witness, Frank Marasa, could not have been discovered by diligent efforts either prior to trial, in preparation of his 1983 postconviction motion, or through an amendment to his 1983 postconviction motion .... ").

Any Information Gleaned from James Slater was not Newly Discovered Evidence or *Brady* Material.

Slater testified during the evidentiary hearing that he worked for the Pinellas County State Attorney's Office from 1981-1985, and he was on duty when the victim's body was found. 3PCR pp. 1425-26. He went to the crime scene, and according to his testimony, that was the extent of his involvement in this case, other than testifying at a subsequent hearing. 3PCR pp. 1426, 1429, 1443. He could not recall the victim's name. 3PCR pp. 1426, 1451. Slater testified that his statement in his affidavit was about his general 34-year-old recollection of what the case was about. 3PCR p. 1445. He could not provide any source for the statement, he could not provide the context in which the statement was made, nor could he recall when the statement was allegedly made. 3PCR p. 1455. He admitted, "[t]he longer I think about it, the less I can connect that type of motivation to anybody involved in that case. Quite frankly, I don't know if I had gotten confused with another case because I

was prosecuting so many at that time." 3PCR p. 1445. He further explained,

> When I signed the affidavit, I had a general overall feeling that that's what this entire case was about. But, again, as I had two weeks to think it through and try and recall on my 34 year memory, I cannot in any way—I can't place that statement to this case by any particular person, which makes me question whether it had anything to do with this case.

This is not newly discovered evidence. In order to obtain a new trial based on a newly discovered evidence claim, Dailey must not only show that the evidence was not known by him, his counsel, or the trial court at the time of trial and it could not have been known by the use of due diligence, Dailey must also show that the newly discovered evidence is of such nature that it would probably produce an acquittal on retrial. *See Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998) (*Jones II*). As previously shown, any evidence from Slater cannot possibly satisfy the first prong of *Jones II*, given that Slater was a listed trial witness.

With regard to the second prong, Dailey has not shown, nor can he, that this "evidence" would probably produce an acquittal. Notably, Slater never testified that Pearcy confessed to murdering the victim. Slater did not testify that Pearcy confessed to him or anyone else. Instead, Slater merely stated

that he thought that the case was about Pearcy attempting to have sex with the victim and stabbing her after she teased him because he was unable to perform; however, Slater was not sure if he was getting this case confused with another one. Significantly, Slater had absolutely no information showing that Dailey did not, or could not have, participated in the murder. Dailey has not provided any evidence from Slater that would produce Dailey's acquittal on retrial. For all these reasons, Dailey's newly discovered evidence claim relating to Slater fails.[2]

In addition, his *Brady* claim also fails. In order to establish a *Brady* claim, Dailey had to show that (1) there was identifiable evidence which was favorable to the defense because it was either exculpatory or impeaching; (2) the State suppressed the identified evidence, either willfully or inadvertently; and (3) he was prejudiced by the suppression of the evidence. *Merck v. State*, 260 So. 3d 184, 194 (Fla. 2018). Dailey failed to meet his burden. First, this evidence from

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[2] It should be noted that Dailey's only challenge to this sub-claim appears to be based on the lower court's timeliness ruling and the court's denial of Dailey's *Brady* claim relating to Slater. Given that Dailey has failed to provide any substantive argument regarding the court's denial of his newly discovered evidence claim, this appellate issue has been waived.

Slater was neither exculpatory or impeaching to Dailey. Next, Dailey never established that the State suppressed *any* evidence from Slater, or that there was even any evidence that the State had an obligation to disclose. Next, Dailey has not shown any prejudice because any evidence from Slater was not material.

As the lower court determined, Dailey has not proven that Pearcy's alleged confession ever existed. "Slater did not even reach the much-vaunted crucible of cross-examination before this testimony withered in court." 3PCR p. 1040. "Even on direct examination, Slater constantly testified that he was not sure, did not remember, or did not know almost anything about this case." 3PCR p. 1040. "Given the clear deficiencies in Slater's memory and the inconsistencies on display at the hearing," the court determined that Slater's testimony and his affidavit were "wholly without credibility." 3PCR p. 1040.

However, the court found that even if it had found Slater's testimony to be credible, Slater never testified that Pearcy confessed, nor did Slater clearly testify that law enforcement knew that Pearcy unsuccessfully attempted to have sex with the victim or stabbed her. 3PCR p. 1040. The court therefore concluded that Slater's impression of the case was neither admissible or favorable evidence.

The court further noted that even though there was no testimony from Slater that Pearcy actually confessed, Dailey's claim that law enforcement knew of a confession was highly unlikely given the circumstances of the case. 3PCR p. 1041. Slater testified that his only work in the case involved responding to the crime scene when the victim's body was found and testifying at a subsequent hearing. In order for Dailey's claim to be true, Pearcy would have had to have confessed to law enforcement within hours of committing the murder, and law enforcement would have had to have relayed the confession to Slater while he was at the crime scene.

Notably, at the time the victim's body was found, she had not been identified, and there were no known suspects. Trial testimony established that law enforcement enlisted the help of the media to assist with identifying the victim. (DAR V6/801). It was not until the following day that the victim's sister contacted law enforcement to identify Shelley. (DAR V6/228). Law enforcement subsequently developed Pearcy and Dailey as suspects once they learned that the victim was last seen with them. (DAR V7/912).

As the lower court correctly noted, "in order to find that law enforcement told Slater about a confession, the Court would

have to presume that Pearcy confessed before he was even found or identified as a suspect." 3 PCR p. 1041. The court would further have to presume that the State was fully aware of this confession but chose not to use it in Pearcy's trial. "This is even more absurd when the Court considers that the State always pursued the theory that [Dailey] and Pearcy acted together- meaning that Pearcy's alleged confession here was not inconsistent with Defendant's guilt." 3 PCR p. 1041. The court finally concluded that "[i]t is far more likely that the statement in Slater's affidavit was due to Slater misremembering that case that he had little involvement in over thirty years ago." 3PCR p. 1041. "In sum, the evidence does not show that this confession from Pearcy ever existed. Nor does it show that other evidence supporting the statement in Slater's affidavit ever existed. There is therefore nothing in this argument on which Defendant could base a newly discovered evidence, *Brady*, or *Giglio* claim." The trial court's ruling should be affirmed.

While Dailey claims that *Brady* material is not limited to admissible evidence, the court's order found no *Brady* violation because there was no credible evidence of a confession from Pearcy. Thus, there was no identifiable evidence that was either exculpatory or impeaching that would qualify as *Brady*. In

analyzing *Brady* claims, this Court considers whether the evidence at issue was exculpatory or admissible. *See, e.g., Duest v. State*, 12 So. 3d 734, 746 (Fla. 2009) ("Because this evidence was not exculpatory or admissible, this claim is not one which requires a factual determination, and we conclude that the trial court did not err in summarily denying this [*Brady*] claim."). In this case, it was neither.

Additionally, given that Pearcy did not testify at trial, even if testimony from Slater were admissible, it would have no impeachment value. *Jimenez v. State*, 265 So. 3d 462, 487 (Fla. 2018) ("*Brady* is not satisfied because this information is not impeaching. Defense counsel could not have used these documents at trial for impeachment as evidence of prior inconsistent statements, because neither Allen nor Detective Diecidue testified at trial").

This case is factually distinguishable from *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004), because Slater had no relevant information that could have led to the defense discovering additional evidence. Slater could not provide the source of any information he allegedly obtained; he could not even determine whether any statement at issue was related to

this case.[3]

To the extent that Slater's statement could be perceived as his perception of a theory of the case, that also would not constitute *Brady* material. *See, e.g., Duest v. State*, 12 So. 3d 734, 746 (Fla. 2009) ("The prosecutor's views on the strength of the case were no more than that: the prosecutor's views on the strength of the evidence…the statement is neither admissible nor leads to the discovery of admissible evidence; therefore, it does not constitute exculpatory evidence under *Brady*"); *see also Williamson v. Moore*, 221 F. 3d 1177 (11th Cir. 2000) (finding that written notations of the prosecutor's mental impression of the case were not discoverable under *Brady*).

Given the trial court's factual findings that Slater's testimony and affidavit did not establish that there was any confession from Pearcy, it is entirely improper for Dailey to continue to allege on appeal that the State suppressed "another confession by Jack Pearcy" or that the information from Slater somehow provides a very clear motive for the murder. Dailey's allegations are baseless and unfounded and in no way establish

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[3] Dailey alleges that Slater's memory would have been more accurate thirty-four years ago, but his counsel certainly could have talked with Slater thirty-four years ago, and the State in no way prevented him from doing so.

any *Brady* violation.

Dailey next takes issue with the trial court's credibility finding. The trial court's findings on the credibility of witnesses are reviewed for competent, substantial evidence. *Marek v. State,* 14 So. 3d 985, 990 (Fla. 2009). Here, competent substantial evidence supports the trial court's finding. Slater's own testimony from Dailey's evidentiary hearing provide firm support for the trial court's credibility finding.

The trial court found that Slater's testimony and affidavit were not credible[4] because Slater "constantly testified that he was not sure, did not remember, or did not know almost anything about the case. He contradicted his affidavit on direct examination" and he contradicted "himself again on cross-examination." 3PCR p. 1040. Competent, substantial evidence supports this finding.

Lastly, Dailey challenges the court's ruling on the

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[4] The State finds Dailey's insinuation of impropriety offensive and distasteful, where Dailey speculates that any unreliability on Slater's part must have been from the State calling Slater prior to the evidentiary hearing to verify that he had signed the affidavit at issue. Dailey's speculative and conclusory allegation is unfounded, whereas the trial court's credibility ruling is actually based on Slater's testimony, his inability to recall details of the case, the inconsistencies in his testimony and his affidavit, and the fact that the circumstances of the case refute Dailey's inference that Slater was referencing a confession from Pearcy.

materiality prong. This argument amounts to nothing more than mere disagreement with the trial court's findings. Dailey continues to incorrectly characterize Slater's testimony as a confession from Jack Pearcy. He somehow believes that Slater's testimony revealed Pearcy's "clear and direct motive" for the murder. To the contrary, Slater's testimony revealed no such motive, nor did it even establish that there was a confession. Competent, substantial evidence supports the lower court's denial of this claim, and this Court should affirm the denial of relief.

The Lower Court Properly Summarily Denied Dailey's Claim relating to Edward Coleman.

Dailey claims that Edward Coleman is a "newly discovered witness and was unknown to Dailey and his counsel prior to 2019." Brief at 33. While Coleman may be newly discovered to Dailey now, he certainly has not satisfied the first prong of *Jones II,* or the requirements of rule 3.851(d), by showing that evidence could not have been known by him or his counsel by the use of due diligence.

Dailey's affidavit from Coleman states that Coleman was incarcerated with Dailey at the Pinellas County Jail, he was in the same pod as Dailey, and he remembered Halliday going to the pod to speak with inmates. 3PCR p. 564. Dailey has long-alleged

that Halliday went to the Pinellas County Jail to interview people in his pod to obtain information against Dailey; Dailey raised similar claims relating to other inmates in his original rule 3.851 motion as well as his second successive rule 3.851 motion. In fact, in Dailey's instant brief, he admits that it was well known at the time of Dailey's trial that Halliday was looking for informants to testify against Dailey. Brief at 39. Dailey has absolutely failed to explain how he could not have talked to Coleman earlier, especially given that he has already talked to many different inmates who were housed in his pod during the time that he was at Pinellas County Jail.

The trial court properly found this claim untimely and procedurally barred. This is now Dailey's third motion "raising a claim relating to Detective Halliday's conduct based on testimony from Pinellas County Jail inmates." 3PCR p. 1042. Dailey "alleges no reason why he could not have brought this claim in 1999 or in 2017 with either of his previous claims asserting similar facts." 3 PCR p. 1042. Dailey never alleged that he could not have found Coleman earlier. In fact, he provided no argument in his motion below to excuse his untimeliness in raising this claim. 3 PCR p. 516. Now, on appeal, he merely claims that Coleman did not disclose the

information contained in the affidavit to Dailey or his counsel until September 29, 2019. Brief at 35. That, however, does not explain why Dailey's counsel could not have talked with Coleman earlier.

Dailey alleges that it was wrong for the circuit court to deny him an evidentiary hearing to establish timeliness; however, Dailey was not entitled to an evidentiary hearing in the first place because he failed to meet his pleading requirements. *See, e.g, Duckett v. State*, 148 So. 3d 1163, 1170 (Fla. 2014) ("Florida Rule of Criminal Procedure 3.851 specifies the pleading requirements for a newly discovered evidence claim in a successive postconviction motion. In this case, Duckett failed to plead the reason that these affidavits were not previously available, an essential element of a newly discovered evidence claim."). Accordingly, the lower properly found this claim untimely and procedurally barred, and this Court should affirm.

Dailey next alleges that the lower court failed to consider the evidence from Coleman's affidavit. However, despite finding the claim procedurally barred, the lower court still analyzed the merits of the claim and found that Dailey would not be entitled to relief under either *Brady* or newly discovered

evidence because the evidence from Coleman would not have changed the outcome of the trial or caused a different result in a new trial. 3 PCR p. 1043-44.

The State finds it curious that Dailey argues that the trial court should have considered the cumulative effect of Coleman's testimony in light of the testimony of James Wright, Travis Smith, and Michael Sorrentino from Dailey's 2018 postconviction evidentiary hearing. As this Court recently reiterated, "Generally, in determining whether newly discovered evidence would likely produce an acquittal upon retrial, a court must evaluate 'the effect of the newly discovered evidence, in addition to all of the **admissible** evidence that could be introduced at a new trial.'" *Dailey v. State*, 2019 WL 4865855, *6 (Fla. Oct. 3, 2019) (quoting *Hildwin v. State*, 141 So. 3d 1178, 1184 (Fla. 2014)) (emphasis added). In Dailey's last appeal, this Court specifically found that the lower court did not have to consider evidence from Wright, Sorrentino, or Smith because "all of Dailey's newly discovered evidence claims were either correctly rejected as untimely or based on inadmissible evidence" so "no such analysis was necessary." *Id*.

The State finds it both alarming and unfortunate that Dailey's counsel continues to somehow disregard prior rulings of

this Court as well as the rules of criminal procedure by advancing a narrative of Dailey's case that is legally unsound and misleading. Dailey continues to ask the lower court and this Court to disregard sound precedent, the rules of evidence, and the rules of criminal procedural to set aside the procedural bars in his case to reach a conclusion that is neither supported by the evidence nor the law.

Like Dailey did in his last postconviction motion, he tries to use Coleman's affidavit to impeach the trial testimony of Pablo Dejesus and James Leitner. The lower court aptly noted that Coleman's affidavit does not allege that he saw Detective Halliday question or offer the same deal to the inmates who testified at trial. 3PCR p. 1043. The court concluded that "Coleman's testimony would therefore be weak impeachment testimony." 3PCR p. 1043.

Coleman's affidavit merely states that Detective Halliday used to come to the pod to ask inmates questions; he took inmates to private interview rooms; one day he took Coleman to an interview room and questioned him about Dailey and Pearcy, but Coleman did not have any information to provide him. 3PCR p. 564. Coleman further stated that Halliday told him to listen carefully and to try to get information; and Halliday returned

another time and took Coleman to a private room and he had newspapers with him. The newspapers were about the case and Coleman remembered seeing a picture of a courtroom. According to Coleman, Halliday told him that Dailey's case was high profile and there was pressure to get a conviction; Halliday wanted him to look for details about the case regarding the timing and who was involved; and Halliday promised to reduce the charges if he was able to learn anything about Dailey or Pearcy. 2PCR p. 565.

This evidence, even if true, would not produce an acquittal. The inmates who testified against Dailey at trial were not ones who were interviewed by Detective Halliday. Instead, those witnesses reached out to law enforcement to offer information that they had obtained. (DAR V8/1028, DAR V9/1064, 1106-06, 1147, 1183). Testimony that Coleman was questioned by Halliday and told he could benefit if he acquired information from Dailey does not show that the testimony of Leitner, DeJesus, and Skalnik must have been a lie. Furthermore, Dailey's trial attorney also had ample opportunity to cross-examine those witnesses about their motives for testifying. Just because Dailey never talked to Coleman about his case does not mean that Dailey would not have talked to the witnesses who testified against him at trial. Furthermore, Coleman does not provide any

information to show that Dailey could not have talked with Leitner, DeJesus, and Skalnik. Instead, he merely states that he did not see Dailey talk about his case to anyone, so he has no knowledge of any of the information alleged by Leitner, DeJesus, and Skalnik. The trial court's denial of this claim requires affirmance.

The Trial Court Properly Denied Dailey's Insufficiently Pled *Giglio* Claim.

Dailey next challenges the trial court's denial of his *Giglio* claim relating to Coleman. The lower court denied this claim, finding that it was facially insufficient. 3PCR p. 1043. The court noted that Dailey's sole allegations concerning false testimony are that the State "withheld *Giglio* evidence" and "misretresent[ed] key facts at trial." 3PCR p. 1043. Dailey failed to specify what testimony was false, nor did he explain how the State knew it was false, or why it was material. The court, nevertheless, found that given the weakness of Coleman's evidence as impeachment, it is unlikely that Dailey could even show that the State put on false testimony and knew the testimony was false. 3PCR p. 1044. While Dailey does not agree with the lower court's findings, he merely reiterates that Coleman's testimony would constitute *Giglio* evidence. Again, nothing Dailey has alleged shows that the prosecutor presented

or failed to correct false testimony that the prosecutor knew was false. The trial court's denial of this claim requires affirmance. *See Doorbal v. State*, 983 So. 2d 464, 480 (Fla. 2008) (affirming summary denial when defendant failed to establish a *Giglio* violation where he completely failed to demonstrate that the State knew that the witness offered false testimony); *see also Owen v. State*, 986 So. 2d 534, 549 (Fla. 2008) (affirming the summary denial of a *Giglio* claim when the prosecutor did not present false testimony).

It was Proper for the Lower Court to Summarily Deny Daily's Claim Regarding Michael Howsare

Dailey was not entitled to an evidentiary hearing on his claim relating to Michael Howsare. Howsare's affidavit merely stated that he worked at Pinellas County Jail when Pearcy was incarcerated; Pearcy was very intelligent and manipulative, and Pearcy was always trying to help his own case. 3PCR p. 567. Dailey raised this as a newly discovered evidence claim.

Dailey is clearly not entitled to relief, as this claim is untimely, legally insufficient, conclusory, and meritless; and Dailey failed to satisfy either prong of *Jones II*. As the trial court correctly found, Dailey offered no allegations explaining "why this evidence could not have been located at the time of trial, much less in the decades of postconviction litigation

following the appeal." 3PCR p. 1044. Dailey failed to meet even the basic pleading requirements in raising this claim, and he certainly was not entitled to an evidentiary hearing. *See, e.g, Duckett v. State*, 148 So. 3d 1163, 1170 (Fla. 2014).

This untimely claim is not only irrelevant to Dailey's case, but Dailey has entirely failed to allege how this evidence would produce an acquittal. Notably, Pearcy never testified at Dailey's trial, so this evidence would not be admissible as impeachment evidence or even character evidence. The court found it "unclear" if Dailey intended to argue that the evidence showed that Pearcy manipulated him into committing the crime, that Pearcy framed him for the crime, or something else entirely. "Regardless, it is weak evidence for either of those propositions, and it would not likely have led to a different result." 3 PCR p. 1044.

Now on appeal, Dailey argues that even if this claim were procedurally barred, the lower court should have considered it when "evaluating the weight of the other newly discovered evidence." Brief at 43. First, the court *did* consider it despite it being untimely and insufficiently pled; the court ultimately found that it would not have impacted Dailey's trial.

Nevertheless, Dailey continues to argue that the lower court was required to consider this evidence along with other claims relating to "Pearcy's manipulative and controlling behavior and proclivity towards violence[.]" The State takes serious issue with this statement. Dailey cites the direct appeal record as if to show that there is actual evidence to support his allegation; however, the record cite provides no such support. Instead, Dailey is relying upon evidence that the lower court previously excluded in his second successive motion for postconviction relief. In that proceeding, Dailey improperly sought to admit extraneous and irrelevant documents riddled with hearsay in an effort to bolster his claims in his closing argument under the guise of judicial notice. *See* Issue III of Briefs in SC18-557.

The trial court did not take judicial notice of the documents now referenced by Dailey, and this Court found that the trial court did not abuse its discretion in failing to take judicial notice. *Dailey v. State*, 2019 WL 4865855, *7 (Fla. Oct. 3, 2019) (finding no abuse of discretion in the trial court declining Dailey's request for judicial notice of Pearcy's court files). It is entirely improper for Dailey to now suggest that

the lower court was required to review information that has never been admitted into evidence.

In order to determine whether evidence is of such nature to probably produce an acquittal on retrial, the trial court should "'consider all **newly discovered evidence which would be admissible**' at trial and then evaluate the "weight of both the newly discovered evidence and the evidence which was introduced at the trial.'" *Jones*, 709 So. 2d at 521 (internal citation omitted) (emphasis added). Despite Dailey's repeated assertions to the contrary, the trial court does not need to consider inadmissible evidence. *Dailey v. State*, 2019 WL 4865855, *6 (Fla. Oct. 3, 2019)("But given that all of Dailey's newly discovered evidence claims were either correctly rejected as untimely or based on inadmissible evidence, no such [cumulative] analysis was necessary."). For all these reasons, Dailey is not entitled to relief on this claim.

Dailey's Cumulative Analysis is Legally Incorrect

Despite the fact that this Court just recently denied Dailey's cumulative error claim in his second successive motion for postconviction relief, Dailey continues to misrepresent the law. For some reason, Dailey completely ignores this Court's cumulative analysis ruling in *Dailey*, 2019 WL 4865855. Dailey

continues to argue that the lower court should look at all evidence, whether admissible or not, in assessing his claims.

Dailey asserts that the lower court should have conducted a deeper review of Slater's testimony. On top of that, Dailey argues that the court should have considered Pearcy's "four other confessions." Brief at 46. Nothing about Slater's affidavit or his testimony can be considered a confession by Pearcy. Slater even testified that he never discussed a "confession" with Dailey's postconviction counsel, and the lower court found that affidavit does not state that Pearcy made any confession. 3PCR p. 1039-40. It is beyond improper for Dailey's counsel to continue to refer to any evidence from Slater as a confession from Pearcy, especially in light of the lower court's factual finding to the contrary.

It is further improper for Dailey to continue to refer to prior evidence deemed inadmissible as confessions from Pearcy that warrant the court's review. Dailey's last postconviction proceeding involved a confession compiled/created by Dailey's own attorneys and alleged to have been from Pearcy. Dailey's attorneys created an affidavit and brought it to Pearcy after

his parole had just been denied.[5] While Pearcy signed the affidavit, Pearcy testified at the evidentiary hearing that none of the contents of the affidavit were true except for his identifying information. Both the lower court and this Court found that affidavit to be inadmissible hearsay. *Dailey*, 2019 WL 4865855, *2-3.

Pearcy had also previously signed an affidavit during Dailey's original 3.851 proceeding, but he refused to testify as to the contents of the affidavit. That affidavit was also deemed inadmissible. *Dailey v. State*, 965 So. 2d 38, 45-46 (Fla. 2007). This Court further noted that "at no point in the statement does Pearcy admit to the murder of Shelley Boggio or the commission of any other crime. Pearcy has had numerous opportunities to testify on Dailey's behalf, and has repeatedly declined to do so." *Dailey v. State*, 965 So. 2d 38, 46 (Fla. 2007). It is wrong for Dailey's counsel to continue to refer to this affidavit and the 2017 affidavit as confessions from Pearcy.

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[5] It has now come to light that Dailey's postconviction attorneys had been improperly exercising legal visits with Pearcy even though they did not represent Pearcy. 3PCR pp. 711, 716 719-744; Fla. Admin. Code R. 33-601.711 (explaining that legal visits involve visits between an attorney and an inmate that the attorney represents).

The other two "confessions" that Dailey's counsel continues to reference came from proferred testimony of Travis Smith and Juan Banda during Dailey's 2018 postconviction evidentiary hearing on his second successive motion, which the lower court did not consider. 2PCR pp. 8878-8882. The court found Smith and Banda's testimony about what Pearcy allegedly told them to constitute inadmissible hearsay. 2PCR p. 8881. Again, the State finds it quite alarming that Dailey's counsel continues to credit all of this inadmissible evidence as valid confessions from Pearcy; and now on top of that, Dailey's counsel somehow refers to Slater's affidavit and testimony as representative of a fifth confession from Pearcy. This is wrong.

Dailey continues to refer to documents that were never admitted as evidence (nor were they judicially noticed by the trial court) as evidence that the lower court should consider. Brief at 47. Dailey argues that "[t]he record in this case makes it clear that Pearcy had what it took." Brief at 47. But yet, in explaining what the "record" shows, Dailey relies on evidence that he has never properly admitted into evidence. Brief at 47-48. Thus, the record does not actually support any of these allegations. Dailey goes on for pages in his brief about all the "evidence" that the court should have considered, but nowhere in

his argument does he actually cite evidence that that court could properly consider.

Dailey's narrative appears to be nothing more than a ploy for media attention rather than an actual legal argument. Given that all of Dailey's newly discovered evidence claims have been untimely and procedurally barred and based on inadmissible evidence, the lower court correctly found that no cumulative review analysis was necessary. Based on this Court's well-established precedent, affirmance is required. *See, e.g., Dailey*, 2019 WL 4865855, *6; *Asay v. State*, 210 So. 3d 1, 25 (Fla. 2016) (explaining that cumulative review does not involve evidence that does not actually constitute newly discovered evidence, nor does it involve review of a procedurally barred *Brady* claim or an insufficient claim).

ISSUE III

DAILEY HAS NO CONSTITUTIONAL RIGHT TO HAVE ADDITIONAL EXECUTION WITNESSES, TO HAVE HIS WITNESSES VIEW THE IV INSERTION PROCESS, OR FOR HIS WITNESSES TO HAVE ACCESS TO A TELEPHONE DURING HIS EXECUTION.

Dailey next challenges the policies of the Florida Department of Corrections (DOC) regarding execution witnesses and their access to equipment. Dailey wants the following: (1) his legal witness(es) to be allowed access to a writing pad and pen during his execution, (2) his legal witness(es) to be

allowed access to a telephone, (3) that he be allowed a second witness to his execution, and that (4) one of his witnesses be allowed to view the intravenous (IV) insertion process. Dailey's brief states that while he made a request to the DOC for these accommodations, it has not yet been denied. Brief at 54. In his motion for postconviction relief, he wrote only that he *anticipates* that his request (for everything but the writing implementations) will be denied. 3PCR p. 520.

Given that these requests have not actually been denied, there is no alleged violation of Dailey's constitutional rights, and therefore, this claim is not ripe for review. *Long v. State*, 271 So. 3d 938, 949 (Fla. 2019) (Luck, J., concurring) ("Taking the allegations in Long's third successive postconviction motion as true, as we must, the department of corrections has not ruled on Long's requests, and until it does, there has been no alleged violation of Long's constitutional rights. There is currently nothing for us to decide.").

Even if this claim were ripe, Dailey still would not be entitled to relief. Section 922.11 of Florida Statutes affords the warden with discretion to select execution witnesses and also to exclude witnesses from the execution. The Court has recognized that the DOC has valid reasons for denying requests

to have additional people observe executions, as "the execution chamber is small and any additional personnel could interfere with the orderly and proper administration of the lethal injection." *Muhammad v. State*, 132 So. 3d 176, 205 (Fla. 2013). It is not the role of the courts "to micromanage the executive branch in fulfilling its own duties relating to executions." *Long*, 271 So. 3d at 946 (citations omitted); *see also Houchins v. KQED, Inc.,* 438 U.S. 1, 12 (1978) (plurality) (noting that the judiciary cannot force prisons to allow access to facilities. Doing so improperly "involve[s] [the Court] in what is clearly a legislative task which the Constitution has left to the political processes."). Thus, Dailey is not entitled to have an additional witness observe his execution.

Dailey further is not entitled to have witness access to a telephone or witness observation of the IV insertion process. The DOC has policies limiting what is permitted inside the prison and the execution viewing room, and the DOC has procedures relating to how executions are performed. Courts do not manage state execution practices and prison policies. Instead, courts are limited to determining whether the state procedures violate a defendant's constitutional rights, and

Dailey has not cited any authority that would even suggest that the DOC's policies are unconstitutional.

Dailey merely claims that by not allowing a member of his team to witness the IV insertion process, and another person to have access to a telephone, he is being denied access to the courts because he will not be able to raise an Eighth Amendment challenge if anything goes wrong during the execution process. This is far too speculative to show that the DOC's policies violate his constitutional rights. *See, e.g., Arthur v. Comm'r, Alabama Dep't of Corr.,* 680 Fed. Appx. 894, 909 (11th Cir. 2017) ("Arthur has not offered anything more than the speculative, conjectural possibility that something might go wrong during his execution which would subject him to cruel and unusual punishment in violation of the Eighth Amendment and that therefore [his attorney] must have a cell phone in the viewing room to call a court to present an Eighth Amendment claim.").

Additionally, to have a valid right-to-access claim, Dailey would have to establish actual injury. *Grayson v. Warden*, 672 Fed. Appx. 956, 966–67 (11th Cir. 2016). He clearly has not done that here. *Id.* (explaining that a request for access to a landline based on the possibility that something might go wrong does not qualify as "actual injury."). The DOC is entitled to a

presumption that it will properly perform its duties while carrying out an execution. *Hannon*, 228 So. 3d at 509; *Lightbourne v. McCollum*, 969 So. 2d 326, 343 (Fla. 2007).

It is finally worth noting that nearly an identical claim was raised in *Long v. State*, 271 So. 3d 938, 946–47 (Fla. 2019). In affirming the denial of relief of this claim, this Court was "mindful that separation of powers principles preclude[d] [this Court] from performing the executive function of establishing a procedure to be used for executions." *Long*, 271 So. 3d at 946; *see also* Art. 2, § 3, Fla. Const. The lower court properly found that Dailey "has not demonstrated any reason why this case is meaningfully different from Long's." 3PCR p. 1046. Dailey is essentially asking this Court to micromanage DOC's policies concerning witnesses in order to prevent hypothetical violations of his rights. The lower court properly denied this claim, and this Court should affirm the denial of relief.

ISSUE IV

THE POSTCONVICTION COURT ACTED WITHIN ITS SOUND DISCRETION IN DENYING DAILEY'S REQUEST FOR ADDITIONAL PUBLIC RECORDS.

Following the signing of his death warrant, Dailey's counsel sought additional public records pursuant to Florida Rule of Criminal Procedure 3.852(h) and 3.851(i) from the State

Attorney's Office, Florida Department of Corrections (DOC), Florida Department of Law Enforcement (FDLE), the Eighth District Medical Examiner's Office, the Florida Commission on Offender Review, the Pinellas County Sheriff's Office, the Office of the Attorney General, and the Office of the Governor. Notably, Dailey had never previously sought records from the Eighth District Medical Examiner's Office, the Florida Commission on Offender Review, and the Office of the Governor. While Dailey had sought records from the remaining agencies, his recent requests were much more expansive than the requests he previously made.

After conducting a lengthy hearing on Dailey's public records requests, the postconviction court sustained the objections from the agencies and denied Dailey's requests.[6] The court provided a very detailed fourteen-page order outlining its reasons for denying Daily's requests. This Court reviews the lower court's denial of public records demands for an abuse of discretion. *See Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017) (noting that this Court reviews rulings on public records for abuse of discretion). "Discretion is abused only when the

[6] Dailey was provided with some records from the State Attorney's Office and the DOC. 3PCR pp. 440, 598.

judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017) (citations omitted). Dailey has failed to show that the lower court abused its discretion in denying his demands for public records.

The lower court acted in its sound discretion in denying Dailey's requests because he was unable to show that his requests were relevant, that they were not overly broad, or that the information sought would likely lead to discoverable evidence. The court found that Dailey did not demonstrate that any of the requested records were related to any colorable claims for postconviction relief.

Dailey essentially raises a due process and equal protection argument related to the limitations placed on his access to records in this case; however, this argument is without merit. This Court has expressly upheld the validity of rule 3.852. *Wyatt v. State*, 71 So. 3d 86, 110-11 (Fla. 2011) (rejecting constitutional challenge to rule 3.852). As noted in *Wyatt*, reasonable restrictions on the access to public records do not offend the constitution. *Id.* The rule was promulgated to

provide a remedy to the inordinate delay occasioned by securing public records for purposes of capital postconviction litigation and is reasonably tailored to accomplish its purposes. Moreover, this Court has repeatedly held that where a defendant makes public records requests that could have been, but were not made until after the death warrant has been signed, the defendant must show good cause explaining why the request was not made earlier. *See, e.g., Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017); *Asay v. State*, 224 So. 3d 695, 700 (Fla 2017).

As this Court has long emphasized, public records requests made after a death warrant has been signed are supposed to be used to receive updates of previously discovered information and not to conduct eleventh-hour fishing expeditions. *Sims v. State*, 753 So. 2d 66 (Fla. 2000). Moreover, this Court has held that a defendant who believes he may have a basis to raise a claim in a successive motion need not await the signing of a death warrant to seek records. *Tompkins v. State*, 872 So. 2d 230, 243-44 (Fla. 2003) ("Thus, a defendant must show how the requested records relate to a colorable claim for postconviction relief *and good cause as to why the public records request was not made until after the death warrant was signed*.") (emphasis added). In fact, this Court has long recognized that claims that are based on the

production of public records that could have been requested earlier are barred. *Zeigler v. State*, 632 So. 2d 48, 50 (Fla. 1993).

Other than challenging the constitutionality of rule 3.852, Dailey does not point to any flaw in the trial court's order. Dailey merely alleges that the court erred in finding that his demands were not related to a colorable claim of postconviction relief. However, the court analyzed all of Dailey's stated reasons for requesting the records, and ultimately found them to be unrelated to a colorable claim for relief. Dailey has failed to show how the lower court abused its discretion.

The court properly determined that Dailey is not entitled to records from the Medical Examiner and the DOC for the purpose of challenging the current lethal injection protocol. This Court has repeatedly affirmed denials of similar public records demands relating to records request for autopsy records. *See e.g., Branch v. State*, 236 So. 3d 981, 985 (Fla. 2018) (explaining that autopsy records are not likely to lead to a colorable claim because they "would not establish when the inmates became unconscious or whether they experienced pain during their executions"); *Hannon v. State*, 228 So. 3d 505, 512 (Fla. 2017) (finding that the court properly denied Hannon's

request for records of the last eight executions); *Correll v. State*, 184 So. 3d 478, 492 (Fla. 2015) (concluding that the public records request for the autopsy records of twenty-one inmates was unlikely to lead to a colorable claim); *Chavez v. State*, 132 So. 3d 826, 830 (Fla. 2014) (concluding that the public records request for the autopsy records of two executed inmates was properly denied because the autopsy records would not establish when the inmates became unconscious or whether they experienced pain during their executions).

It is well settled that records regarding lethal injection are unlikely to lead to a colorable claim once "the challenge to the constitutionality of lethal injection as currently administered in Florida has been fully considered and rejected by the Court." *Walton v. State*, 3 So. 3d 1000, 1013-14 (Fla. 2009). The constitutionality of the current lethal injection protocol was fully considered and rejected by this Court in *Asay v. State (Asay VI),* 224 So. 3d 695, 700-702 (Fla. 2017). Accordingly, denial of these requests was proper.

The court further found that records relating to the clemency process and the death warrant selection process are not cognizable claims for postconviction relief. That ruling is supported by this Court's precedent. *Muhammad v. State*, 132 So.

3d 176, 203 (Fla. 2013) (recognizing that clemency records would not relate to a colorable claim). Clemency records are also confidential and exempt from public records production. *Id*. The trial court properly denied disclosure of these records, and Dailey has failed to show any abuse of discretion.

With regard to Dailey's record requests from the Pinellas County Sheriff's Office, the State Attorney's Office, and the Attorney General's Office, the court found that Dailey's requests were based on mere speculation. This Court has emphasized that rule 3.852 is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief. *Valle v. State*, 70 So. 3d 530, 549 (Fla. 2011). Dailey has failed to show that the lower court's rulings amounted to an abuse of discretion.

Circuit courts have discretion to deny public records requests that are "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence." *Valle v. State*, 70 So. 3d 530, 548–49 (Fla. 2011) (quoting *Moore v. State*, 820 So.2d 199, 204 (Fla. 2002)). The lower court properly exercised its discretion in this case, and Dailey is not entitled to any relief.

ISSUE V

DAILEY'S CLAIM THAT HIS LENGTH OF TIME ON DEATH ROW VIOLATES THE EIGHTH AMENDMENT IS WITHOUT MERIT.

The postconviction court properly summarily denied Dailey's claim that his length of time on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Dailey's claim is based on language contained in Justice Stevens' opinion regarding the Supreme Court's denial of certiorari review in *Lackey v. Texas*, 514 U.S. 1045 (1995). This claim is unavailing. As the lower court aptly noted, *Lacky* is a twenty-four-year-old memorandum opinion from two United States Supreme Court Justices concurring in the denial of certiorari; it has no precedential value. 3PCR p. 1047.

As the lower court correctly recognized, this Court has repeatedly rejected claims that lengthy periods on death row prior to execution are cruel and unusual. *See Long v. State*, 271 So. 3d 938, 946 (Fla. 2019); *Jimenez v. State*, 265 So. 3d 462 (Fla. 2018); *Branch v. State*, 236 So. 3d 981 (Fla. 2018); *Lambrix v. State*, 217 So. 3d 977, 988 (Fla. 2017); *Correll v. State*, 184 So. 3d 478, 486 (Fla. 2015); *Muhammad v. State*, 132 So. 3d 176, 206-07 (Fla. 2013); *Carroll v. State*, 114 So. 3d 883, 889 (Fla. 2013); *Pardo v. State*, 108 So. 3d 558, 569 (Fla. 2012); *Ferguson v. State*, 101 So. 3d 362, 366-67 (Fla. 2012).

Dailey fails to distinguish or reconcile the binding precedent consistently rejected this claim, and Dailey has not provided any reason for this Court to depart from its sound precedent.

In addition to being foreclosed by binding precedent, Dailey's claim is disingenuous. Even now, by filing his third successive motion for postconviction relief as well as various motions to stay his execution, Dailey is only seeking to further delay or prohibit his execution. Most of the delay in execution is attributable to Dailey's own actions. *See Valle v. State*, 70 So. 3d 530, 552 (Fla. 2011) (Valle "cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction[s] and sentence."); *Carroll v. State*, 114 So. 3d 883, 890 (Fla. 2013) ("Further, the length of time Carroll has spent on death row is due in large part to his postconviction motions and habeas petitions."). Dailey has been engaging in collateral challenges for decades in an attempt to avoid or delay his execution. Any complaint now that the process, which he has used to his advantage to delay his execution, took too long, is plainly frivolous. *See Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring) (On the denial of certiorari, "I write only to

point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."). The fact that his litigation has taken many years does not render his death sentence unconstitutional or preclude the issuance of a death warrant.

Finally, Dailey's period of incarceration on death row is not so long that it distinguishes him from other cases where similar claims have been rejected. *See, e.g., Long*, 271 So. 3d at 946 (over thirty years); *Muhammad*, 132 So. 3d at 206 (over three decades); *Lambrix v. State*, 217 So. 3d at 988 (more than three decades); *Valle v. State*, 70 So. 3d at 552 (thirty-three years). Accordingly, this Court should affirm the summary denial of this claim.

RESPONSE TO MOTION TO STAY OF EXECUTION[7]

A stay of execution is warranted only when there are *substantial grounds* upon which relief may be granted. *Chavez v. State*, 132 So. 3d 826, 832 (Fla. 2014) (internal citations

[7] Prior to filing the instant brief, the United States District Court, Middle District of Florida, entered an order granting a limited stay of Dailey's execution. As of the time of this filing, the State intends to file a motion to vacate the stay.

omitted) (emphasis added); *see also Buenoano v. State*, 708 So.2d 941, 951 (Fla. 1998) (citing *Bowersox v. Williams*, 517 U.S. 345 (1996)). Dailey has failed to allege any substantial grounds entitling him to relief, and therefore, his motion must be denied.

Dailey first alleges that he is *entitled* to a stay so that the United States Supreme Court and the lower federal courts may "meaningfully" consider the appeal of the denial of his second successive motion for postconviction relief. Dailey has in no way asserted a valid basis for a stay. Notably, this Court's opinion at issue was entered October 3, 2019. Dailey has not yet sought certiorari review in the United States Supreme Court, nor has he filed any substantive pleadings in the lower federal courts.

Dailey, however, asks this Court to speculate that a stay would be warranted, in the event that Dailey seeks federal review, and in the event that those other courts may need additional time to review his claims. It would be improper for this Court to decide whether other courts require additional time to review Dailey's claims.

Next, Dailey alleges that he is *entitled* to a stay so that this Court may "meaningfully" consider the appeal of the denial

of the third successive motion. However, this Court, in its scheduling order entered on September 26, 2019, already contemplated the time it needs to decide the appeal of circuit court proceedings. Dailey has not provided any valid reason to show that the issues on appeal will not be meaningfully considered and resolved before his execution date.

Moreover, nearly all of the arguments contained within his third successive motion were based on old, previously alleged allegations that are procedurally barred and without merit. His only truly new allegation was found to be untimely and meritless and will not result in the granting of relief. 3 PCR pp. 1038-1041. Dailey has provided no argument or authority establishing that his claims (which are nevertheless procedurally barred and/or meritless) cannot be adjudicated before his scheduled execution.

While Dailey continues to assert his innocence, he has never provided any evidence to show his actual innocence, and nearly all his stated reasons for asserting his innocence in his third successive motion and subsequent appeal are based on allegations that have previously and consistently been rejected. Dailey's only "new" claim involves a statement that former prosecutor Slater may have heard from an un-named and

unknown source that does not actually exculpate Dailey and may not even be related to his actual case. Dailey has not presented a single meritorious argument: there simply are no substantial grounds to justify a stay in this case.

A stay is an equitable remedy, not a matter of right or entitlement, and Dailey is in no way *entitled* to a stay. The issuance of a stay would further conflict with the rights of the victim's family and contravene the state constitution. *See* Art. I, § 16, Fla. Const. (b) (10) (Crime victims have "[t]he right to proceedings free from unreasonable delay, and to a prompt and final conclusion of the case and any related post-judgment proceedings."). For all these reasons, Dailey's motion to stay should be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests that this Honorable Court affirm the denial of relief of all of Dailey's successive postconviction claims and deny his motion for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of October, 2019, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Chelsea Rae Shirley, Julissa R. Fontan, and Kara Ottervanger, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel-Middle, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, **shirley@ccmr.state.fl.us**, **fontan@ccmr.state.fl.us**, **ottervanger@ccmr.state.fl.us** and **support@ccmr.state.fl.us**; and

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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